



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NUMBER 57 OF 2000**

1. TALIB HUSSEIN F. BHAIJI
2. IQBAL HUSSEIN F. BHAIJI .....PLAINTIFFS

-VERSUS-

1. THE ATTORNEY GENERAL for on behalf of the COMMISSIONER OF LANDS.....DEFENDANTS
2. DOULTON HOLDINGS LIMITED

**RULING**

[1] The application before me is dated 7th April, 2011. In that application, the applicant seeks for orders that the court order dated 5th November, 2009 be set aside. It further seeks that the plaintiffs be substituted by Leo Investments Ltd and that all consequential orders be directed to the said company, that alternatively the matter be determined inter parties and finally an alternative order for costs against the plaintiffs be varied in terms that are just.

[2] The applicants grounded their application on the following facts. That the suit property was sold by the plaintiffs to LEO INVESTMENTS LTD during the pendency of this suit. The applicants aver that the said company was made aware fo the existence of the suit and that they agreed to take over the suit and step into the shoe of the plaintiffs. It is contended that the said company instructed Messrs A B Patel and Patel advocates to hand over the entire file to its own advocates Muli & Ole Kina. That M/s.Muli and Ole Kina advocates failed to appear and/or prosecute the matter properly or at all leading to a ruling of Hon. Azangalala J (as he then was) of 23rd April 2009. That following no compliance of those orders, the suit was struck out and dismissed by Ojwang J (as he then was ) on 5th November 2009.

[3] The applicants aver that they were unaware of all these happenings as they assumed the said company had equally assumed the responsibility for the suit after the property was transferred to it. That a Notice of change of advocates was filed by M/s. Muli and Ole Kina. The said advocates had taken possession of the plaintiffs court file from A B Patel and Patel advocates. The applicants therefore state that due to that wilful misrepresentation by the said company, they allege that they have been exposed to grave prejudice and the danger of substantial loses by way of taxed costs.

[4] The application is supported by an elaborate affidavit of 2nd plaintiff Iqbal Husein P. Bhaiji who explains how they owned the plot and what lead to the sale of the same to the said company and how one Firoz Hirani instructed M/s. A B Patel and Patel advocate to hand over the file to Muli & Ole Kina Advocates of Malindi. The affidavit gives the history of how the case came to be dismissed and how

costs of Kshs. 7.4. million arose and as a result Leo Investments Ltd ought to be made to account for its *mala fides* and that it should be made a party to the suit.

[5] The 2nd defendant filed a lengthy affidavit opposing the application. They argued that this matter has been pending for 9 years prior to dismissal. The suit was sustained by an ex parte order. The 2nd defendant argues that the ruling of 23rd April 2009 gave the plaintiffs reprieve by directing the plaintiffs to file fresh summons to enter appearance within 10 days of the said Ruling. The applicants did not take that chance to save their suit. The 2nd defendant states that after 5 months the suit was struck out and dismissed on 5th November 2009. The 2nd defendant states that the ruling of Judge Azangalala has not been complied with. The net result being that we have a plaint without summons. That even if the court were to be magnanimous and grant the order sought, the same would be a zero sum game.

[6] The 2nd defendant argues that the plaintiffs have already sold the property that formed the basis of filing and maintaining the suit. It is argued that the applicants have not shown any good reason why they did not attend the court in 5th November 2009 and that the applicants sold their own property that they were seeking to protect by way of an injunction to Leo Investments Ltd in a clandestine manner and that they were running away from the suit, in that, in their own words, they felt the court case was more of a millstone hanging around their necks which they needed to unshackle despite the assurances from A B Patel and Patel Advocates that they had a good chance of success.

The 2nd defendant argue that the plaintiffs plan to sell the subject matter of the suit and leave the 2nd defendant defending the suit and the injunction did not work as Leo Investments Ltd had no interests in the suit and have not sought to be joined. The 2nd defendant argued that the said Leo Investments Ltd have denied ever instructing M/s. Muli and Ole Kina Advocate to represent them.

