



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Miscellaneous Civil Application 585 of 2005**

**IN THE MATTER OF: THE PARCELS OF LAND KNOWN AS PLOT**

**MOMBASA MAINLAND NORTH 111/1111 AND LR. MN/1112**

**AND**

**IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS  
OF THE APPLICANT AS ENSHRINED IN CHAPTER FOUR OF THE CONSTITUTION**

**BETWEEN**

**ALI MWINYI HAMISI ..... PLAINTIFF/APPLICANT  
V E R S U S**

**MIKE MAINA ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**FLY OVER INVESTMENTS LIMITED ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**CAUSEWAY ENTERPRISES LIMITED ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**AND**

**1. GLADYS RIZIKI NYAMAWI**

**2. MOHAMED KARISA MWISHO**

**3. CHENGO NGUMA BENGUMA**

**4. PARTISON KAHINGI NYUNDO**

**5. NGALA CHIGUNDA JIRA**

**6. MBODZE JILANI**

**(for and on behalf of 399 others)..... INTERESTED PARTIES**

**RULING**

1. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have in a Motion dated 22<sup>nd</sup> October 2010 asked me to strike out the Plaintiffs suit against them as being Res Judicata **Mombasa HCC No. 732 of 1991 Mwinyi Hamisi Ali – Vs- The Attorney General & Another** and an abuse of the process of Court.

2. In the nature of the application some background information is necessary. In **Mombasa HCC No. 732 of 1991** the Plaintiff's father Mwinyi Hamisi Ali ("**the Deceased**") commenced proceedings against the Attorney General, Philemon Mwaisaka Wawaka and the Commissioner of Lands seeking to be declared the owner of all that parcel of land known as Section III Mainland North 515 by way of adverse possession. That was the main prayer. The others will not concern us. In the amended plaint the Deceased averred that this parcel of land was a result of subdivisions of land parcels 323/11/MN and 334/III/MN.

3. In a verdict returned on 18<sup>th</sup> September 1995 Wambilyanga, J found that Plot No. 324 and 334 was replanned and subdivided into several portions. That Plot No. 1112 was ascribed to the space where the Deceased lived. That Plot had been registered in favour of Mike Maina (the 1<sup>st</sup> Defendant herein). The learned Judge then reached this result-

**"I find that by the time Mike Maina was registered as proprietor the Plaintiff had already acquired a superior right by adverse possession over the land. I accordingly declare that the registration of the Plot 1112 in the name of Mike Maina is null and void. I order that the register be rectified and the name of the Mike Maina as owner of that Plot 1112 should be cancelled forthwith and be substituted with that of the Plaintiff as the registered owner (of that plot). The Plaintiff's case thus succeeds to that extent only."**

4. An appeal was preferred (being **Civil Appeal No. 125 of 1997 Mwinyi Hamisi Ali –Vs- The Attorne General & Another**) against that decision and the Court of Appeal was unable to agree with the decision of the High Court and held-

**"In our view the learned Judge was wrong in ordering the transfer of the Title to Plot 1112 to Mr. Hamisi Ali. There was evidence before the learned Judge to the effect that Plot 1112 was allocated to a Mr. Mike Maina by the Commissioner. Mr. Maina (whoever he be) was not made a party to the suit. It was injudicious on part of the learned Judge to say that Mike Maina, is only a pseudonym. That can only be ascertained if Mr. Maina was made a party to the suit and served with court papers in the suit either personally or through substituted means. As it stands, there was a title document issued to Mike Maina by the Commissioner. That title could only be challenged in the laid down manner and not in the manner that the learned Judge did by simply assuming that Mr. Maina did not exist, or he existed per a pseudonym or that like Mr. Darius Mbela he was not interested in claiming his title or that he was ashamed to be seen as a grabber."**

I shall return to this.

5. The Deceased was not about to give up. He joined hands with some 408 others and filed **Mombasa Civil Suit No. 64 of 2004 Mwinyi Hamisi Ali Kombo & 408 Others –Vs- Darius Mbela & 3 Others (64 of 2004)**. Amongst the Defendants was Mike Maina the 1<sup>st</sup> Defendant herein. The Plaintiffs lay a claim over Plot No. 324. It is said that the Deceased withdrew from those proceedings. This Court was shown a Notice of Discontinuation dated 4<sup>th</sup> August 2010 and filed on 10<sup>th</sup> August 2005. He then commenced this suit.

6. The star pleadings for the Plaintiff in these proceedings is the Amended Originating Summons of 20<sup>th</sup> December 2011 which was introduced herein after a consent was entered by the parties before Lady Justice Kasango on 14<sup>th</sup> December 2011. In these proceedings the Plaintiff stakes a claim over Plot No. Mombasa MN/111/1112 (**Plot 1112**) and Mombasa/MN/111/1111 (**Plot 1111**) by virtue of adverse possession and the Court is invited to determine whether-

- The Applicant is entitled to Plots 1111 and 1112 by virtue of adverse possession.

- Whether the Applicant was discriminated against by The Attorney General (proposed 4<sup>th</sup> Defendant) when the plots were allocated to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.
- Whether the Court should issue orders of certiorari canceling the Title Deeds over the two plots and that of mandamus compelling the proposed 4<sup>th</sup>

Defendant to issue Title in the name of Plaintiff.

