IN THE COURT OF APPEAL

AT MOMBASA

(Coram:Law, Miller & Potter JJA)

CIVIL APPEAL NO. 10 OF 1980

BETWEEN

PETER SALAI MWALAGAYA.....APPLICANT

AND

MURTAZA HUSSEIN BANDALI.....RESPONDENT

(Appeal from the High Court at Mombasa, Kneller J)

JUDGMENT

This is an appeal from the decision and order of the High Court Mombasa (Kneller J), made on a preliminary objection as to practice and procedure at the hearing of a civil application in chambers. The application was by way of originating summons stated to be under section 57(5) of the Registration of Titles Act (cap 281) (hereinafter referred to as the act) and order XXXVI of the Civil Procedure Rules.

The applicant was one Peter Salai Mwalagaya; and the application was in respect of a plot of land of 5.77 acres ie Plot No 69 section II Mombasa Mainland North and as to which land the applicant claims “a purchaser’s interest.” The respondent to the application was one Murtaza Hussein Bandali, a Land and Estate agent of a firm named Shimoni Enterprises; and the applicant prayed, (a) that agent Bandali show cause why the caveat lodged by him on March 27, 1979 registered at the Coast Registry as No CR 1317/15 against the title of the said Plot should not be withdrawn; and (2) that the court do declare the applicant the rightful purchaser of the said plot and entitled to be registered as such in the coast Registry.

For the respondent, the following one of three filed grounds of objection was argued, the other two being abandoned.

“the proceedings on the plaintiff’s own supporting affidavit would give rise to a disputed question of fact; and an originating summons is not the procedure by which decisions on disputed questions of fact ought to be obtained without a suit in the ordinary course”

…and after considering the arguments on both sides with a study of the authorities cited, the learned

judge upheld the preliminary objection and dismissed the summons with costs.

Although I do not consider it necessary to my understanding of the situation, I shall nevertheless summarise the applicant's affidavit in support but engaging myself specifically on the examination of the question of a suit proper, as opposed to proceeding by way of originating summons and the dismissal of the summons in this case, and adopting and bearing in mind that originating summons procedure –

"is primarily designed to deal with questions of law or discretion arising upon factor substantially not in dispute, and indeed, where there is any choice in the matter, it is wrong to bring proceedings by originating summons if it is known that the facts are disputed. But sometimes the procedure is obligatory even in cases where there may be substantial disputes of fact;…. whilst interlocutory applications are not normal in proceedings commenced by originating summons, yet, if necessary, applications can be made for the appointment of receivers, and for discovery, or for any other interlocutory relief which could be granted in an action commenced by writ." (*Odgers' Principles of Pleading and Practice*, 21st Edn. p 319-320).

I understand this to mean that proceedings commenced by originating summons may well engage the adjudicating function of the court as would proceedings commenced by writ of summons.

The affidavit in support is to the following effect:-

The suit plot is registered in the names of Mr and Mrs Robinson (husband and wife). On the August 18 , 1976 Mrs Robinson on behalf of herself and husband gave written authority to Shimoni Enterprises to sell the plot for Kshs 160,000. By September 3, 1976 the applicant and Shimoni Enterprises had negotiated the sale of the Plot the applicant paying 10% deposit and the Robinsons being informed accordingly; and with the knowledge and concurrence of the respondent, the applicant lodged a caveat against the title of the Plot claiming a purchaser's interest. After some hesitation on the part of the Robinsons as to the respondent's authority to sell the Plot, on May 8, 1978 Shimoni Enterprises were duly confirmed by the Robinsons as authorised so to do; they also then recognised the sale to the applicant, with certain attending steps ie (a) an undated transfer of the vendor's interest in the plot in favour of the applicant against payment of the purchase price by the applicant under a power of attorney made out in favour of the respondent and limited to the sale and the transfer of the plot.

The applicant experiencing difficulty in making early payment of the balance of the purchase price, authorised the respondent to deal with his interest in the Plot and 'to safeguard and to look after' his interest in every necessary manner even to the extent of probably obtaining a special power of attorney from the vendors.

