



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**ENVIRONMENTAL & LAND CASE 786 OF 2007**

**ABDULRAZAK ABDULREHMAN ADAM ..... PLAINTIFF**

**VERSUS**

**ASLAM ABDULREHMAN ADAM ..... 1<sup>ST</sup> DEFENDANT**

**SHAMIM ABDULREHMAN ADAM ..... 2<sup>ND</sup> DEFENDANT**

**KHATIJBHAI ABDULREHMAN ADAM ..... 3<sup>RD</sup> DEFENDANT**

**SERABANU ABDULREHMAN ADAM ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

(1) Long before the promulgation of the Constitution of Kenya, 2010, it was generally accepted that courts would not lightly exercise the discretion to strike out suits for not disclosing a reasonable cause. In the leading decision of **D.T. Dobie & Co. (K) Ltd v. Muchina (1982) KLR 1**, the Court of Appeal held that as the power to strike out pleadings is exercised without the court being fully informed of the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously. **Madan JA at p. 9** said:

***“A court of Justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of Justice ought not to act in darkness without the full facts of a case before it.”***

Even where the court thought that the application before it had been made under inappropriate procedure, the court would in the interests of justice deem it as amended to bring it under the more appropriate procedure and deal with it as such. For instance in the famous decision of **Githunguri v. Republic No. 2 (1986) KLR 1**, the Constitutional Court (Madan, Ag. CJ, Aganyanya and Gicheru, JJ) dealt with an Order 53 application for Prohibition as an application for enforcement of fundamental human rights under section 84 of the former constitution and said at p. 12:

***“It seems to us that the application in these proceedings comes more appropriately as a fundamental right application under section 77 (1) of the Constitution as referred to in section 84 (1) above .... In the interests of justice we will treat the application before us as having been made, and to deem it amended and to have been brought under section 84 (1) [of the Constitution].”***

The victory of substance over form was eventually put beyond doubt by Article 159 of the Constitution of Kenya, 2010 which provides so far as material that in exercising judicial authority the courts shall be guided by the principle that **“Justice shall be administered without undue regard to procedural technicalities.”**

(2) It is against that background that I must consider the Defendants’ application dated 24<sup>th</sup> July 2011 for the striking out of the Plaint herein on the ground that **“it does not disclose a reasonable cause of action.”** Order 2 Rule 15 of the Civil Procedure Rules empowers the court to either strike out the pleading or order its amendment and the issue before the court, therefore, is whether the Plaint is so incurable by amendment as to make it liable for striking out as prayed by the Defendants.

(3) The parties have filed their respective written submissions. The Defendants/Applicants’ submission is principally that the Plaintiff’s case is based on fraud whose particulars have not been given specifically as required under Order 2 Rule 10 of the Civil Procedure Rules and therefore the Plaint does not disclose a reasonable cause of action. The Defendants contend that the Plaintiff’s cause of action lies under the Law Succession Act and the Plaintiff ought to have sought a Grant of Letters of Administration in order to make the claim for the Estate.

(4) The Plaintiff opposes the application and urges that the Plaint discloses a reasonable cause of action and gives in his written submissions the **“particulars of fraud and duress”** in a paragraph under that title under paragraph 13 of the Plaint but which particulars are not so set out in the Plaint filed herein. However, counsel for the Plaintiff urges that the court should not at this stage get into disputed matters of fact or law which raise triable issues for determination at the trial and that the application should be considered upon perusal of the Plaint alone, citing **Windham JA in Jeraj Shariff & Co. V. Chotai Fancy Stores (1960) EA 375.**

(5) I have considered the matter and I agree, as held by the Court of Appeal in the **D.T. Dobie** case, supra, that only the allegations in the Plaint are to be considered in assessing whether the action has some chance of success, without embarking upon a trial thereof on the merits.

Looking at the Plaint, I find that the particulars of the fraud alleged by the Plaintiff are set out in the body of the Plaint although not under a special paragraph headed as such. In my view, there is no requirement that the particulars must be given in a specially headed paragraph in the Plaint. The only requirement of Order 2 Rule 10 of the Civil Procedure Rules is that the particulars of fraud, misrepresentation, breach of trust etc. be contained in the Plaint, and the court has under sub-rule 2 discretion to order a party to serve any other party particulars of any claim, defence or other matter stated in his pleading.

I find that the Plaint contains particulars of the alleged fraud and duress in the pleading that the deceased was severally ill and not in a state to understand and sign a transfer of the suit property; that the signing of the transfer by the deceased was obtained by undue pressure and that the 1<sup>st</sup> Defendant subsequently transferred the suit property to the 2<sup>nd</sup> - 4<sup>th</sup> Defendants to be exclusion of the Plaintiff who was entitled, as alleged, as a child of the deceased. These are sufficient particulars, in my view, to comply with the requirement of specific pleadings of particulars of fraud and undue influence and the Defendants were at liberty to seek further particulars under sub-rule 2 of the rule 10 Order 2 Civil Procedure Rules.

(6) Even if this were not so, the provisions of Order 2 rule 15 of the Civil Procedure Rules gives discretion to the court to order an amendment to the pleadings. In the interests of justice, I would grant the Plaintiff leave to amend the Plaint to set out, as he may be advised, any necessary particulars of his cause of action. Moreover, in deference to the Defendants’ argument that the Plaintiff should have filed a petition under the Law of Succession Act, the court may in interests of justice as required under Article 159 of the Constitution deem the Plaint as amended and deal with it as if it were a petition under the Law of Succession Act, a course of action which finds precedent in **Githunguri v. Republic**, supra.

(7) By reason of the foregoing, I dismiss the Defendants’ Notice of Motion dated 24<sup>th</sup> July 2011 and in the interests of an expedited determination of the suit make the following further orders:

- (1) The Plaintiff is at liberty to amend the Plaintiff, as he may be advised, to give further particulars of his claim against the Defendants within the next 7 days.
- (2) The Plaintiff shall serve the amended Plaintiff, if any, within three days of filing.
- (3) The Defendants shall have 14 days after service of the Amended Plaintiff to file an Amended Defence, if necessary.
- (4) The parties will then file their respective pre-trial documents.
- (5) Mention on 28<sup>th</sup> August 2012 for purposes of taking a hearing date before the court on priority basis.

Being in the nature of proceedings between family members, I make no order as to costs of the application.

**Dated and delivered this 18<sup>th</sup> day of July 2012.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Khatib for Applicant  
Mr. Kinyanjui for Respondent  
Ms Linda - Court Clerk