



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Case 162 of 1995**

**ISHMAEL BUSOLO WATUKO (suing as the Administrator and legal representative of the estate of RAMADHANI WANYONYI BUSOLO(DECEASED))..... APPLICANT**

**VERSUS**

**JOEPH BUSOLO ..... 1ST RESPONDENT**

**FRANCIS BUSOLO WESONGA..... 2ND RESPONDENT**

**PIUS WAFULA WESONGA .....3RD RESPONDENT**

**DAVID BUSOLO WESONGA .....4TH RESPONDENT**

**RULING**

The respondents have raised a preliminary objection both on the application dated 5th February 2013 and the suit. The respondents contend that this suit offends order 37 Rule 7 (2) of the Civil Procedure Rules, is incurably defective and ought to be struck out and the application is an abuse of the court process.

Mr. Khakula Junior submitted that the applicant ought to have filed this application before 23rd January 2013 in compliance of the court's earlier order issued on 6th December 2012. The applicant having failed to do so, there is no suit before the court.

Secondly the suit offends order 37 Rule 7 (2) as there is no certified copy of the register annexed to the supporting affidavit. The said order is couched in mandatory words. He relied on the case of Peter Ngoge vs. Ammu Investments Co. Ltd. Nbi. Misc. Civ. Appeal No. 745 of 2009 to answer to the provisions of article 159 of The Constitution.

He also quoted from Sietco Vs. Kigive Complex Ltd. HC. No. 464 of 2012 – Nbi. He submitted that justice is a double-edged sword and litigants who do not follow procedure should not be entertained. He prayed the court to find there is no suit and hence the application ought to be struck out.

Mrs. Mumalalsi opposed the preliminary objection. She said that order 37 (7) (2) does not make the annexure mandatory. She invoked article 159 of the Constitution and submitted that case law cited by the respondents do not state that all procedures must be observed. Further submission that the failure by advocate who filed suit without annexing the certified copy of register is a mistake which should not be visited on the applicant. She also submitted that under Order 37 Rule 19, originating summons turns into a plaint and a plaint can be amended anytime. The respondents will not suffer any prejudice by this omission.

She stated that once the suit property was subdivided into nine pieces, getting green cards took time. She

urged the court to take judicial notice of delay in getting documents from lands office. She urged the court to exercise its discretion under Sec. 3, 3A to extend time in favour of the applicant. She urged for the objection to be dismissed.

Mr. Khakula in reply submitted that the application before court was not for extension of time. Further the directions had not been taken in this matter hence provisions of order 3 and 11 of the Civil Procedure Rules are not applicable.

I will first deal with the limb of the objection on the suit being incurably defective and ought to be struck out. The defect in my understanding of the preliminary objection was two fold I.e that it did not comply with the provisions of order 37 (7) (2) and secondly having failed to comply with the order of the court issued on 6th December 2012, there is no suit capable of being amended.

Order 37 (7) (2) provides ***“the summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed”***. The supporting affidavit to the originating summons filed in court on 13th November 1995 did not contain a certified title extract. The respondent in his replying affidavit filed in court on 14th December 1995 raised the flag at paragraph 4 of his affidavit which I reproduce.

***“ That even if it was competent , it still offends against the express provision of O.XXXVI Rule 3D (2) of the Civil Procedure Rules as it is not supported by a certified extract of the suit land”.***

The applicant was made aware of this defect quiet early. Mrs. Mumalasi's submission that it took them long to obtain the green card is therefore inexcusable. She averred that it is the affidavit which must be filed and not the annexure. The reading of the order reflects it is one sentence, separating or disintegrating the words is a ploy deemed to fail. In the case of **Kweyu vs Omuto (1990)KLR 709**, the court of appeal held at par 5 that the O.S is to be supported affidavit to which a certified extract of the title to the land in question is annexed. No such extract was annexed. Similarly in case of **Symon Gatutu & 587 others vrs E.A Portland Cement (2011) eKLR** at par 27 the Justice Dulu stated thus 'Requiring a certified extract is not a talismanic hoop to be jumped by an intended disseisor but the objective is to provide a means to the court to ascertain the existence and proprietorship of the suit land'. Finally in **Githi Mwangi & 4 others Vs Joseph Mwai (2005) eKLR**, Justice B.P Kubo held that non-compliance with mandatory requirements of Order 36(D)(2) renders the O.S incompetent.

This suit has been in court since 1995. It was dismissed for want of prosecution at one stage. When I reinstated the suit on 6th December 2012, I gave the applicants time limits within which to file their documents. None has been filed. In the supporting affidavit seeking to amend the originating summons, there are no annexed documents of certified extracts of the now mutated land although paragraph 22 of the applicants state it has annexed them. Mrs Mumalasi did not explain in an affidavit that she had difficulty obtaining them from the land registry. This difficulty is submissions from the bar. It is not supported by any document. The applicant cannot therefore invoke Article 159 of the Constitution when it is clear they made no effort in applying the law. The cited case of Peter Ngoge, the court said that article 10 and 159 of Constitution is to ensure each litigant has an equal chance and that the rules of natural justice are observed. I find that failure to annex the certified extract is inexcusable and hence the O.S is incompetent. Had the applicant filed the documents, probably I would have invoked Article 159 and held otherwise.

On the second of limb of there being no suit, I agree with the respondent. The suit was dismissed in 2002. The applicant sought reinstatement in 2008, six years later. The application for reinstatement was vigorously opposed. However, I allowed the application and conditionally reinstated the suit. The ruling was made on 6th December 2012, and the applicant was required to comply with the Order 3 Rule (2) of the Civil Procedure Rules within 21 days from 6th December.

As earlier mentioned, no documents or witness statements were filed within the time allocated. The penalty of such default as per the order of the court of 6th Dec 2012 is the suit stood as dismissed. As rightly put by counsel for the respondent, there has been no application to extend time or vary the orders

of 6th Dec. The application for amendment of pleadings was also filed outside the 21 days period. This suit was therefore dismissed immediately the 21 days lapsed by end of January 2013. The application for amendment is therefore seeking to amend a non-existent suit. The last part of the preliminary objection was the application being an abuse of the court process. From the foregoing explanation, I need say no more than the application is misplaced in the circumstances.

In conclusion therefore, I hold the preliminary objection is merited and strike out the application and the entire suit with costs to the respondent.

**RULING DATED, SIGNED, READ AND DELIVERED** in open court this 27th day of May 2013.

**A. OMOLLO**  
**JUDGE.**