It is not clear to me whether the respondent's safeguarding of the applicant's interest had perhaps at sometime amounted to securing the outstanding balance of the purchase price for and on behalf of the applicant: but it is patent from the affidavit and supporting document (Exhibit M 10) that around August, 1978 the Robinsons received their demanded price for the land and the Coast Registry was duly informed of the receipt thereof no doubt towards the expected transfer of their right, title and interest to the applicant. Be that as it may, the affidavit proceeded to aver that by March, 1979 the respondent had commenced subdividing the land and had already agreed to sell one such subdivision for Kshs 75,000 and had received substantial deposits in respect of other sales of portions of the land. Further, and in these circumstances, as advocates for the applicant called upon the respondent to render account of his dealings with the Plot, he replied through his advocates that he had himself purchased the plot and that the applicant had no right, title or interest in it. The affidavit also averred that the respondent on March 27, 1979 lodged caveat on behalf of himself in respect of the said plot of land claiming purchaser's

interest. It is clear that this last mentioned act by the respondent prompted the applicant to approach the court; and his originating summons having been dismissed, he appeals to this court praying:

(a) that the order of dismissal be set aside, and

(b) that the matter be remitted to the learned judge for hearing the originating summons on its merits.

I now reproduce the statutory provisions under which the appellant approached the High Court and underlining such portions thereof as I consider most relevant to the appeal. Section 57(5) of the Act:

"The proprietor or other person claiming land may, by summons, call upon the caveator to attend before the court to show cause why the said caveat should not be withdrawn, and it shall be lawful for the court, upon proof that the caveator has been summoned, and upon such evidence as the court may require, to make such order in the premises, either *ex parte* or otherwise, as the court shall deem fit, and, where a question of right or title requires to be determined, the proceedings shall be as nearly as may be in conformity with the rules of the court in relation to civil causes."

I believe it is correct to say that reading section 57(5) as aforesaid and the general provisions of order XXXVI together, some proceedings commenced by way of originating summons may well end up as being in many respects the same as if the proceedings had been initiated by plaint. Several cases were cited and examined by both sides before the learned judge and before this court; but on the premises I have laid above, I will concern myself with the circumstances of this particular case. As I see it, at the time of hearing of the preliminary objection, the complaint which was expressly before the court was to the effect that the respondent lodged a caveat in opposition to an existing caveat which had been lodged by the appellant with his knowledge and concurrence; thereby creating an obstacle in the way of transfer under the provisions of section 24 and 29 of the Act. But keeping within the strict confines of the objection and the question of procedure with which I am directly concerned, it is perfectly correct that order XXXVI rule 10 gives the court a discretion to refuse to pass any order on the summons and to dismiss the same if it appears that the matters in respect of which relief is sought cannot properly be disposed of in summary manner; but there is an attaching consideration to that discretion ie if the judge thinks fit, to adjourn the originating summons proceedings into court for taking evidence *viva voce* or hearing arguments. With respect, I do not think that as appears in the learned judge's ruling, at the crucial moment of decision as to whether or not to continue entertaining the originating summons, the test is merely reasonable apprehension of weighty or protracted evidentiary matters which may be forthcoming. Indeed, in my humble opinion section 57(5) of the Act which confers the right to relief upon the litigant with respect to the subject matter of the Act, presupposes some action by the court itself when and where 'it may require' evidence. I think that it is perhaps in the same trend that there can be seen this in the judgment of Windham CJ in *Kulsumbai v Abdulhussein,* [1957] EA, 701:

"learned counsel for the third and fourth defendants has made it clear, and I accept his assurance, that a number of facts upon which the plaintiffs rely in support of their claim will be contested."

Further, and as a matter of construction, I view the complaint seeking determination of the question as to which of the two opposing caveats is valid in law, as "a question of right" expressly contemplated within section 57(5) of the Act, and as the provisions mandatorily direct, that such complaint should be proceeded with as nearly as may be in conformity with the rules of the court in civil cases, the order dismissing the originating summons was in effect an order of "discontinuance" and was incorrect. I would therefore allow the appeal, and order (i) that the appeal be allowed with costs (ii) that the order of the High Court dated December 17 be set aside and the preliminary objection dismissed with costs and (iii) that the matter be remitted to the High Court Mombasa for hearing the originating summons on the

merits.

Law JA. I have read in draft the judgment prepared by Miller JA and I agree with his conclusion that this appeal must be allowed.

