



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**LAND CASE NO. 62 OF 2008**

**UCHUMI SERVICES**  
**LTD.....PLAINTIFF/APPLICANT**

**=VERSUS=**

- 1. CHENGO KATANA KOI**
- 2. MUGANGA MWAGAYA KATANA**
- 3. CHIEF LAND REGISTRAR**
- 4. COMMISSIONER OF LANDS**
- 5. DIRECTOR OF LAND AND ADJUDICATION AND SETTLEMENT.....DEFENDANTS/RESPONDENTS**

**R U L I N G**

**Introduction**

1. What is before me is the Plaintiff's Application dated 13<sup>th</sup> June, 2013 brought under Order 2 Rule 15(d) of the Civil Procedure Rules. The Application is seeking for the following reliefs.

**(a) That the Defendants' pleadings and particularly the defence, amended defence and further amended defence and counterclaim and all ensuing actions and or steps herein be struck out.**

**(b) That the suit do proceed as a non-defended cause and judgment be entered for the Plaintiff.**

2. The Application is supported by the Affidavit of the Plaintiff's Director, Shakoor Haroon Ahmed and by the grounds on the face of the Application.

**The Applicant's case**

3. According to the Applicant's Supporting Affidavit, the Defendants' Defence and

Counterclaim was filed by the firm of Ongera Andembesa and Company Advocates, which law firm did not exist then as confirmed by the letter from the Law Society of Kenya and that the pleadings having been drawn by a non-existent firm of advocates amounts to abuse of the process of the court and cannot stand.

4. The Applicant's director has further deponed that at paragraph 48 of the Further Amended Defence and Counterclaim, the Defendant learnt of the fact that the suit property was registered in the Plaintiff's name in 1983 but they did not seek the remedies that they are now seeking from the court.

5. Accordingly, it was deponed, any claim over the land is now time barred and that the claim has been mischievously filed contrary to the express provisions of the Limitation of Actions Act, and in particular section 7 thereof.

6. The Applicant finally deponed that the Defendants have no *locus standi* to bring their action because of the delay in filing the action; that some of the Defendants have worked as farm hands for the Plaintiff and that the Defendants are guilty of non-disclosure of material facts particularly the failure to disclose to the court the pendency of summons for revocation of grant currently pending in the Mombasa Registry.

### **The Respondents' case**

7. The Respondents, through the 1<sup>st</sup> Respondent, filed their Replying Affidavit on 15<sup>th</sup> July 2013 and deponed that the Counterclaim dated 13<sup>th</sup> March 2013, being a fresh suit was drawn and handled by a competent advocate and should not be struck out.

8. It is the Respondents' case that under Section 9(2) of the Limitation of Actions Act, where a person brings an action to recover land of a deceased person, and the deceased person was the last person entitled to be in possession of the land, the right of action accrues on the date of death. The cause of action herein, it was deponed, arose on 19<sup>th</sup> September 2005 when Mwangaya Katana Koi died.

9. The Plaintiff's/Applicant's advocate filed his submissions on 22<sup>nd</sup> October 2013 while the Defendant's counsel filed his submissions on 4<sup>th</sup> February 2014. I have considered the said submissions and the authorities that have been relied upon the parties.

### **Analysis and findings**

10. The only two issues before me for determination is whether the claim by the Defendants is time barred and whether the Defence and Counterclaim that was filed by an unqualified person is a valid pleading. Those issues cannot be determined without looking at the pleadings.

11. The Plaintiff filed this claim by way of a Plaint on 15<sup>th</sup> August 2008 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. In the Plaint, the Plaintiff averred that it was registered as the proprietor of plot number Kilifi/Madeteni/539 (the suit property) on 31<sup>st</sup> July, 1981. The Plaintiff alleged in the Plaint that the Defendants had defamed it by way of a letter dated 16<sup>th</sup> June 2008 and sought for damages for defamation. That was the only prayer in the initial Plaint.

12. On 4<sup>th</sup> September 2008, the firm of Ongera Adembesa and Company Advocates filed a Defence and Counterclaim. The Defendants averred in the Defence that Kilifi/Madeteni/536 was their ancestral land and that it was owned by Katana Koi Mugumba who died on 17<sup>th</sup> July 1988. The Defendants further averred that after the demise of Katana Koi Mugumba, the suit property was inherited by one of the deceased son, Mwangaya Katana Koi who also died on 19<sup>th</sup> September 2005. The Defendants are said to be the administrators of the Estate of Mwangaya Katana Koi.

However, it was averred the Defendants discovered that the land they thought was their ancestral land had been registered in the name of the Plaintiff when they conducted an official search on 25<sup>th</sup> April 2008. In the counterclaim, the Defendants have claimed that the suit property belongs to their late grandfather and father.

13. The Plaintiff filed an Amended Plaintiff with the leave of the court on 27<sup>th</sup> May 2009 and sought for declaratory orders to the effect that it was the lawful owner of the suit property. The Defendants had earlier on filed their amended Defence and Counterclaim through the same firm of advocates.

