

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC. APPEAL NO. E014 OF 2023**

**JOYCE**

**MUKUHI**

**NJENGA.....APPELLANT**

**VERSUS**

**NAIPANOI RIMPASON & MARIA KITEMON**

*(Suing as Legal Representatives of the late RIMPASON OLE  
SANTAMU alias*

*IMPASOL OLE KURARY SANTAMU).....1<sup>ST</sup>*

**RESPONDENT**

**SILVANUS SHIGONDE MAKOTSI.....2<sup>ND</sup>**

**RESPONDENT**

*(Being an Appeal against the Ruling of Hon. A. N. Makau in Ngong  
ELC Case No. E049 of 2021 (OS) delivered on 17<sup>th</sup> April 2023)*

**JUDGMENT**

1. The Learned Trial Magistrate Honourable A.N. Makau in the **ruling** dated and delivered on **17<sup>th</sup> April 2023** in Ngong **ELC Case No. E049 of 2021** held:

*... Whether by an Originating Summons or Complaint, the issues herein can be determined by Court since the court issues directions on the basis of what is presented before the time of pre-trial conference. Once issues for determination are framed the court is duty bound to give appropriate directions whether the suit shall proceed by way of evidence or written submissions and as such the suit is not fatally defective.*

*On whether it is statute barred... As such the suit is not barred by limitation of time forth was filed within twelve years...*

*...As to whether the court has jurisdiction... I consider the rate at which land is increasing its value and find this court lacks jurisdiction to determine the issues*

***raised herein. The applicant is thus advised to move the ELC Court Kajiado to have this matter transferred to it for hearing and determination...***

2. Aggrieved by the said ruling, the Appellant has appealed to this Court and prays for an order of striking out the suit on the grounds that:

***1. The learned Magistrate erred in law and in fact in finding that the procedure of originating summons was a proper way to institute proceedings in the case where orders were sought inter alia to invalidate the Appellant's title to the suit property and where serious allegations of fraud and corruption have been raised against the parties.***

***2. The Learned Magistrate erred in law and in fact failing to find that in the circumstances of the case the procedure of Originating Summons was expressly prohibited under the provisions of Order 37 Rule 8 of the Civil Procedure Rules.***

- 3. The Learned Magistrate erred in law in finding and holding that that the objection raised against the procedure of originating summons that had been adopted by the Plaintiffs in commencing the suit was a mere technicality and that the same could be saved under the provisions of Order 37 Rule 19 (1) and Article 159 of the Constitution.***
- 4. The Learned Magistrate erred in law and in fact in finding that the cause of action arose in the year 2009 upon the demise of Rimpason Ole Santamu who was the original owner of the property and that the suit was therefore not statute barred under Section 7 of the Limitation of Actions Act.***
- 5. The Learned Magistrate having found that she had no pecuniary jurisdiction to handle the matter erred in law and in fact failing to strike out the suit.***
- 6. The Learned Magistrate erred in law and in fact in directing the parties to apply before the ELC Court at Kajiado for the transfer of***

***the case to that court while she had no jurisdiction to issue such direction.***

***7. The Learned Magistrate erred in law and fact in relying on an affidavit that had been struck out and expunged from the records.***

3. This appeal was canvassed by way of written submissions.

**The Appellant's submissions**

4. On the issue of institution of the suit as Originating Summons, counsel submitted that the learned Magistrate erred by not finding that as per **Order 37 Rule 8 of the Civil Procedure Rules**, the suit was not properly instituted. This is because the said provision prohibited Courts from entertaining a claim for cancellation of title by way of Originating Summons. The learned Magistrate thus erred in finding that the suit could be saved under **Order 37 Rule 19(1) of the Civil Procedure Rules and Article 159 of the Constitution**. The suit was therefore fatally defective and ought to have been struck out as was held in *Cyril J. Haroo & another vs Uchumi Supermarkets Ltd & 3 others (2014) eKLR*. While still making reference to this case, counsel submitted that whereas Court had the discretion to order a suit initiated by Originating Summons

to be converted to a Plaint, this was only applicable if the suit had been properly commenced. Therefore, seeking an order of cancellation of title through Originating Summons would be prejudicial to the other parties and not in conformity with the Oxygen Principles or Article 159 of the Constitution.

5. On whether the cause of action was statute barred, counsel submitted that the Magistrate erred in holding that the cause of action did not arise when the Appellant acquired the title in 1993 but upon the demise of the 1<sup>st</sup> Respondent's husband in 2009 and the suit was therefore not time barred. While **Section 9(2) of the Limitation of Actions Act** provides that a cause of action to recover land of a deceased person where the deceased person was the last person entitled to the land at the time of his demise, the circumstances of this case were different because the deceased was no longer in possession of the suit property from the year 1993 when he transferred it to the Appellant. The learned Magistrate therefore wrongly relied on this provision. That notwithstanding, the suit was still statute barred because the deceased passed away in

May 2009 and the suit at the lower court was instituted in September 2021, which was 12 years and 4 months later.

