



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL SUIT 479 OF 2009

**MWANAMISI IDDI MWACHANYUMA.....PLAINTIFF**

**-VERSUS-**

**1. ATTORNEY-GENERAL**

**2. FRANCIS KIPKOECH KIGEN**

**3. THE REGISTRAR OF TITLES.....DEFENDANTS**

**RULING**

After the filing of the plaintiff's suit, by plaint dated **22<sup>nd</sup> December, 2009**, the 2<sup>nd</sup> defendant moved the Court by the Chamber Summons of **8<sup>th</sup> July, 2010** brought under s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya) and Order VI, Rule 13(1)(b) and (d) of the earlier edition of the Civil Procedure Rules. The application carries one substantive prayer: that "*the plaint dated 22<sup>nd</sup> December, 2009 be struck out.*"

The application rests on the following grounds:

(i) *the suit as filed is "scandalous, frivolous and vexatious";*

(ii) *the suit is "otherwise an abuse of the process of the Court";*

(iii) *the plaintiff's claim is "time-barred in its entirety";*

(iv) *the plaintiff's suit is res judicata in the light of Mombasa H.C. Misc. Civil Application No. 344 of 2006;*

(v) *the Orders sought by the plaintiff "are in complete contradiction to the decree issued in Civil Appl. No. 344 of 2006, which decree is valid and not the subject of an appeal";*

(vi) *the 2<sup>nd</sup> defendant's right as the holder of first registration is indefeasible;*

(vii) *the property known as Kwale/Diani Beach/642 no longer exists under the law.*

The applicant swore a 20-paragraph affidavit, on **8<sup>th</sup> July, 2010** in support of his application; and to this, the plaintiff, **Mwanamisi Iddi Mwachanyuma** swore a 21-paragraph replying affidavit on **26<sup>th</sup> August, 2010** deponing that the suit, in respect of L.R. No. Kwale/Diani Beach/642, is not time-barred since "*the High Court has [inherent] jurisdiction to deal with matters governed by the Registered Land Act (Cap.300).*" The deponent deposes that she has always lived in the suit premises and she regards it as her

home and has developed it on that basis.

Learned counsel, **Mr. Munyao** for the applicant, submitted that the suit was time-barred: for 2<sup>nd</sup> defendant had acquired ownership of the suit property, L.R. No. Kwale/Diani Beach/642 in **1991**, and the suit was filed on **23<sup>rd</sup> December, 2009**. Counsel urged that the plaintiff herself has confirmed 2<sup>nd</sup> defendant's ownership: at *para.7 of the plaint*, the plaintiff pleads –

*“That in 1990 or thereabouts the suit property herein was allocated to the 2<sup>nd</sup> defendant by the Commissioner of Lands whereas the plaintiff was resident on the same land and...2<sup>nd</sup> defendant has never resided in the said property.”*

And at para. 3 of the plaintiff's replying affidavit she deposes:

*“THAT it is true...the suit revolves around property known as Kwale/Diani Beach/642, and the 2<sup>nd</sup> defendant acquired title in 1992.”*

Counsel urged that the plaint cannot stand *“whether under tort or for recovery of land, when it is being filed more than 18 years after the title had...been issued to 2<sup>nd</sup> defendant.”* Relying on the terms of s.7 of the Limitation of Actions Act (Cap.22), counsel urged that *“the plaintiff slept on her rights to initiate an action at the appropriate time and so she is guilty of laches and...cannot [even] be aided by equity since equity aids the vigilant and not the indolent.”*

Counsel submitted that the action, insofar it is grounded on tort, ought, by s.4(2) of the Limitation of Actions Act, to have been brought within three years.

Counsel submitted that the plaintiff's case would also not qualify under s.27 of the Limitation of Actions Act, as she had not pleaded *“any ignorance of the material facts leading to the 2<sup>nd</sup> defendant being registered as the owner of [the suit property].”*

Learned counsel submitted that the suit property being former Government land, the plaintiff would have been bound by the time-frame for action specified in s.136 of the Government Lands Act (Cap.280, Laws of Kenya), which provides:

***“All actions, unless brought on behalf of the Government for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards.***

***“Notice in writing of the action, and the cause thereof, shall be given to the defendant one month at least before the commencement of the action.”***

The instant action, counsel submitted, *“has not been commenced within the stipulated time of one year...”*; and so, the suit ought to be struck out.

