



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**CIVIL APPEAL NO. 49 OF 2009**

**PAULINE MWAGAMBO**  
**MWATANDO.....APPELLANT**

**VERSUS**

**ARESMUS M.**  
**BANZI .....RESPONDENT**

**RULING**

This is an appeal filed by Pauline Mwangambo Mwatando (appellant) against Aresmus M. Banzi (respondent) contesting the ruling and orders made by Hon. P. Kiama (Resident Magistrate, Kilifi) on 1<sup>st</sup> October 2009 in RMCC No. 63 of 2009 where the appellant had sought by a Chamber Summons dated 29<sup>th</sup> July 2009, for the court to strike out the plaintiff's (respondent) suit as against the appellant on grounds that it was an abuse of the court process since respondent had no *locus standi* to institute the suit on behalf of the legal allottee of plot No. 171 Ukombozi Residence, one Naomi Banzi.

The trial magistrate declined to grant the orders on grounds that the matter could only be fully determined after hearing evidence in court and not by way of an interlocutory application. His view was that striking out the pleading was a draconian remedy which could only be resorted to in very rare cases and that respondent's case raised issues which had merit.

This finding is contested on grounds that the trial magistrate totally disregarded the law and erred by making a finding that respondent was legally married to one Naomi Banzi despite there being no evidence to support that.

Although the trial magistrate held that there were triable issues, he did not specify which issues they were.

Mr. Mrima acted for the appellant in this appeal while respondent was represented by the firm of F. M. Mwaweni.

The appeal was disposed of by way of written submissions.

Mr. Mrima submitted that the dispute involves plots No. 171 which was purportedly subdivided to create 170 and 172. Plot No 171 is said to be in the name of Naomi Banzi, yet the respondent on the replying affidavit stated that he was the owner of the plot and that Naomi Banzi is his wife, and the use of her names was purely for purposes of convenience.

Mr. Mrima's contention is that the position adopted by the respondent is not known in law and offends the provisions of section 120 of the Evidence Act which states:

***“120 when one person has, by his declaration, act or omission, intentionally cause or permitted another person to believe a thing to be true and to act upon such belief, neither he or his representative shall be allowed, in any suit as proceeding between himself and such person as his representation to deny the truth of that thing. Mr. Mrima points out that annexures to the respondent's replying affidavit which were presented to the trial court clearly showed that Naomi Banzi is the beneficiary of the plot in issue as per the documents, yet the suit is instituted by someone other than Naomi. It is his contention that legally it is only Naomi Banzi who can institute a competent suit to protect or enforce any rights”***

Mr. Mrima's argument is that even if Aresmus is Naomi's husband, he is not a recognized agent as Order III rule 2 clearly provides that:

***“The recognized agents of parties by whom such appearance, applications and acts may be made or done are-***

***a) Persons holding powers of altering attorney authorizing them to make such appearances and applications and so such acts on behalf of parties”***

Of course under Rule 1 of the same Order the other person who can purport to act in a matter is a duly appointed advocate.

Mr. Mrima's argument is that the respondent has not obtained any power of attorney from Naomi and so the suit was bad *ab initio*.

Mr. Mrima's submission is that the question of triable issues cannot override the issue of *locus standi*, otherwise any busy body will be filing suits at whim.

In response, Mr. Msawasi for respondent submits that since the plots are not registered in anyone's name, then the list which appellant relies on does not confirm title nor is it evidence of title. Further that in the lower court there was an acknowledgment by both the appellant and the Provincial Administration that in fact the plot belongs to respondent and appellant had even written a note committing herself to compensate the respondent.

It is defence Counsel's contention that respondent used the name of his wife on the list for purposes of convenience and that if applicant is asserting that Naomi Banzi is not the respondent's wife, then the onus is on her to prove that.

Counsel also urges this court that in the interest of justice the respondent should not be shut out of this litigation and he should be accorded an opportunity to be heard.

When the application was argued before the Resident Magistrate, Mr. Mrima drew to his attention paragraph 4, 5 and 6 of the plaint dated 26<sup>th</sup> July 2009 where the Respondent described himself as the lawful owner of plot No. 171 in Ukombozi Residence.

He then filed an application for injunction and annexed receipts issued to Naomi Banzi in relation to that plot. Mr. Mrima's argument was that if the respondent paid for the plot but had the receipts issued in Naomi's name, then there was nothing to support that.

It would seem to me that the trial magistrate mixed up two issues – the subject matter of the suit (which is the land) and the parties to the suit.

The subject matter raises triable issues as regards division of the plot to create others and whether appellant ought to be regarded as a trespasser and therefore whether orders of injunction ought to issue.

The subject of the application was in relation to the respondent's status in the matter. He confirmed in his replying affidavit and through his advocate's submissions before the trial court, that documents issued in relation to the plot (even if they do not constitute documents of title) are actually in the name of Naomi. No one is disputing his relationship with Naomi at this point – she could well be his wife or adult daughter BUT does that clothe him with the legal status to institute the suit and obtain orders?

Order III has been referred to and is very clear – the position stated by the respondent offends both Order III Rule 2 and section 120 of the Evidence Act. Compliance with Order III will not in any way mean that respondent is shut out of litigation, it means he places the matter in perspective by either obtaining a power of attorney from Naomi so as to act in this matter or let Naomi institute the suit as against the respondents.

Once the issue of locus is suited out then the substantive material issues would be addressed. The appeal has merit. I recognize though that striking out the entire suit will simply delay the lower court matter; the trial magistrate did err in declining to grant the orders, but for justice to be seen to be done, I would make the following orders;

- (1) The ruling by the Resident Magistrate Mr. Kiama is set aside.
- (2) The respondent is directed to amend his pleadings so as to comply with section 120 of the Evidence Act or obtain authority to act in this matter by way of Power of Attorney within the next 21 (twenty one days) in default of which the orders here will be vacated and the suit will be deemed as struck out
- (3) Costs of this application shall be borne by the respondent.

Delivered and dated this 21<sup>st</sup> day of **February 2011** at Malindi.

**H. A. Omondi**  
**JUDGE**

Mr. Mrima for appellant  
No appearance for respondent