This appeal depends largely on the interpretation of subsection (5) of section 57 of the Registration of Titles Act, which reads –

"(5) the proprietor or other person claiming land, may, by summons, call upon the caveator to attend before the court to show cause why the said caveat should not be withdrawn, and it shall be lawful for the court, upon proof that the caveator has been summoned, and upon such evidence as the court may require, to make such order in the premises, either *ex parte* or otherwise, as to the court shall deem fit; and, where a question of right or title requires to be determined, the proceedings shall be as nearly as may be in conformity with the rules of the court in relation to civil causes."

We have heard much argument as to the meaning of this subsection. I do not think it is disputed that the words 'by summons' mean 'by originating summons' where, as in this case, there was no suit in existence, see *Boyes v Gathure* [1969] EA 385. The words "The proprietor…. may by summons, call upon the caveator…." are in my opinion permissive only to the extent of empowering the proprietor to call upon the caveator. If he does so call, then it is mandatory to him to follow the prescribed procedure, that is to say 'by summons'. As was held in *Taylor v Taylor* (Vol 31, L R Ch Div) (1875-1876) 426, at page 431:

"When a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted."

Mr Lakha, for the respondent, supported the learned judge's holding that the procedure by way of summons prescribed by section 57(5) was permissive and did not preclude a party from claiming relief under the subsection by suit if he so desired, at his option. Mr Lakha's submission, as I understood it , is that the subsection has two limbs, involving two different sets of circumstances. The first limb, involving the withdrawal of a caveat, maybe "by summons"; but the second limb, where a question of right or title zequires to be determined, must be 'by suit', which in Mr Lakha's submission is the meaning of the words "the proceedings shall be as nearly as may be in conformity with rules of the court in relation to civil causes". With respect, I am unable to agree. If the legislature had intended a question of right or title to be determined exclusively by suit, it would have said so, using two words instead of twenty-two. In my view, the procedure "by summons" applies to both the withdrawal of caveats and the determination of questions of right or title where both matters are raised in the same summons, the difference being that in the latter case, the proceedings, although by summons, shall incorporate all relevant rules of civil procedure as may be applicable to the determination of the question. Mr Lakha's alternative submission was that, a 'summons' means, for the purposes of this appeal, 'originating summons', then the provisions of order XXXVI apply, and that the learned judge, in dismissing the appellant's originating summons and leaving it open to him to 'institute an action in the ordinary way to obtain the relief which he seeks", was acting fairly and squarely within the powers conferred upon him by rule 10 of order XXXVI. That rules reads:

"10. The judge hearing an originating summons may, if he thinks fit, adjourn the same into court for taking evidence *viva voce* or hearing arguments; and if it appears to him that the matters in respect of which relief is sought cannot properly be disposed of in a summary manner, may refuse to pass any order on the summons, and may dismiss the same, referring the parties to a suit in the ordinary course, and making such orders as to costs as may appear to be just."

The learned judge in this case was of the view that the matters in dispute could not properly be disposed of in a summary manner and he dismissed the summons. I have no doubt that he could have done this in a case in which it was open to a party to proceed either by originating summons or by suit, at his election, see for instance *Kulsumbai v Abdulhussein* [1957] E A 699; but the same considerations do not apply, in my view, when the sole procedure open to a party is by way of summons. Here I agree with the submissions of Mr Inamdar for the appellant.

The only procedure open to the appellant in this case was to proceed by summons. The concluding words of subsection (5) provide that where a question of right or title requires to be determined 'the proceedings' (meaning the proceedings by way of summons) "shall be as nearly as may be in conformity with the rules of the court in relation to civil causes." The proceedings retain their original nature, that of a summons, and are not transformed into a suit, but are to be conducted 'as nearly as may be' in conformity with the rules relating to suits. This is in harmony with rule 9 of order XXXVI. To insist on transforming the summons into a suit, under rule 10, is not in harmony with the provisions of the statute, which would have so provided had it been so intended. To the extent that there is a conflict between the statute and the rules, the statute must prevail. The statute in this case has prescribed that the procedure, where there is no suit in existence, shall be by originating summons, and the general provisions of rule 10 of order XXXVI cannot, in my opinion, override the specific provisions of the statue by substituting a suit for a summons. For these reasons, I agree that this appeal must be allowed, and as Potter JA also agrees, there will be an order in the terms proposed by Miller JA.