Is the suit *res judicata*? Yes, indeed, learned counsel urged. From the evidence: the plaintiff had filed Land Dispute No.32 of 2005 at the Msambweni Land Disputes Tribunal, to which 2<sup>nd</sup> defendant was not a party; it was heard and determined; the award was adopted by the Senior Resident Magistrate's Court in Kwale Land Case No. 6 of 2005; the 2<sup>nd</sup> defendant filed *Judicial Review proceedings* by Notice of Motion of **5<sup>th</sup> April, 2006** – Misc. Civil Application No. 344 of 2006 in which the *plaintiff* was the Interested Party; the Notice of Motion was *allowed* by consent of the parties; a *decree* was, on that basis, issued.

In the Judicial Review matter of **5<sup>th</sup> April, 2006** certain issues had arisen which, counsel urged, affect the application herein: was 2<sup>nd</sup> defendant the registered owner of the suit property? did the process of registration extinguish any pre-existing customary claims? was the plaintiff entitled to the prayers sought in Msambweni Land Disputes Tribunal Case No. 6 of 2005? was the *plaintiff* the rightful owner of the

suit parcel of land, L.R. No. Kwale/Diani Beach/642? should all titles resulting from subdivisions of L.R. No. Kwale/Diani Beach/642 be cancelled, and all the titles re-issued in the name of the *plaintiff*?

Counsel submitted that, in the Judicial Review matter, the plaintiff had a full opportunity to be heard, and she elected to reach a *consent* with 2<sup>nd</sup> defendant which resulted in the Notice of Motion of **5<sup>th</sup> April, 2006** being *allowed*, and a *decree* being made and issued on that basis. By so consenting, counsel urged, “*the plaintiff was in fact putting to rest all the other issues she could have raised which she has again raised in this present claim*”; for she seeks a declaration that she is the lawful owner of plot No. Kwale/Diani Beach/642; she seeks that all entries in the Land Register in respect of the original plot No. Kwale/Diani Beach/642 be expunged; and she seeks an Order of injunction restraining 2<sup>nd</sup> and 3<sup>rd</sup> defendants from subdividing, selling, transferring, disposing of or interfering with plot No. Kwale/Diani Beach/642.

Learned counsel urged that the issues arising in the current suit are, by and large, the *same* issues that *arose or ought to have been raised* in Misc. Civil Application No. 344 of 2006, and, by the terms of s.7 of the Civil Procedure Act (Cap.21), such issues are *res judicata*.

The principle raised by counsel is well recognized in judicial practice: ***Pop-In (Kenya) Ltd & 3 Others v. Habib Bank AG Zurich*** [1990] KLR 609.

Learned counsel, ***Ms. Okumu*** for the plaintiff submitted that “*dismissing this suit will be draconian as it would effectively lock her out of the justice system.*” But learned counsel did not claim the 2<sup>nd</sup> defendant’s argument was marred by any juristic deficiency; instead she adjured the Court to be guided by its “*inherent powers to hear and determine all matters under the Registered Land Act (Cap.300).*”

Counsel acknowledged that “*the suit may be time-barred under s.7 of the Limitation of Actions Act (Cap.22)*”; but she maintained that “*the defect can be cured by leave being obtained under Order XXXVI, Rule 3C(2) of the Civil Procedure Act.*”

Of the issues of *res judicata*, learned counsel thus urged: “*the suit is not res judicata for the reason that [Misc. Application] No. 344 of 2006 merely quashed the decision of the Land Disputes Tribunal .....*”

Order XXXVI, Rule 3C of the earlier edition of the Civil Procedure Rules, which ***Ms. Ogola*** proposes as a basis for validating the plaintiff’s suit, thus provides:

“(1) *An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit.*

“(2) *Any such application made after the filing of a suit shall be made ex parte by summons in the suit supported by affidavit.*”

Counsel, in effect, proposes that the Court should be constrained to have the suit progress, and should create *locus poenitentiae* for the plaintiff to render the suit a proper one, by filing a new application in respect of an expired limitation period.

Learned counsel did not, however, address herself to the critical challenge to the suit, the very test upon which the suit must stand or fall: Is the suit *res judicata*? Is the subject-matter of the suit “*an issue that has been definitively settled by judicial decision*” [**Black’s Law Dictionary, 8<sup>th</sup> ed. (2004)**, pp.1336-1337]?