6. On the issue of jurisdiction, counsel submitted that the learned Magistrate having acknowledged that she did not have pecuniary jurisdiction to determine the cause of action would be to strike it out and not direct the Respondents to apply to this court citing R vs Kuria West District (Masaba Division) Land Disputes Tribunal & 3 others and another (2014) eKLR, Charles Omwata Omwoyo vs African Highlands & Produce Company Ltd (2002) eKLR and the Court of Appeal's case of Phoenix of E.A Assurance Company Ltd vs S.M. Thiga t/a Newspaper Service (2019) eKLR.

7. On the issue that the learned Magistrate relied on an Affidavit that had been expunged from record, counsel submitted that the Supplementary Affidavit dated 2<sup>nd</sup> March 2023 was expunged by the lower court on grounds that it was filed without court's leave. However, in her ruling, the Magistrate made reference to the said Affidavit by stating that the Appellant's survey report had been challenged for having been prepared by unqualified valuers, information that was only available on the

expunged Affidavit. The Magistrate thus erred in relying on that document.

8. The Appellant's Preliminary Objection should therefore have been allowed and the suit struck out.

### **The Respondent's submissions**

9. Counsel for the Respondents submitted that the only issue for determination was whether the Appeal was merited. Counsel submitted that the moment the Magistrate declared she had no jurisdiction, the suit was dead on arrival and could not be merited as was held by the Court of Appeal in Phoenix of E.A Assurance Company Ltd vs S.M. Thiga t/a Newspaper Service (2019) eKLR. Since there can be no appeal on a nullity, the appeal should be dismissed with costs to the Respondent.

### **Analysis and Determination**

10. I have considered the grounds of appeal, the record of appeal, the written submissions and the authorities cited. I find that the issues for determination are:

- i. **Whether the learned Magistrate erred in finding that the lower court suit instituted as Originating Summons was properly before court;***

- ii. Whether the learned Magistrate erred in finding that the suit was not statute barred;*
- iii. Whether the learned Magistrate erred in not striking out the suit for lack of jurisdiction;*
- iv. Whether this appeal is merited;*
- v. Who should bear costs of the appeal?*

11. This being a first appeal, it is the duty of this court to re-analyse the case and draw its own independent conclusion as was held in **Paramount Bank Limited v First National Bank Limited & 2 others [2023] KECA 1424 (KLR)**:

***“... A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as***

***well as on law. While considering the scope of section 78 of the Civil Procedure Act, a first Appellate Court can appreciate the entire evidence and come to a different conclusion...”***

12. This suit was initiated in the lower court through an Originating Summons, where the Respondent averred that the property in question, Kajiado/Ntashart/2105, had been fraudulently transferred to the Appellant in 2015. The Respondent claimed that the fraudulent transfer only came to light in 2018, while they were collecting the assets of the estate of their late husband, who had passed away in 2009. Upon discovering the alleged fraud, the Respondent sought various orders, including the revocation of the Appellant’s title to the suit property. The parties to the suit subsequently filed their respective pleadings, and in response, the Appellant filed a Preliminary Objection dated 10<sup>th</sup> March 2023, which forms the crux of the impugned ruling.

13. In the said Preliminary Objection, the Appellant contested that the suit was fatally defective because it was instituted by way of Originating Summons while it had complex issues for determination; that the suit was

statute barred; and the Lower Court did not have pecuniary jurisdiction to determine the suit.

14. The suit in the lower court was instituted by originating summons. **Order 37 rule 8 of the Civil Procedure Rules** provides;

***“An application under the Land Registration Act, 2012 other than under Part VII and Part VIII thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made in that suit.”***

**Order 37 rule 19 of the Civil Procedure Rules** provides;

***“(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.***

***(2) Where the court makes an order under subrule (1), Order 11 shall apply.***

***(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.***

***(4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1)."***

15. I agree with the learned trial magistrate that the suit was not fatally defective as at the pre-trial conference the court would have discretion to give appropriate directions as to whether the matter would proceed by *viva voce* evidence or written submissions.

16. **Article 159(2) (d) of the constitution** implores on courts to do substantial justice rather than dwell on technicalities. I agree that the Originating Summons can be directed to proceed as a plaint.

17. **Section 9 (2) of the Limitations Actions Act** provides that;

***“Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.”***

It is the Respondents case in the lower court that they discovered the fraud in 2018 and this suit was filed in 2021. It therefore follows that the suit is not statute barred.

The action to recover the suit land accrued in 2009 when the original owner Rimpasson Ole Santamu died.

18. The Valuation Report presented by the 1<sup>st</sup> Defendant’s Valuer shows that the land is worth Kshs.25,000,000/= . The said Valuation Report will be tested once the same is presented in evidence. As at this point the value of the suit property has not been ascertained.

In any event, parties can apply to have the suit transferred to the Environment and Land Court for hearing and determination.

19. In conclusion I find no merit in this appeal and the same is dismissed with costs to the Respondents.

**Dated, Signed and Delivered virtually at Kajiado this 24<sup>th</sup> day of October 2024.**

**L. KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Wanjohi for the Appellant.

Mr. Njogu for Mr. Karanja for the Respondent.

Court Assistant – Mutisya.