



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE 48 OF 2012**

**HATHAWAY LIMITED.....PLAINTIFF**

**V E R S U S**

- 1. ADAN HAJI ALI.....1<sup>ST</sup> DEFENDANT**
- 2. JUMA ALI CHINGUNIA OR CHIGUNIA.....2<sup>ND</sup> DEFENDANT**
- 3. JUMA SULEIMAN MWAKUHENZA.....3<sup>RD</sup> DEFENDANT**
- 4. JUMA RAMAKHERI.....4<sup>TH</sup> DEFENDANT**
- 5. OMARI RASHID CHIRINZO.....5<sup>TH</sup> DEFENDANT**
- 6. LAND REGISTRAR (KWALE)..... 6<sup>TH</sup> DEFENDANT**
- 7. ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT**
- 8. COUNTY COUNCIL OF KWALE..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. The County Council of Kwale, the 8<sup>th</sup> Defendant, wants an early exit from these proceedings. I am asked to have the Plaintiffs suit against it struck out as a prefatory issue.
2. The Plaintiff's case is that it is the absolute proprietor and indefeasible owner of land described as Kwale/Galu/Kinondo/41, 42, 43, 44 and 45. The Plaintiffs grievance is that portions 41, 42 and 45 have been unlawfully registered in name of the 1<sup>st</sup> Defendant. It is the Plaintiffs contention that the transactions leading to the registration are fraudulent and sets out the roles of the Defendants in this fraud. The particulars of fraud are in paragraph 17 of the plaint.
3. The Plaintiffs cause of action against the 8<sup>th</sup> Defendant is in paragraph 17(h) of the plaint which reads;

***“The 8<sup>th</sup> Defendants fraudulently, deliberately and/or illegally decline to grant consent to the Plaintiff***

***to develop the suitland.”***

As a consequence the plaintiff prays that the 8<sup>th</sup> Defendant be compelled to give approval of building plans to enable the Plaintiff to develop its property.

4. The 8<sup>th</sup> Defendants counsel thinks that its client is misjoined to this suit whose central issue relates to ownership of land. That the orders sought against it cannot be properly considered and determined in these proceedings. I am also told that the Plaintiffs grievance against the 8<sup>th</sup> Defendant is a matter which should be dealt with under the Physical Planning Act (Chapter 286). That the statute provides the procedure for challenging rejection of Development Permission by Local Authorities. This court is aware that Section 15 of that Act gives a right to any person aggrieved by a decision of the National Liason Committee to appeal to the High Court. It is argued by the 8<sup>th</sup> Defendant that the role of the High Court is limited to entertaining appeals under that Section and that the High Court is not the first port of call.

5. I have looked at the pleadings before me and considered the rival submissions by counsel. If the Plaintiff feels aggrieved by the decision of the 8<sup>th</sup> Defendant in respect to the Development permission then it is entitled to challenge that decision and seek redress. The question is whether the procedure for redress in the Physical Planning Act ousts the jurisdiction of this court. This is a question that should be left to the full argument by the parties, more so because of the provisions of Section 13(2) (a) of The Environment and Land Court Act. That Section empowers the Environment and Land Court to hear and determine, amongst other disputes, those relating to land use planning. In the event the court was to hold that the Plaintiff should first exhaust the procedure under the Physical Planning Act then it must decide, as a corollary, whether the suit is for staying or for striking out. These matters were not addressed by Counsels in their arguments.

6. It seems to me that it is untidy to lump the issue of the development permission between the Plaintiff and the 8<sup>th</sup> Defendant with a private contest as to ownership of land. On the face of it there is no correlation and there may be misjoinder. But should this defeat the suit?

7. On this I turn to the self-speaking provisions of Order 1 Rule 9 of The Civil Procedure Rules which provides an answer-

***“No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.” (emphasis mine)***

8. As would now be obvious I am for disallowing the application for striking out. I am not sufficiently persuaded that I should make such a draconian order. The 8<sup>th</sup> Defendant may feel unfairly burdened by proceedings which in its view are hopeless. The eventual outcome of these proceedings may vindicate this feeling. An order of costs, in my view, would in some measure compensate for any inconvenience suffered. The result is that the Preliminary Objection is dismissed with costs.

***Dated and delivered at Mombasa this 21<sup>st</sup> day of June, 2012.***

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-**

**Mlandi for Kiarie for the Plaintiff**

**No appearance for 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants**

**Asige for Tindi for 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants**

**Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**