



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AKIWUMI, TUNOI & O'KUBASU, JJ.A.)

CIVIL APPEAL NO. 212 OF 1996

BEATRICE NYAMBURA MUCHERU APPELLANT

AND

JOYCE WANJIRU MUCHERU RESPONDENT

JUDGMENT OF THE COURT

This is an appeal against the judgment of Aluoch J., in which she declared a piece of land as belonging to the dead husband of the original respondent, Teresia Mucheru, and which she and her children had inherited upon the death of her husband, and also ordered that he be buried on that piece of land. The complex issues that were involved in the proceedings before the learned Judge will now be recounted. By originating summons, the Respondent, Teresia Mucheru, sought the determination of the following questions. 1. Whether she by herself, servants or agents were entitled to bury her deceased husband, Francis Mucheru?

Whether Francis Mucheru was entitled to a portion of the suit land, land parcel Ngenda/Gituru/310, which was registered in the name of Mucheru Karanja the deceased husband of the Appellant, Beatrice Mucheru, and did it devolve unto Teresia Mucheru on the death of her husband Francis Mucheru? 3. Was the said portion of the suit land identifiable in the light of the clan elders' decision that it was held in trust by Mucheru Karanja for the benefit of Francis Mucheru?

If Francis Mucheru was entitled to the said portion of the suit land, what was its dimension and site? After the filing of the originating summons, Teresia Mucheru applied by Chamber Summons to be allowed to bury her husband on the suit land. This was on the basis that even though the suit land was registered in the name of Mucheru Karanja, he held a portion of it in customary Kikuyu trust on behalf of Francis Mucheru. Objections to this application raised complex issues such as, whether Kikuyu customary trust could override the registration of the suit land in the name of Karanja Mucheru as its beneficial owner; whether the burial of Francis Mucheru on the suit land was merely a ruse to obtain title to the affected part of the suit land; whether the burial of Francis Mucheru and other related issues were matters that could be brought by way of originating summons; and whether Beatrice Mucheru could be made a party to the proceedings. In her ruling on this application, the learned Judge, Aluoch, J., first held that the originating summons was properly before the court; secondly, that Beatrice Mucheru had been properly made a party to the suit; and thirdly, and significantly, that:

"I have found that the dispute in this case goes deeper than just the question of the burial of the dead body, now lying at the City Mortuary. The ownership of the land in question, is a point to be determined. The 2 issues are co-related, and to decide on one without the other, would be to prejudge issues. I have found that I cannot decide on such issues on affidavit evidence alone, I have to hear the oral evidence. ... I

will now go ahead and hear oral evidence in this case."

The learned Judge presumably, rejecting the submission that the matter should not have been brought by way of originating summons and being of the view that it was unnecessary to raise the matters involved by way of a suit, then went on to hear oral evidence to determine not only the Chamber Summons but also the originating summons in which Teresia Mucheru as heir to the portion the suit land which Mucheru Karanja held in trust for her husband, Francis Mucheru, sought the determination of the complex questions raised in the originating summons and as hereinbefore set out. But was she right to do so? We must first consider the applicable substantive civil procedure rule under which the originating summons was filed. This is rule 1 of order 36 which so far as it is relevant, provides that: "... any person claiming to be interested in the relief sought as ... heir ... of a deceased person ... may take out ... an Originating Summons ... for such relief of the nature or kind following, as may by the summons be specified and the circumstances of the case may require, that is to say, the determination ... of any of the following questions:

(a) any question affecting the rights or interest of the person claiming to be ... heir ...". One may well suppose that the question regarding the issue whether Teresia Mucheru as heir to Francis Mucheru, was entitled to his share of the suit land and the dimension and particulars of the same, if it were in the circumstances, a simple issue, which as it happened was not the case, came within the ambit of order 36 rule 1. But can the same be said about the first question set out in the originating summons, that is, whether Teresia Mucheru was entitled to bury her dead husband? We would say, no! What is more, the issues involved in the originating summons were, as the learned Judge herself, as already shown, admitted, of a complex nature and which should not have been dealt with by way of the originating summons as the learned Judge did. As Newbold Ag. V.P. espoused in his judgment in *Bhari v Khan* (1965) EA 94 at 101: "An originating summons is a form of legal proceedings designed to give in certain specific cases, a quick summary and inexpensive remedy.". Newbold Ag. V.P. then went on at p. 105 to observe as follows: "The other items were, however, certainly not matters which could be agitated on an originating summons under Order 36, and while rules 9 and 10 of that Order permit of evidence being taken, this is only so if the matters in respect of which relief is sought can be disposed of in a summary manner."

