



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CIVIL SUIT NO. 97 OF 2001 (O.S)**

TABELGA CHEPNGENO TELE.....1<sup>ST</sup> PLAINTIFF

TABLULE TELE.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

KIPKOSGE TELE.....1<sup>ST</sup> DEFENDANT

SALLY CHEPKOECH MISIK.....2<sup>ND</sup> DEFENDANT

PHILIP KIPLANGAT KORIR.....3<sup>RD</sup> DEFENDANT

**THE CHAIRMAN BURETI DISTRICT**

LAND CONTROL BOARD.....4<sup>TH</sup> DEFENDANT

**THE LAND REGISTRAR**

KERICHO/BURETI DISTRICTS.....5<sup>TH</sup> DEFENDANT

**RULING**

The suit herein was commenced by Messrs **Tabelga Chepngeno Tele** and **Tablule Tele** (the Applicants) by way of Originating Summons dated 28/11/2001 against Kipkosge Tele (the Respondents). On 18/4/2009, the Respondents had filed an application dated 15/4/2009 seeking directions in the suit. The hearing of directions came up before me on 26/1/2011 and again on 14/3/2011.

Mr. Siele Sigira, the learned Counsel for the Applicants, conceded that when the application for directions was pending, he went before the Deputy Registrar with an ex parte application to amend the Originating Summons and that he obtained orders to amend the Originating Summons. On 23/9/2010, a further amended originating summons was filed.

Mr. Oboso, the learned Counsel for the Respondents, took issue with the manner in which the amendment of the Originating Summons was procured. He was never served with the application for amendment of the Originating Summons, he said.

The application to amend the Originating Summons seems to have been prompted by the Respondents' application to strike out the Originating Summons which was however dismissed. Mr. Oboso contends that the amended Originating Summons is prejudicial to his clients not least because it introduces a new cause of action and an additional party.

I have perused the pleadings in this suit. The application dated 1/2/2010 on the basis of which the Deputy Registrar allowed amendment was heard on 17/3/2010 and a Ruling was delivered on 19/3/2010 allowing the application in terms of prayers 1 and 2 of the application dated 1/2/2010 which prayed in prayers 1 and 2.

***"1. That the Attorney General be joined as the 6<sup>th</sup> Defendant to the suit."***

***"2. That the necessary directions be given."***

The filed amended Originating Summons has not only added the AG as a new party, it has also effected other amendments which were neither sought in the application nor allowed. Moreover, the Deputy Registrar did not have power to hear or determine the application which was not based on any of the rules stipulated in **Order 49 of the Civil Procedure Rules (2010)** giving the Deputy Registrar power to hear and determine applications.

It is my finding that save for the joining of the AG as a new party, the amendment effected to the

Originating Summons was not allowed by the Deputy Registrar and even if it was, which is not the case, it would have been of no effect as the Deputy Registrar had no power under **Order 49** to hear and determine the application.

In the light of the above, I hereby set aside the orders made by the Deputy Registrar on 19/3/2010 and expunge from the record the purported amended Originating Summons filed in Court on 23/9/2010. It was improper for Mr. Siele Sigira to go behind the back of his colleague to prosecute ex parte the application dated 01/02/2010. It must be appreciated that parties to a suit must all be given the right to be heard unless the law allows a matter to be heard ex parte.

In the circumstances of this case, I order that the applicants shall pay to the Respondents the costs incurred on 26/1/2011, 14/03/2011, and today.

The application for directions dated 15/4/2009 filed by the Respondents shall be heard on 27/2/2011.

**DATED at KERICHO this 13<sup>th</sup> Day of April, 2011**

**G B M KARIUKI, SC**

**RESIDENT JUDGE**

**COUNSEL APPEARING**

Mr. Siele Sigira, Advocate, for the Applicants

Mr. Oboso, Advocate, for 1<sup>st</sup>, 2nd, and 3rd Respondents

Mr. R. Koech, Court clerk



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