So the Plaintiffs claim is anchored on the Doctrine of Adverse Possession and a Constitutional complaint of discrimination.

7. Are these proceedings caught up by the provisions of Section 7 of the Civil Procedure Act? That Section provides-

**“No court shall try any suit or issue in which the matter directly**

**and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”**

- The Defendants advocate argued that I would reach a decision that these proceedings are Res Judicata if I give due regard to explanations 4 and 6 of this Section. These provides-

**“Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

**Explanation. (6) – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.**

8. All explanations to Section 7 of the Act must be read with the contents of the provisions of the Section in mind. The explanations are merely to aid in interpreting the scope of the rule. They must not be read in isolation of the core provisions themselves. The Plaintiff is in the present suit in his capacity as the personal representative of the Deceased who was the Plaintiff in **732 of 1991**. None of the Defendants here were parties in that suit. It has not been demonstrated that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, indeed even the 1<sup>st</sup> Defendant, were parties in **No. 732 of 1991** either by themselves or through persons under whom they claim. Once there is no commonality of parties then Res Judicata does not arise and it would be needless to invoke explanations 4 and 6. The decision of the Court of Appeal in **Civil Appeal No. 261 of 2002 1) Daniel Kirui 2) Kipsinende Farm Co. Ltd –Vs- 1) Monicah W. Macharia 2) Commissioner of Lands** illustrated this. There the Court of Appeal held that a suit by a wife of a Deceased person was Res Judicata an earlier suit filed by her late husband because the wife’s claim could not be mounted without reference to her husbands right to the property. This is what the Court said-

**“Monicah could not possibly claim a right to the property whether as allottee or otherwise, on her own right without reference to her husband. Otherwise, it cannot be that the allotment was made both to her and her husband at the same time for the loss of a designated piece of land.”**

9. In respect to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants the decisions in **Appeal No. 125 of 1997** make it even more clearer that the matters between them and the Plaintiff had not been determined. This is what the Court of Appeal said-

**“So effectively what the learned Judge has done, is to give land allotted to the “legendary” Mr. Mike Maina to Mr. Hamisi Ali. Then there is a further problem. According to an entry made at the**

**Land Titles Registry at Mombasa, Mike Maina had on 14<sup>th</sup> October, 1991 transferred his right title and interest on Plot No. 1112 to a company referred to as Flyover Investments Limited at a consideration of Kshs. 2,000,000/-. We do not wish to go into the merits or demerits of the title under the Act of Flyover Investments Limited. The problem manifested itself when the order made in the superior Court, ordering transfer of Plot 1112 to Mr. Hamisi Ali was not registered by the Senior Registrar of Titles, Mombasa. Although the suit in the superior Court was filed on 30<sup>th</sup> September 1991 no attempt was made to bring either Mr. Maina or Flyover Investments Limited as parties to the suit.” (my emphasis)**

The Deceased sued the wrong persons in **732 of 1992**. The Deceased was barking up the wrong tree. It now seems that the correct persons have been sued. The Doctrine of Res Judicata does bar that claim.

10. Perhaps it would now be opportune to say that had I come to the conclusion that the two proceedings had common parties litigating in respect to the same subject matter then I would have held that the constitutional angle introduced by the Plaintiff would have been Res Judicata. The question of Discrimination introduced in the amended pleadings was a matter which was available as a ground of attack in the former suit. The protection from discrimination was guaranteed by Section 82 of the old Constitution in almost the same way as Article 27 of The Constitution 2010.

11. Let me say something about **Civil Suit No. 64 of 2004**. As pointed out by the Defence that suit was filed after the Court of Appeal decision and was in my view an attempt by the Plaintiff to rectify the errors committed in **Civil Suit No. 732 of 1991**. Those proceedings did not go as planned (from the Plaintiffs point of view) because in the Ruling of 3<sup>rd</sup> November 2006 Judge Serгон ordered the Plaintiffs to vacate parcel of land known as MN/II/515. It is the view of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that the current suit is an abuse of Court process as it is intended to defeat the result in **Suit No. 64 of 2001**. The Plaintiffs answer to this is that the Deceased withdrew from those proceedings. Shown to the Court is a Notice of Discontinuation of suit by the first Plaintiff dated 4<sup>th</sup> August 2005 and filed on 10<sup>th</sup> August 2005. I have to agree with the Plaintiff herein that the Ruling delivered on 3<sup>rd</sup> November 2006 did not affect him. Infact these Originating Summons were commenced on the very same day the Plaintiff withdrew from the **64 of 2004**. I am unable to find that these proceedings were intended to circumvent Judge Sergon’s decision as they were filed about 16 months before that decision.

12. As it would now be apparent, I am for disallowing the application of 22<sup>nd</sup> October 2010. It is hereby dismissed with costs.

***Dated and delivered at Mombasa this 29<sup>th</sup> day of October, 2012.***

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-  
Munyithya for the Plaintiff/Applicant  
No appearance for the Defendants/Respondents  
No appearance for the Interested Parties  
Court clerk - Beatrice**

**F. TUIYOTT  
JUDGE**