Subsequently, in *Kibutiri v Kibutiri* (1982-88) 1 KAR 60 Law J.A. had this to say: "The procedure by way of originating summons is intended - 'to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question.'

This was said in *In re Giles* (2) (1980) 43 Ch. D. 391, a decision cited with approval by this Court's predecessor in *Kuslum Bhai v Abdulhussein* (1957) EA 699. See also *Bhari v Khan* (1965) EA 94, in which it was held that the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit ... Finally, I would like to advise judges who have to deal with an originating summons to consider the judgment of this Court in *Kenya Commercial Bank Ltd. v James Osebe* (1982-88) 1 KAR 48 and in particular the judgment of Hancox Ag. J.A. in which the law and practice relating to originating summons, and their scope, are extensively reviewed."

We now set out the following pertinent part of the judgment of Hancox Ag. J.A. (as he then was) in *Kenya Commercial Bank Ltd v James Osebe* (supra): "In support of the first limb of his submissions Mr. Kwach cited Sir Ralph Windham C.J.'s judgment in *Kulsumbhai v. Abdulhussein* [1957] EA at p 701 where he said: 'It was pointed out in *In re Giles* (2) (1980) 43, Ch. D. 391, that such procedure 'was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involved a serious question.' And I would also refer to the following passage from a judgment of my own in *Salehmohamed Mohamed V.P.H. Saldanha* (3), Kenya Supreme Court (Mombasa) Civil Case No. 243 of 1953, (unreported), where the scope and general purpose of procedure by way of originating summons were being considered: 'Such procedure is primarily designed for the summary and 'Ad hoc' determination of

points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court, such as trustees, administrators, or (as here) the court's own execution officers. That despatch is an object of the proceedings is shown by O.XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into a court.'

Even clearer is the statement he quoted from Newbold J.A.'s judgment in *Bhari v. Khan* [1965] EA at p.101. Moreover strange results would follow if a judge were free to determine issues not properly before him, see Newbold J.A. (as he then was) in *Bhari v. Khan* at page 105 letters B to C and Duffus J.A. at page 108 letter D. Moreover the Originating Summons procedure is not for the purpose of obtaining decisions on disputed questions of fact - see *In re SUTCLIFFE* [1942] I CH. at p. 455 per Bennet J. followed by Madan J. in *Official Receiver v. Sukhdev* [1970] E.A. at p. 248."

Hancox Ag. J.A.'s judgment was considered by the learned Judge in what purports to be a 19 page somewhat confusing judgment instead of a ruling. The learned Judge after considering the "complex and contentious questions of fact and law" as to whether Mucheru Karanja held a portion of the suit land in trust for Francis Mucheru; whether not withstanding that the suit land was first registered in the name of Mucheru Karanja as its sole proprietor, under the Registered Land Act, Francis Mucheru could still claim title to a portion of it as being held in trust for him by Mucheru Karanja, or through adverse possession under the Limitation of Actions Act CAP 22; and the following legal authorities - *Gatimu Kinguru v Muya Gathangi* (1976) KLR 253 and *Francis Munene Paul Muthuita v Milka Wanie w/o Paul Muthuita, John Namus s/o Paul Muthuita and George Mwaniki s/o Paul Muthuita* (1982-88) 1 KAR 42; and the Registered Land Act, misapplied the judgments not only, of Hancox Ag. J.A., but also, that of this Court in *Kibutiri* (supra). She said:

"Finally, I would agree with the submission that there is no specific legal procedure dealing with burial of dead bodies. This is a recent development in Law. Anyway, in this case Teresiah Mucheru, the plaintiff maintained rights from the beginning that her deceased husband had a portion in the suit premises and that she together with her children being the deceased's heirs are entitled to bury his body on that portion which belonged to him. Evidence was led to the effect that Teresiah and her children are entitled to inherit from the deceased. It was because of this, according to submissions that the plaintiff came to Court under Order XXXVI rule 1 of the Civil Procedure Rules, which states, inter alia 'and any person claiming to be interested in the relief sought as creditor, devise, legatee, heir...'.