From the evidence and the submissions by counsel on both sides, the suit herein shares at least some common ground with a previously-concluded Judicial Review matter: **Mombasa H.C. Misc. Civil Application No. 344 of 2006**. In that matter, in which the plaintiff herein appeared as Interested Party, the contest was in relation to the suit property which is the subject of the instant suit, *plot No. Kwale/Diani Beach/642*; and the *ex parte* applicant, who is 2<sup>nd</sup> defendant herein, was seeking certain

Orders which would confirm him as the *legal owner* of the suit property. The applicant in that case had sought the nullification of Orders of lower tribunals which had left doubts lingering as to the *legal ownership* of the suit property; and the High Court concluded the matter with a *Decree*, issued on **26<sup>th</sup> January, 2007**, in the following terms:

**“(a) An Order of certiorari be and is hereby granted to the ex parte applicant quashing the Judgment of Msambweni Land Disputes Tribunal in Land Disputes Case No. 32 of 2005 where the complainant was Mwanamisi Iddi Mwachanyuma and which Judgment was filed at the Senior Resident Magistrate’s Court at Kwale and on 6<sup>th</sup> October, 2005 the said Magistrate made an Order adopting the Judgment.**

**“(b) An Order of certiorari be and is hereby granted to the ex parte applicant quashing the Order made on 6<sup>th</sup> October, 2005 by the Senior Resident Magistrate’s Court at Kwale in Land Case No.6 of 2005 where the plaintiff was Mwanamisi Iddi Mwachanyuma and which Order confirmed and adopted the award of the Msambweni Land Disputes Tribunal in terms of the Judgment entered in the aforesaid Land Dispute Case No.32 of 2005.**

**“(c) An Order of Prohibition be and is hereby issued directed at the Land Registrar, Kwale prohibiting the Land Registrar, Kwale from revoking and cancelling Subdivisions made on plot No. Kwale/Diani Beach/642 and in particular the Land Registrar Kwale be prohibited from revoking or cancelling title Nos. Kwale/Diani Beach/879, Kwale/Diani Beach/909, Kwale/Diani Beach/910, Kwale/Diani Beach/911, Kwale/Diani Beach/912, Kwale/Diani Beach/915 all being Subdivisions of Kwale/Diani Beach/642 issued to and held by the ex parte applicant herein (Francis Kipkoech arap Kigen) and that the Land Registrar, Kwale be and is hereby prohibited from issuing a fresh title to Plot No. Kwale/Diani Beach/642 in favour of Mwanamisi Iddi Mwachanyuma.”**

That was the *last word* of the Court; there was *no appeal* therefrom. So, the Decree represented a final, binding statement of the law regarding the *rights of the parties*; and the parties, in essence, were the *plaintiff* and the 2<sup>nd</sup> defendant herein. As between these parties the High Court had settled the question of *ownership* of Plot No. Kwale/Diani Beach/642 with finality: the legal owner was 2<sup>nd</sup> defendant herein. The Court had gone further to validate the several subdivisions already created out of Plot No. Kwale/Diani Beach/642, and to prohibit the *Land Registrar* from making any alterations to the Register.

The plaintiff, however, by her plaint of **22<sup>nd</sup> December, 2009**, just-under-three years since the High Court’s Orders, returns with prayers for injunctions to *restrain the subdivision* of Plot No. Kwale/Diani Beach/642; for declarations *nullifying the subdivisions* that have already taken place and have declared valid; for cancellation Orders directed at the Land Registrar; for a declaration that the *plaintiff* is the lawful owner of the said property.

That cannot be done. *Res judicata*. Since this position must be well apprehended by the plaintiff’s counsel who filed the suit papers, the suit is to be regarded as a glaring *abuse* of the process of the Court.

I hereby allow the second defendant’s application by Chamber Summons of **8<sup>th</sup> July, 2010**; and I strike out and dismiss the plaintiff’s suit of **22<sup>nd</sup> December, 2009**. The plaintiff shall bear all costs in respect of the said suit and application.

**Orders accordingly.**

**SIGNED at NAIROBI .....**

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 19<sup>th</sup> day of March, 2012.**

**MAUREEN ODERO**  
**JUDGE**