The 2nd defendant request the court to deny the plaintiffs the chance to rush back to court since they had sold the suit property without notifying the court. They argue that there can be no joinder of parties after judgment particularly when the decree has been extracted.

[7] The proposed party filed his submissions opposing the application. They argue that the provisions of Order 1 rule 9 and 10 of the Civil Procedure Rules are only applicable to a suit which is alive and not a non existent or a dismissed suit. It argued that the court is *functus officio*. It is argued that a joinder applied when its presence is of importance to enable the court to ventilate the issues. It argued that the present application is a non starter. Further that the order sought to be set aside has not been annexed to the application. That the plaintiffs were guilty of not complying with court orders. That the law is clear on the issue of costs. That the procedure is either by applying the same to be set aside or to file a reference in the High Court and that the plaintiffs application is devoid of merit and should be dismissed with costs.

These being the issues in this case should the prayers sought in the application of 7th April 2011 be granted?

### **Setting aside**

[8] On 23rd day of April 2009, F. Azangalala J (as he then was) allowed the plaintiff ten (10) days to issue fresh summons upon payment of the requisite legal fees. Applications made subsequent to the invalid summons were struck out with costs. The applicants did not issue fresh summons. Later the 2nd defendant applied for the suit to be struck out. The suit was struck out on 5th November 2009 and the suit was dismissed, no summons had ever been taken out. If the application to set aside the orders of 5th November were to succeed what would be the position? We would end up with a suit filed but whose summons had not been taken out. What are the reasons why the summons were not taken out? firstly, the original summons taken by the applicants advocates were found by the court to be defective. A ten days reprieve was given by the court to remedy the situation. This was not done. The reason given by the applicants for that failure was that they sold the suit land because in their own words;

*"We felt the court case was more of a millstone hanging around our necks which we needed to*

*unshackle despite assurance from Messrs A.B. Patel & Patel advocates that we had a good chance of success"*

[9] This sale was without any notification to the court and to the defendants. The suit land was the one supposed to be protected by the injunction against the defendants. The plaintiffs allege that they therefore agreed with Mr. Nanji advocate for the alleged proposed third defendants that their case file which was then with A B Patel and Patel advocates should be sent to M/s. Muli and Ole Kina advocates of Malindi to handle. That they therefore assumed that the said advocates Muli & Ole Kina and M/s. Leo Investments Ltd would conduct the suit. This was apparently a clandestine arrangement only known to the applicants, A B Patel & Patel advocates, applicants advocates Nanji & Co and allegedly Muli & Ole Kina advocates . Unfortunately for the applicants, the said Muli & Ole Kina did nothing but file a notice of appearance. M/s. Leo Investments Ltd cannot be said to be visible anywhere in this suit. Finally court orders given were not honored and subsequently the suit was stuck out .

[10] Are these good reasons to set aside the court orders? I am afraid I do not think so. Firstly, the plaintiffs sold the subject matter of the suit in the pendency of the suit without notifying the court and the defendants. Their intention was to get out of the suit without involving the court and other parties and leave the court file hanging and the defendants in suspense. These are clearly persons who should not benefit from Order IA and IB of the Civil Procedure Rules. Secondly, this suit was truck out and dismissed. The decree of the court was extracted on 5th November, 2009. There is therefore no suit in court. Order I rule 9,10 and Order 51 rules 14 and 15 only apply when there is a suit. The order for substitution is equally misconceived. Substitution can only be done when there is a suit. The Court in this matter is *functus officio*. I am of the view that the law does not allow the Court to grant the orders sought. Even if the court was not functus, the conduct of the applicant would not entitle them to be granted the orders sought.

**Dated and delivered in open court at Mombasa this 20th day of June, 2014.**

**S. MUKUNYA**

**JUDGE**

**20.6.2014**

In the presence of:

Khagram advocate for the plaintiff

Kiarie advocate for Njoroge advocate for 2nd defendant.