14. This matter proceeded for hearing before Omondi J until when the firm of Sagana & Biriq Advocates came on record for the Defendants. The said firm filed an Application seeking the leave of the Court to further amend the Amended Defence and Counterclaim, which Application was allowed by the consent of the parties.

15. The Defendants new advocates filed the Further Amended Defence and Counterclaim on 19<sup>th</sup> April 2013. In the Further Amended Defence and Counterclaim, the two Defendants introduced three other Defendants. The Defendants further averred that the suit property is trust land and that it was allocated to the Koi clan by the Settlement Fund Trustee and the same could not be allocated to a company. The Defendants introduced more causes of action in the Counterclaim. The Plaintiff then filed the current application.

16. The Defendants have not denied in their Replying Affidavit that the Defence and Counterclaim that was filed on 4<sup>th</sup> September 2008, by the firm of Ongera Adembesa and Company Advocates was filed by an unqualified person. Indeed, the Plaintiff's advocates have annexed on their Supporting affidavit a letter from the Law Society of Kenya dated 31<sup>st</sup> May 2013 stipulating that David Ongera M last held a practicing certificate in the year 2003 and was not licensed to practice law in the year 2008.

17. Section 2 of the Advocates Act defines the term '*unqualified person*' as "*a person not qualified under section 9 to act as an advocate.*" Section 9 of the Act provides as follows:

*Subject to this Act, no person shall be qualified to act as an advocate unless;*

***(a) he has been admitted as an advocate; and***

***(b) his name is for the time being on the Roll; and***

***(c) he has in force a practicing certificate and for the purpose of this Act a practicing certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4).***

18. The courts have given due interpretation of the use of the conjunctive term 'and' as used in section 9 of the Act and have held that for one to be deemed to be qualified as thereunder provided, one must be in possession of all the requirements listed in section 9. In the case of ***Belgo Holdings Ltd v Esmail*** [2005] 2 EA 28, the High court rendered itself as follows:

***"It is instructive that these four qualifications are not to be read to the exclusion of each other. The use of the word 'and' means that for one to be qualified to act as an advocate, one must have all of the four qualifications above. If one does not have one or all, he is thereby rendered an unqualified person and section 34 aforesaid operates to stop him from doing any of the things therein enumerated, including drawing documents in legal proceedings."***

19. In the case of ***Kenya Power & Lighting Company v Chris Mahinda T/A Nyeri Trade***

*Centre* [2005] 1KLR 753, the Court of Appeal in striking out the notice of appeal and memorandum of appeal signed by an advocate, who at the time of signing the documents did not have a practicing certificate, held as follows:

***“A practicing certificate is issued for a whole year and the certificate issued in this case was for the year 2004 and it was suggested that, although it was issued on 22<sup>nd</sup> September 2004, it had retrospective effect back to the beginning of 2004. We do not accept this submission. If no practicing certificate had been issued when the act was done, the advocate was not qualified to do that act, at the time he did it.”***

20. In *Obura v Koome* [2001] 1 EA 175, the Court of Appeal struck out an appeal filed by an advocate who lacked a practicing certificate at the time that a Memorandum of Appeal was filed.

21. In the circumstances, I find that the Defence and counterclaim dated 2<sup>nd</sup> September 2008 and the Amended Defence and Counterclaim dated 20<sup>th</sup> May 2009 drawn and filed by Ongera Adembesa and Company Advocates are incompetent and should be expunged from the record.

22. It is true, as argued by the Defendants' new advocates, that a Counterclaim is substantially a cross suit and should be treated for all purposes as an independent action. However, the Defendants Further Amended Defence and Counterclaim dated 13<sup>th</sup> March 2013 is premised on the initial Defence and Counterclaim which was drawn and filed by an unqualified advocate. Consequently, the Further Amended Defence and Counterclaim cannot be said to be distinct and independent of the initial Defence and Counterclaim dated 2<sup>nd</sup> September 2008.

23. The law with respect to the status of amended pleadings was stated by Newbold, JA (as he then was) in *Eastern Radio Services & Another Vs. R J Patel T/A Tiny Tots and Another* [1962] EA 818 as follows:

*“Whereas a Plaintiff as amended may be treated as if it were the original claim, there is nothing which requires that it must be so treated for all purposes and in all circumstances. Logic and commonsense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed”.*

24. Similarly, in *Dhanji Ramji Vs. Malde Timber Co.*[1970] EA 422 the East African Court of Appeal stated as follows:

*“While amendments of pleadings are conclusive as to the issues for determination the original pleadings may be looked at if it contains matters relevant to the issues. The new pleading is of course conclusive as to the issues for determination, but it does not replace the old pleading for all purposes. Logic and common sense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed. The test is, in the Court’s opinion, whether the old pleadings contains matters relevant to the questions for determination in the suit; if so, it may be looked at...It is clear that the court looks only to the pleadings as amended in deciding the issues. Again, where an original pleading contained an admission which was deleted in the amended pleading, that admission can no longer be relied on. But that does not mean that the original pleading has entirely ceased to exist. It remains on record and it is a rule of practice that the amendment must be so effected that what was originally written remains legible. It seems that it is proper to refer to an original pleading for certain limited purposes, one of course which is, to show inconsistency”.*