It was in this respect, and also applying the laws of Natural Justice that I went beyond the chamber application concerning burial and dealt with the whole dispute on land, otherwise I am aware of the advice given to Judges dealing with originating summons, by Law J.A. (as he then was) in Civil Case (O.S.) 70/79, who referred to the Court of Appeal Judgment in *Kenya Commercial Bank v James Osebe*, Civil Appeal No. 60/82, and particularly the Judgment of Hancox Ag. J.A. (as he then was) in which the law and practice relating to originating summons and their scope, was extensively reviewed. Now finally, to answer the plaintiff's question in her prayers brought to court, I would say that her late husband, the deceased was entitled to a portion of the suit premises during his life-time, and that portion now devolves to her and her children, under Kikuyu Customary Law.

According to evidence on record, that portion is identifiable, since evidence was led to show that the clan elders planted a hedge (Kariaria). Alternatively, the deceased had once built a house on the land and cultivated crops. That showed his portion. A third way of identifying it is I suppose, as per the evidence of Gachihi Wagiko, the portion nearest to his land.

The size of the deceased portion is 3 acres, that was the evidence led (sic) in court, which I accepted.

The above questions having been answered, I would now finally answer the question on the burial of the dead body, that the plaintiff and/or her agents are entitled to bury the body of her late husband Francis Mucheru Muruchu, who died on 11th February, 1984 and whose body is still lying at the City Mortuary, on that portion.

In view of my findings, I hereby direct that the chief of this village, Chief Charles Gathu Mungai, and the

District Officer (D.O.) Mr. Njoroge Ndirangu, be present at the burial, to ensure that my orders are carried out, and further that the officer-in-charge, Gatundu Police Station also be present to ensure that Law and Order is maintained at the time of the burial.

The deceased should be buried as soon as reasonably possible, in view of the fact that to date, his body has been lying in the mortuary for 38 days, inclusive of to-day.". If the learned Judge thought that the matter should continue as if by a plaint, which she clearly did not, she should have invoked the provisions of rule 10 (1) of Order 36 which is as follows and not persisted in misapplying the law: "10 (1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits."

In her "judgment" the learned judge relied upon the judgment of Madan J. (as he then was) of 5th November, 1976, in Kinguru (supra) where he held that: "The creation of a trust over agricultural land in a land control area does not constitute an "other disposal of or dealing" for the purposes of section 6(1)(a) of the Land Control Act and, therefore, does not require the consent of the local land control board; and the absence of any reference to the trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of section 126(1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive."

From the evidence adduced at the hearing, the suit land would seem to be "agricultural land" as defined in section 2 of the Land Control Act and as such, any transaction in it without the consent of the relevant Land Control Board, would in accordance with section 6(1) of the Act, be void for all purposes. Section 6(2) of the Act which was introduced by The Statute Law (Repeal and Miscellaneous Amendments) Act, 1980, and which is as follows:

"(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).",

extends the provisions of section 6(1) of the Act to the declaration of trust in agricultural land. This is an important issue which may well have affected the agricultural land allegedly being held in trust by Mucheru Karanja for the benefit of Francis Mucheru. The learned Judge did not pursue this particular issue which might affect the correctness of Madan, J.'s judgment in Kinguru (supra) upon which she relied. It is noteworthy that in the Memorandum and Objects of the Statute Law (Repeal and Miscellaneous Amendments) Bill, it is stated with respect to the amendment of the then existing section 6(2) of the Land Control Act that: "The existing provisions at sections 6(2)(a) ... are deleted entirely. The proposed new section 6(2) will simply clarify a point concerning trusts, over which there has been judicial disagreement ...".

All this also goes to show how complex the matter was and why it should not have been dealt with in an originating summons. The learned Judge erred, as illustrated in her confusing "judgment" as set out above, in proceeding in hearing the "complex and contentious questions of facts and law" raised in the originating summons and particularly also when she determined an issue raised by a Chamber Summons at the same time as those raised in the originating summons.

Counsel for the appellant has informed us that the appellant is not appealing against the learned Judge's ruling concerning the burial of Francis Mucheru. It is now sixteen years ago when Francis Mucheru was buried and we are not surprised at this. We will, however, for the reasons set out above, and without prejudice to whatever future steps the respondent may wish to take, allow the appeal against all the other orders made by the learned Judge in her "judgment" appealed against. Because of the intertwined family relationship between the appellant and the present respondent who is the legal representative of her dead mother, Teresia Mucheru, we make no order as to costs.

Dated and delivered at Nairobi this 8th of December, 2000.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR