



**Karinge v Mushu & another (Environmental and Land Originating Summons E003 of 2023) [2024] KEELC 5618 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5618 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2023  
LC KOMINGOI, J  
JULY 18, 2024**

**BETWEEN**

**MARY WAITHIRA KARINGE ..... PLAINTIFF**

**AND**

**MARY OLE MUSHU ..... 1<sup>ST</sup> DEFENDANT**

**KAJIADO LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By the Originating Summons dated 2<sup>nd</sup> March 2023 brought under Order 37 Rule 3&8 of the *Civil Procedure Rules*; Section 1A, 1B & 3A of the *Civil Procedure Act*; Sections 3, 13(1) & 2(d)(e) of the *Environment and Land Court Act*; Sections 128, 133, 143 & 150 of the *Registered Land Act* and Article 40 of the *Constitution* the Plaintiff seeks;
  - i. Spent.
  - ii. That the 2<sup>nd</sup> Respondent be ordered to file the documents relied upon to transfer the ownership of the suit property to the 1<sup>st</sup> respondent and for any other parcels subdivided out of the said piece of land.
  - iii. That the 2<sup>nd</sup> Respondent be ordered to file in court a search report of the suit property as well as certified copies of green cards of Kajiado/Kaputiei North/39744.
  - iv. Spent.
  - v. Spent.
  - vi. A permanent injunction restraining the 1<sup>st</sup> Defendant by herself and /or her agents, servants and employees from entering, remaining of developing or in



any way interfering with the Applicant's piece of land measuring 10 acres out of land parcel no. Kajiado/Kaputiei North/39744 in whatsoever manner.

- vii. A declaration that the Applicant is the bonafide purchaser of 10 acres out of land parcel number Kajiado/Kaputiei North/39744.
  - viii. An order directing the 1<sup>st</sup> Respondent to sign all the transfer instruments and accompanying documents to enable the applicant transfer the 10 acre piece to herself.
  - ix. Costs of this suit.
2. This is premised on the grounds that on 4<sup>th</sup> March 2011, the Plaintiff entered into a sale agreement with one OLMushu Ole Partaru Saiyalel (1<sup>st</sup> Defendant's late husband) for the sale of 10 acres of Kajiado/Kaputiei North/39744 excised from Kajiado/Kaputiei North/31818 for a consideration of KShs. 4,000,000 in presence of the 1<sup>st</sup> Respondent. Unfortunately, OLMushu passed soon after the agreement before its completion. However, the 1<sup>st</sup> Respondent promised that upon issuance of grant of administration, the sale transaction would be completed. The Applicant made the entire purchase price payment as expected as per the acknowledgement receipts but the 1<sup>st</sup> Respondent went on to indicate that the value of the property had increased and demanded for payment of an extra KShs. 1,000,000 which the Applicant claims to have paid. That notwithstanding, the 1<sup>st</sup> Respondent failed and refused to furnish the Applicant with the completion documents and intends to sell the property to other people in breach of the agreement. The Applicant claims that she lodged a caution against the property to protect her interests over it, but she later learnt that the caution had been lifted without her consent or a valid court order.
  3. The 1<sup>st</sup> Respondent in her Replying Affidavit confirmed that she was the owner of property Kajiado/Kaputiei North/39744 having obtained grant of administration letters and that the said agreement between the Applicant and the late OLMushu was null and void, adding that the proceedings were not only defective having been brought under non existing laws but also time barred. She thus sought for dismissal of the suit.
  4. The Originating Summons was canvassed by way of written submissions.

### **The Applicant's Submissions**

5. Counsel submitted on the following issues for consideration:
6. On whether the application was time barred and whether it was properly before court, counsel submitted that the Respondent did not show how the same was time barred. That notwithstanding, the Respondent could not purport that time lapsed after the 90 days completion period on the sale agreement because, she continued receiving payment past the completion date, renegotiated terms of the contract and made the Applicant believe that she was taking out letters of administration to enable her transfer the property to the Applicant. Therefore, by virtue of this conduct the completion period was extended as was held in *Doge v Kenya Cannery Ltd* (1989) KLR 127. Counsel also submitted that the sale agreement neither made time of the essence nor was the Applicant issued a completion notice as stipulated under Clause 4(7) of the Law Society of Kenya Conditions of Sale citing *Simpson v Connolly* (4) [1953] ALL ER 474 and Court of Appeal's *Macharia Mwangi Manina & 87 others v Davidson Mwangi Kagiri* (2014) eKLR. Further, Section 7 of the *Limitation of Actions Act* provides that an action to recover land cannot be brought 12 years from when the action accrued and this case the action accrued when the Applicant made the final payment of the purchase price which was on 12<sup>th</sup> May 2022. On the issue that the application was brought under non-existent laws, counsel submitted that



Order 37 rule 3 of the [Civil Procedure Rules, 2020](#) provided that a vendor or purchaser of immovable property could take out Originating Summons for the determination of any question arising out of the contract of sale.

