



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ENVIRONMENTAL AND LAND LAW DIVISION**

**CIVIL SUIT NUMBER 789 OF 2003**

**NAOMI LINAH WERE.....**

**.....1<sup>ST</sup> PLAINTIFF**

**CHRISTINA WERE.....**

**.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....1<sup>ST</sup> DEFENDANT**

**ELAKANA ONDERI BOSIRE SECHERO.....**

**.....2<sup>ND</sup> DEFENDANT**

**HON. JUSTICE S.E.O BOSIRE.....**

**.....3<sup>RD</sup> DEFENDANT**

**DONALD MISATI**

**BOSIRE.....4<sup>TH</sup>**

**DEFENDANT**

**RULING**

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants took out a Notice of Motion under Order 2 Rule 15(1)(b)(c) and (d) and Order 51 Rule (1) of the Civil Procedure Rules, Sections 1A and 3A of the Civil Procedure Act and all other enabling provisions of the law, praying for orders that the plaintiffs further amended plaint dated 6<sup>th</sup> June, 2011 be struck out on the grounds that it is scandalous, vexatious and an abuse of the court process and the suit be dismissed. That motion is dated 2<sup>nd</sup> September, 2011 and was filed in court on 20<sup>th</sup> September, 2011.

The 4<sup>th</sup> defendant had on the 26<sup>th</sup> July, 2011 taken out a similar application which was filed in court on the 20<sup>th</sup> September, 2011. These two applications were by the consent of all parties consolidated and heard together before me.

The applications are based on the grounds that the plaintiffs were never registered as having any interest

in the suit property and the suit is brought mischievously to serve ulterior motives and as such the same is an abuse of process. That the claim against the 4<sup>th</sup> defendant is barred by Limitation of Actions Act and that the addition of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants has been done without jurisdiction. Other grounds are that the plaintiffs are non-suited and there is a misjoinder of parties to the suit, as well as the plaintiffs having failed to comply with mandatory provisions of **Order 3 Rule 2 of the Civil Procedure Rules**.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are said to be one and the same person and he has sworn an Affidavit in support of the application. He deposed that he was initially added into the suit by an amendment to the plaint and the case against him was withdrawn by the plaintiffs and the order to that effect was given by this court (Lenaola J) on 27<sup>th</sup> January 2004. He finds his further inclusion in the suit, seven years later, as mischievous and an abuse of process. He adds that although he entered into a Tenant Purchase Agreement with the 1<sup>st</sup> defendant during 2003, he had the 4<sup>th</sup> defendant included as a co-owner during 2004 and two months later he transferred his interest in the suit land to the 4<sup>th</sup> defendant. He denied any knowledge of eviction of the plaintiffs from the suit land to pave way for the acquisition of the suit premises by the 4<sup>th</sup> defendant. He saw the suit as being defective and prays that the same be dismissed.

On his part the 4<sup>th</sup> defendant while reiterating the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's averments above added that he bought the suit land facilitated by his employer and he is the absolute owner thereof and has never been aware of the plaintiffs' registered interest in the suit, as there was none when he had a search conducted on his behalf in respect of the suit land. He saw the suit as frivolous and bad in law and seeks that the same be dismissed.

The 1<sup>st</sup> plaintiff has sworn the Replying Affidavit in opposition to the application and she has deposed that the claim against the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants is not barred by limitation and so the suit should proceed to hearing. That there were matters that required the suit to be determined at hearing. The deponent further averred that she had a good case based on fraudulent transactions relating to the suit premises. That order 3 Rule 2 is not mandatory and default in complying thereto can be cured upto the time of setting the suit down for hearing.

At the hearing of the Motion Learned Counsel for the Applicants submitted that the suit is mischievous and ought to be dismissed. He added that the suit is time barred by statute the claim being one on fraud. The order adding the 2<sup>nd</sup> to the 4<sup>th</sup> defendants in the suit was seen as one granted without jurisdiction and the further amended plaint was described as defective for want of a verifying affidavit.

Learned counsel for the plaintiffs relying on the two Replying Affidavits submitted that there was fraud on the part of the 2<sup>nd</sup> to 4<sup>th</sup> defendants since 2003. Counsel added that the Oxygen Rule would cure time bar and allow the suit to be determined at trial.