25. In the circumstances and considering that the Defence and Counterclaim dated 2<sup>nd</sup> September 2008 and the amended Defence and Counterclaim dated 20<sup>th</sup> May 2009 were drawn and filed by an unqualified person, it follows that the Further Amended Defence and Counterclaim, although drawn and filed by a qualified person cannot stand. The same is therefore

hereby struck out. I shall however not make any orders as to costs considering that the Defendants cannot be blamed for instructing a person who had not taken out a practicing certificate.

26. But where does that leave the Defendants who might not have known that the person who purported to be an advocate was actually not a qualified advocate in terms of the provisions of Section 9 of the Advocates Act? Will justice be done, and seen to have been done if the Defendants are removed from the seat of justice just because their pleadings were filed by an unqualified person?

27. Every person has the right to access justice and to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body (**See Article 48 and 50 (1) of the Constitution**).

28. When a court finds, as I have done, that the pleadings before it have been filed by an unqualified person, I am of the view that the court can invoke its inherent jurisdiction under Section 3A of the Civil Procedure Act to allow such a party to file valid pleadings for the ends of justice.

29. In the case of Mechanical Engineering Plant & 2 Others Vs Standard Chartered Bank Kenya Ltd (2009) Eklr, Justice Bosire dealt with an Application for extension of time to file a record of appeal which had been struck out for having been drawn by an unqualified advocate as follows:

**“It is now well settled that a party whose appeal has been struck out as being incompetent may apply for extension of time within which to file and serve not only a fresh notice of appeal but also a fresh record of appeal.”**

30. Consequently, I will not allow the Plaintiff's prayer to have the suit proceed as a non-defended cause and judgment to be entered for the Plaintiff. Instead, I shall, which I hereby do, allow the Defendants to file a fresh Defence and Counterclaim.

31. The other objection that the Plaintiff has taken up in its Application is that in any event, the Defendants claim is time barred and is brought contrary to the express provisions of Section 7 of the Limitation of Actions Act. Section 7 of the Act provides as follows:

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

32. According to the Plaintiff, the patriarchal head of the Defendants and his entire descendants all became aware of the registration of the suit property in favour of the Plaintiff as early as 1983 but never raised objections to such registration, and that the claim has been brought more than fifteen years after the alleged owner died.

33. Section 9(2) of the Limitation of Actions Act addresses a situation where an action is filed to recover land of a deceased person whether under a will or an intestacy, which seems to be the Defendants' claim. The said section provides as follows:

**“Where a person brings an action to recover land of a deceased person, whether under a will or 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.”**

34. In the case of **R Vs Land Dispute Tribunal Taveta Senior Resident Magistrate &**

**Others (2013) e KLR**, Muriithi J held that the question of whether the dispute before the court is barred by Limitation of Actions depends on an inquiry and determination of facts relating to the claim as to when the Respondents father died and whether he was the last person entitled to the land so that the right of action accrued on the date of his death.

35. I agree with the position taken by the Judge in the above case. The question as to the last person that was entitled to the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' clan or family can only be determined after evidence has been presented to this court and not on an Application filed under Oder 2 Rule 15 of the Civil Procedure Rules.

36. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have denied in their Defence and Counterclaim that the Plaintiff is the registered owner of the suit property. The Defendants have averred that the suit property was fraudulently acquired by the Plaintiff and in contravention of the law. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have also set out in the Counterclaim the particulars of fraud.

37. The question as to whether the Defendants can recover the suit property on the ground of fraud, and when the alleged fraud was discovered by the Defendants or on the ground of illegality can also only be determined at the hearing of the suit and not at this particular stage.

38. The third and final objection by the Plaintiff is that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are guilty of non-disclosure of material facts. The Plaintiff's advocate submitted that the Defendants failed to disclose to the court the pendency of summons for revocation of the grant which was issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant by the Plaintiff in the Mombasa High Court Probate and Administration section.

39. In my view, until the grant issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is revoked, the defendants remain in legal representation of the Estate of the person they purport to represent. The failure to disclose that a party is challenging a grant in my view cannot invalidate the pleadings filed by them on the basis of the said grant. In any event, it is the Plaintiffs who sued the Defendants and they had the right to defend themselves, with or without the grant.

40. Consequently, and for the reason I have given above, I make the following orders.

**(a) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants Further Amended Defence dated 13<sup>th</sup> March 2013 be and is hereby struck out with no order as to costs.**

**(b) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are at liberty to file a valid Defence and counterclaim and in event within 14 days from the date hereof**

**(c) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay the cost for the Application dated 13<sup>th</sup> June 2013.**

Dated and Delivered in Malindi this **28<sup>th</sup>** Day of **February 2014**

**O. A. Angote**

**Judge**