7. On whether the Applicant rightfully purchased the suit property and was entitled to it, counsel submitted that there was a valid contract entered between the Applicant and the 1<sup>st</sup> Respondent's deceased husband. She was therefore entitled to the transfer of the property with reference to [Broadspect Investment Ltd v Francis Njoroge Mwangi](#) (2017) eKLR. Counsel also submitted that the agreement was binding on the 1<sup>st</sup> respondent who confirmed to have undertaken grant of administration letters against her husband's estate and should as such transfer it to the Applicant, together with the other orders sought.

### **The Respondent's Submissions**

8. Counsel submitted that the agreement entered on in 2011 was null and void because no efforts had been made to obtain consent from the Land Control Board and other necessary documents for the transfer of the suit land adding that the Applicant sought for a declaration that she was a bonafide purchaser of the 10 acres but did not discharge the burden of proof as espoused under Section 107 of the [Evidence Act](#) citing [Ngeni Muigai & Another v Peter Nyoike Muigai](#) (2018) eKLR; [Levi Simiyu Makali v Koyi John Walokwe](#) (2018) eKLR.
9. Counsel also submitted that this was a complex matter that should not have been instituted under Originating Summons as was held in [Kibutiri v Kibutiri](#) (1983) eKLR. Adding that the suit was also defective because the 1<sup>st</sup> Respondent's legal capacity had not been disclosed: whether she was being sued in her own capacity or as the administrator of the Estate of the late Olmushu Ole Partaru Saiyalel. Therefore, the suit should be dismissed.

### **Analysis and Determination**

10. I have considered the pleadings, the response thereto, the written submissions and the relevant authorities. I find that the issues for determination are:
  - i. Whether this suit is properly drawn.
  - ii. Is the Plaintiff entitled to the reliefs sought?
  - iii. Who should bear costs of this suit?
11. Section 19 of the [Civil Procedure Act](#) provides that: Every suit shall be instituted in such manner as may be prescribed by rules. Order 3 of the [Civil Procedure Rules](#) outlines the framing and institution of suits. From the foregoing and upon a lengthy perusal of the pleadings before me, I find that the single issue for determination is whether this suit is proper before court.
12. The Plaintiff has initiated proceedings by way of Originating Summons. However, the said summons are framed as an application because they seek injunctive reliefs. On seeking injunctive reliefs, Order 40 Rule 1 of the [Civil Procedure Rules](#) clearly provides for grant of temporary injunction in suits. This means that an application should be anchored in a suit. Unfortunately, in this case there is none. What is before court is an Originating Summons worded as an application. Had there been a suit, the court, in line with not giving due regard to procedural technicalities, would have bypassed the heading and considered the application. But in the current state, this procedural deficiency is not just a mere technicality that can be overlooked because it renders the suit void ab initio. Without legs, a suit cannot stand.



13. Finally, courts have over time agreed that suits initiated by Originating Summons should be in matters where the facts are mainly undisputed. However, if the suit was properly before court, this would not have been injurious because, Order 37 rule 19 of the [Civil procedure Rules](#) provides that in cases where a suit initiated through originating Summons, courts have the discretion to order the suit to proceed as if it was instituted through a Plaintiff.
14. I agree with the 1<sup>st</sup> Respondents submissions that the issues raised by the Applicant are complex and cannot be dealt with by way of Originating Summons.
15. I also find that the suit is defective since the capacity in which the 1<sup>st</sup> Respondent is sued is not disclosed. This is because the Applicant relies on a sale agreement between herself and one Olmushu Ole Partaru Saiyalel (Deceased).
16. I have gone through the said agreement and find that the same was not executed by the said registered owner who is now deceased.
17. I find that the Originating Summons as filed is a non-starter and the same is struck out with costs to the 1<sup>st</sup> Respondent. The Applicant is at liberty to file a proper suit to ventilate her claim.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18<sup>TH</sup> DAY OF JULY 2024.**

**L. KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Butaki for Ms. Kidui for the Applicant.

N/A for the Respondent.

Court Assistant – Mutisya.

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