Potter JA. I agree with the order which is proposed. The issues raised in this case concern the correct interpretation of section 57(5) of the Registration of Titles Act, (cap 281), (herein referred to as the Act), and also the application of order XXXVI (entitled "originating summons") of the Civil Procedure Rules, to proceedings commenced under and in accordance with section 57(5) of the Act.

Two questions have arisen in this case as to the interpretation of section 57(5) of the Act. The first is whether, as the learned judge held, the person opposing a caveat has the option to commence proceedings by summons or by suit, or whether, as the appellant contends, it is mandatory that the proceedings be commenced by summons. It is common ground that a summons in this context is an originating summons, see *Boyes v Gathure* [1969] E A 385. The material words of section 57(5) of the Act are:

"(5) The proprietor or other person claiming land may, by summons, call upon the caveator to attend before the court to show cause why the said caveat should not be withdrawn, and it shall be lawful for the court, upon proof that the caveator has been summoned, and upon such evidence as the court may require, to make such order in the premises, either *ex parte* or otherwise, as to the court shall deem fit;……."

To my mind the meaning of these words is plain. The claimant may if he wishes invoke the jurisdiction of the court. If he does so wish, he is required by the words of the subsection to proceed by way of summons. If he proceeds in any other way, the court will not have the jurisdiction conferred on the court by the subsection. The decision in *Taylor v Taylor* LR XXI CH D (1875-6) 426 supports this construction.

The second question arises out of a submission by Mr Lakha, who appeared for the respondent, and that is as to the meaning of the final words of section 57(5) which are

"…; and, where a question of right or title requires to be determined, the proceedings shall be as nearly as may be in conformity with the rules of the court in relation to civil causes."

Mr Lakha contends that these words mean that, in the circumstances envisaged, the proceedings shall be by way of ordinary suit. Mr Lakha's contention does terrible violence to the language of the subsection. In my view the sentence means exactly what it says, and that is that in the envisaged circumstances the proceedings by way of originating summons shall conform as nearly as possible to proceedings by way of civil suit.

The question then arises as to the effect of order XXXVI in this case. The Civil Procedure Rules are subsidiary legislation made under section 81 of the Civil Procedure Act, (cap 21), which provides for a Rules Committee which has power to make rules relating to the procedure of civil courts, including rules providing for "procedure by way of originating summons" (section 81(2) (g)). There can be no doubt that order XXXVI is of general application to proceedings by way of originating summons.

Rule 10 of order XXXVI is relied upon by Mr Lakha. In his submission it provides further justification for the decision of the learned judge. The rule provides –

"10. The judge hearing an originating summons, may, if he thinks fit, adjourn the same into court for taking evidence *viva voce* or hearing arguments; and if it appears to him that the matters in respect of which relief is sought cannot properly be disposed of in a summary manner, may refuse to pass any order on the summons, and may dismiss the same, referring the parties to a suit in the ordinary course, and making such orders as to costs as may appear to be just."

Rule 10 is not consistent with section 57(5) of the Act. The rule bestows a discretion on the judge to dismiss the summons and to refer the parties to a suit in the ordinary cause, if it appears to him that the matter cannot properly be disposed of in a summary manner. Subsection (5) of section 57 of the Act admits of no such dismissal and reference. It provides, with a clear recognition of the possibility of complex issues arising, that

"where a question of right or title requires to be determined, the proceedings shall be as near as may be in conformity with the rules of court in relation to civil causes."

The rule is repugnant to the statute. There can be no doubt as to the outcome of that repugnancy. The subsection is not only special, it is a provision of statute; the rule is general, and it is subsidiary legislation. Section 57(5) prevails. The Legislature must be presumed at least to have intended the consequences which flow from those of its enactments which suffer from no taint of ambiguity. It is the every day task of the courts to give effect to the enacted will of Parliament. The provisions of section 57(5) of the Act are plain. The whole contest of opposing a caveator must be fought on to the finish in the proceedings under the originating summons.

I wish to thank Mr Inamdar, for the appellant and Mr Lakha for the respondent, for their admirably concise submissions.

Dated and Delivered at Mombasa this 30th day of October 1980.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

.....

JUDGE OF APPEAL

I Certify that this is a true copy

of the original.

DEPUTY REGISTRAR