



**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA AT MACHAKOS**

**Civil Case 149 of 2008**

**1. FRANCIS KYENGO KALOKI**

**2. HARISON MUTHOKA KALOKI**

**3. PHILOMENA KAMIA**

**4. FIDELIS NZOMO KALOKI**

**5. DAVID KALOKI..... PLAINTIFFS**

**V E R S U S**

**1. PETER MAKENZI KALOKI**

**2. HOMEWARD AGENCIES LTD.....DEFENDANTS**

**R U L I N G**

**1.** The Defendants have raised a **preliminary objection** to the Plaintiffs' suit by notice in that regard dated 5<sup>th</sup> December 2008. The points taken are as follows-

(i) That the Plaintiffs lack capacity to file this action for lack of letters of administration in respect to the estate of the late KALOKI MUKWILU and MUTILE KALOKI duly issued by a competent court of law.

(ii) That in any case "the parties are not properly pleaded in accordance with Order II of the Civil Procedure Rules".

(iii) That the suit is *res judicata* "in view of the suit culminating in Machakos Civil Appeal No. 110 of 1998 whose judgment was delivered on 2<sup>nd</sup> day of October 2003."

**2.** The preliminary objection was canvassed by way of written submissions. The Defendants filed their submissions on 26<sup>th</sup> May 2010 while the Plaintiffs filed theirs on 18<sup>th</sup> October 2010. I have considered those submissions, including the cases cited. I have also read the plaint and the statement of defence filed by the Defendants.

**3.** The Plaintiffs case has been pleaded at length and the plaint contains much evidence which it should not. But briefly stated, their case is that the various suit lands were purchased by the 1<sup>st</sup> Defendant upon instructions of the parties' late father and with funds the late father provided for the benefit of the entire family, but that the 1<sup>st</sup> Defendant had then registered in his sole name instead of the name of their late father.

4. The Plaintiffs have further pleaded, in effect, that in the circumstances there is a resulting trust, and the 1<sup>st</sup> Defendant was thus registered proprietor of the suit lands in trust for the family (including himself and the Plaintiffs).
5. The Plaintiffs have also pleaded that the 1<sup>st</sup> Defendant subsequently unlawfully sold some of the family properties to the 2<sup>nd</sup> Defendant in breach of the aforesaid trust.
6. The main reliefs sought by the Plaintiffs are declarations of the aforesaid trust and a finding that the 1<sup>st</sup> Defendant is in breach of the same; and an order for termination of the said trust and the various suit properties be shared equally among the Plaintiffs and the 1<sup>st</sup> Defendant. There is an alternative relief sought in adverse possession.
7. In their statement of defence filed on 8<sup>th</sup> October 2008 the Defendants have, *inter alia*, denied all the particulars of trust pleaded, including the facts leading to such trust. They have also pleaded that this dispute has already been heard and finalized in **Machakos Tribunal Land Case No. 34 of 1997** whose decision was affirmed in **Machakos PM Misc. Application No. 61 of 1997** and settled in **Machakos Civil Appeal No. 110 of 1998**. The Defendants state that the “result of the cases cited above puts all the issues to rest that the disputed parcels are the property of the 1<sup>st</sup> Defendant and lawfully passed to the 2<sup>nd</sup> Defendant”.
8. The implied or resulting trust pleaded in the plaint is specifically denied. Other issues relating to procedure and the Plaintiffs’ *locus standi* have been raised in the defence.
9. Although the notice of preliminary objection dated 5<sup>th</sup> December 2008 is expressly raised against the suit itself in the Defendants’ submissions objection is taken in respect to the Plaintiffs’ application by chamber summons dated 25<sup>th</sup> September 2008 that sought temporary injunction, in effect to preserve the *status quo*, pending disposal of the suit.
10. It is trite law that a preliminary objection must raise a pure point of law which, if resolved in favour of the party raising it, will have the effect of disposing of the suit. Such pure point of law cannot be based upon disputed facts, or upon facts whose existence must first be established by adjudication of conflicting evidence.
11. The point taken that the suit is *res judicata* must depend upon the pleadings of the previous suits that have been mentioned and the decisions in those suits. Those pleadings must of necessity be laid before the court, and the proper way to do that would be as annexures to an affidavit sworn in an application to strike out the plaint. Such evidence cannot be laid before the court by way of submissions. That would be evidence from the bar which cannot be properly admitted. There is not before the court a formal application to strike out the suit.
12. As to the plea that the Plaintiffs lack the necessary standing to bring the suit, the suit has not been brought on behalf of the estate of their deceased father and mother. The Plaintiffs have brought the suit on their own behalf as beneficiaries of the trust pleaded.
13. The technical objection to the plaint upon the ground of want of proper verification under rules of procedure cannot hold in the new Constitutional dispensation. The courts are required by the **Constitution** and also the law (**sections 1A and 1B of the Civil Procedure Act**) to lay less emphasis upon technicalities in favour of adjudicating the real issues between the parties, however brought before the court. That way, disputes will be finally and effectually dealt with and resolved.
14. In the result, I find no merit in the preliminary objection. The same is overruled with costs to the Plaintiffs. It is so ordered.
15. Delay in the preparation of this ruling is deeply regretted. The same was caused by my poor state of health the last few years. But thanks God I have now regained full health.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF AUGUST 2012**

**H.P.G. WAWERU**

**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY  
OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

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**JUDGE**