



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 7 OF 2011

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300

OF THE LAWS OF KENYA AND REGISTRAR OF TITLES ACT CAP 281 LAWS OF KENYA

AND

**IN THE MATTER OF: FREHOLD INTEREST IN PARCEL NUMBER C.R 7358 (SECTION II
NORTH MAINLAND)**

IN THE MATTER OF: LIMITATION OF ACTION ACT CAP 22 OF THE LAWS OF KENYA

KARISA MURAMBA THOYA & 59 OTHERS.....PLAINTIFFS/APPLICANTS

V E R S U S

1. AHMED SAID

2. KHAMIS SAID

3. NASSIR SAID

4. RUKIYA MOHAMED ABDI

5. MANOOR MOHAMMED

6. AZIZA MOHAMMED DEFENDANTS

RULING

1. The application before me is dated 20th December 2011 in which the Plaintiffs seeks the following prayers-

(a) That this Honourable Court be pleased to substitute the 1st Plaintiff to the 59th Plaintiff.

(b) That this Honourable Court be pleased upon substitute (sic) the 1st Plaintiff to the 59th Plaintiff, add in their place and 74 other Plaintiffs.

(c) That the 60th Plaintiff, KASSIM OMAR AHMED do remain in addition to the 74 others plaintiffs herein this application.

2. An application for substitution and/or additional of parties would usually not draw much controversy but as will become apparent the one before Court is not plain sailing.

3. These Originating Summons were commenced on 14th January 2011 in which 60 persons were named as Plaintiffs. The Summons were said to have been taken out on their behalf by Mungatana & Co. Advocates.

4. The affidavit in support of the Summons was allegedly sworn by the 60th Plaintiff KASSIM OMAR AHMED. Annexed also to the Summons was an authority to act granted to the 60th Plaintiff by the 1st to 59th Plaintiffs who allegedly appended their signatures on the Notice.

5. By a Notice of change dated 13th July 2011 and filed on 14th July 2011 the firm of Sifuna & Co. Advocates took over the conduct of the suit on behalf of the Plaintiffs. A day later on 15th July 2011 the firm of Okanga & Co. filed another Notice of Change of Advocates to act on behalf of the Plaintiff.

6. The 60th Plaintiff is the Applicant in the application under consideration. The reasons he gives for seeking the substitution are-

(a) That the 1st and 59th Plaintiff are fictitious persons and therefore misjoined.

(b) That it is in the interest of justice that the fictitious persons be removed and be replaced with 74 proposed Plaintiffs.

7. I have to agree with the Defendants counsel that this application must fail. The 60th Plaintiff says the following in paragraph 4 of his affidavit in support of the application-

“I have never instructed the firm of Mungatana & Co. Advocates to institute the suit herein.”

8. It must be remembered that this is the same 60th Plaintiff who is said to have sworn the affidavit of 3rd January 2011 in support of the Originating Summons. Paragraph 2 of that affidavit states;

“I have been duly authorized by co-Plaintiff No. 1 to 59 herein to make and swear this affidavit on their behalf and on my own behalf and I do annex hereto the document of such authorization collectively marked KOA-1”

9. The 60th Plaintiff has, as earlier noted, denied ever instructing the firm of Mungatana & Co. to institute this suit. He was more unequivocal in an affidavit sworn on 24th August 2011 in support of a withdrawn, but not expunged, application of the same date. This is what he stated in paragraphs 4 & 9;

“4. I have never instructed the firm of Mungatana & Co. Advocates to institute the suit therein.”

“9. I have never signed any court document as purported neither have I ever been authorized by the purported Plaintiffs/Applicants.”

10. What the 60th Plaintiff is telling Court is that the Originating Summons is founded on a forged affidavit and that the commencement of this suit was not authorized by him or the other Plaintiffs. Clearly then these proceedings, from his standpoint, are founded on deceit.

11. Order 1 Rule 10(1) of The Civil Procedure Rules, 2010 on substitution and addition of parties reads as follows;

“(1) Where a suit has been instituted in the name of the wrong persons as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the court thinks fit. (emphasis mine)

12. The purpose of Order 1 Rule 10 is to remedy a bona fide mistake. It cannot be called in aid where the institution of the suit is, like here, based on deceit and falsehood. For this reason the application has to fail.

13. I was asked by the Defendant to dismiss or strike out the suit but I decline to do so without being moved by way of a formal application. I, however, suspect that my refusal to grant the orders for substitution will render these proceedings otiose! The parties herein will have to choose how to proceed from here.

14. The upshot is that the application dated 20th December 2011 is hereby dismissed with costs to the Defendant.

Dated and delivered at Mombasa this 18th day of June, 2012.

**F. TUIYOTT
JUDGE**

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

No appearance for Applicants

..... for Respondents

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**