I have considered all the pleadings, submissions by both counsel and the authorities cited. That the provisions of **Order 3 Rule 2 Civil Procedure Rules** are mandatory in nature is not deniable. All one needs is to read it to confirm that. That then means that, amongst other documents, an affidavit verifying the correctness of the averments in the plaint must be filed with the plaint. The only proviso to the rule relates to witness statements which with the leave of the court may be filed at least fifteen (15) days prior to the trial conference provided for under **Order 11 Civil Procedure Rules**. It was not denied that there was no verifying affidavit to the further amended plaint.

Issue was taken on the manner that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants were added into the suit. The plaintiffs did not refer the court to the provisions of the law that allow such an application to be made ex parte. On my part I am not aware of any. Instead the position would appear to be that such addition of parties be done at a hearing inter partes as was the case in **CENTRAL KENYA LTD –V- TRUST BANK LTD (2000) E.A. 365**. And that must be so so that no Motion is made without notice to the parties affected by such Motions. Ex parte orders may of course be granted in situations where not to grant an order at the ex parte stage would cause irreparable mischief. That was not shown to be the case in this present one. Consequently I make the finding that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were added to the suit without

jurisdiction the order adding them having been given ex parte improperly **see SHANZU VILLA LTS – VS- GUARDIAN BANK LTD & ANOTHER Milimani HCCC 642/2003.**

Undoubtedly a party has the right to choose his/her opponent but when such opponent is chosen and dropped and then picked yet again, as in this case as regards the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, in those circumstances the party would be forgiven for reading mischief into the matter. That becomes more the case of mischief in light of the plaintiffs' letters dated May, 26<sup>th</sup> 2003 and 30<sup>th</sup> June, 2003 annexed to the plaintiffs' Replying Affidavit and marked "NLW/Bundle" wherein the 1<sup>st</sup> Plaintiff cleared the 3<sup>rd</sup> defendant from any wrong doing and excused any activity on his part as being done without knowledge of certain facts/factors.

The claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants is one of fraud and malice. Fraud is a tort. **Section 4(2) of the Limitation of Actions Act Chapter 22 of the Laws of Kenya** provides: \_

**“An action founded on tort may not be brought after the end of three years form the date on which the cause of action accrued.”**

The amended and further amended complaints were filed in November, 2003 and June 2011 respectively. The acts complained of occurred during 2003/2004. The claim against the 4<sup>th</sup> defendant is clearly barred by limitation. See the words of Trainor J. in the case of **ATIENO V OMORO (1985) KLR 677.**

**“The number of cases that have been reported dealing with applications to amend proceedings by adding a new party are many. The position now seems to be well established. Where the application is granted the new party will not be prejudiced. Any defence that is open to him at the time application is granted is available to him as if proceedings were first instituted against him at that time (emphasis provided). To put it another way, the Act may be relied on as a defence if the period has expired. It would appear from the cases that I have found, and there are many, that time is calculated upto when the proceedings are instituted; in the case of an added party time continues to run until the amendment adding him as a defendant is ordered.”**

That is the law. The suggestion by counsel for the plaintiffs that the Oxygen Rule can cure this defect is untenable. The Oxygen Rule has no capacity to amend substantive law. Counsel had the opportunity to apply under the Rules for extension of time. He chose not to. That was fatal. The suit as against the 4<sup>th</sup> defendant was brought beyond time. The 4<sup>th</sup> defendant was improperly added to this suit and was prejudiced by being denied his defence of limitation. He has his recourse in this application wherein the court finds that the suit having been brought outside time the same is not sustainable against the 4<sup>th</sup> defendant.

The case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is brought without a reasonable legal cause as evidenced by the conduct of the plaintiffs in their letters annexed to the Replying Affidavit and the withdrawal of the case and then a subsequent addition, which addition I have found was made without jurisdiction and make the further finding that the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is scandalous, frivolous and is made for reasons not of a claim of a breached right.

For all these reasons I find that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' applications under consideration are meritorious. Accordingly the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are struck out of the further amended complaint. There is nothing in this suit against the said defendants to allow the suit against them to proceed to a hearing. The plaintiffs' claim **against the 1<sup>st</sup> defendant remains.**

It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2012.

**P.M. MWILU**  
**JUDGE**

In the presence of:-

..... Advocate for 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> Defendants

..... Advocate for 1<sup>st</sup> Defendant

..... Advocate for Plaintiffs

..... Court Clerk

**P.M MWILU**  
**JUDGE**