



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 57 OF 2010 (O.S.)

**IN THE MATTER OF: REGISTRATION OF TITLES ACT (CAP 281 LAWS OF KENYA)
AND THE LIMITATION OF ACTIONS**

ACT (CAP 22, LAWS OF KENYA)

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND RULES ENACTED THERETO

**IN THE MATTER OF: LAND REFERENCE NO. MN/V/15 WITHIN MOMBASA
MUNICIPALITY, MOMBASA DISTRICT**

BETWEEN

**1. MARGARET WALEGWA.....PLAINTIFFS
2. BENSON LUSWETI WANYONYI.....PLAINTIFFS
3. PAUL KIZUMBI & 155 OTHERS.....PLAINTIFFS**

AND

**1. CHANGAMWE HOUSING SCHEME LIMITED.....1ST DEFENDANT
2. TRUST BANK LIMITED (IN LIQUIDATION)2ND DEFENDANT**

RULING

By this Chamber Summons dated 3rd November 2010 brought under Certificate of Urgency the Plaintiffs through their advocate Ms. Chesaro seek the following orders inter alia that:-

“(2) That the Judgement slated to be read on 5th November 2010 be stayed pending the hearing and determination of this application.

(3) That Deponents of 1st and 2nd Defendants replying affidavits dated 16th September 2010 and 1st April 2010 be examined on oath.

(4) *The plaintiffs be granted leave to file further submissions out of time or as this Honourable court may direct.*

(5) *Costs be in the cause*”

Mr. Oyatsi counsel for the Defendants opposed the application. The parties did by way of a consent dated 3rd May 2010 agree that the case be determined by way of affidavit evidence. The parties further set out an elaborate time table for exchange of such affidavits and consented further that the court would receive oral highlighting of those written submissions. All that was agreed upon in the consent was done (except for the oral highlighting) and the judgement was reserved for 5th November 2010. Before that judgement could be read as scheduled the Plaintiffs filed this present application. I do agree with counsel for the Defendants that at that point this matter was effectively closed. The parties voluntarily entered into a consent regarding the mode of argument of the case and where a party wishes to set aside or vary that consent (as the Plaintiff now seeks to do) then a substantive application to so vary and/or set aside the consent should be made. This was not done in this case. Further Ms. Chesaro alleges that the Defendant did not come out clear in his replying affidavit. The court did on 27th September 2010 allow to the Plaintiffs an opportunity to respond to these replying affidavits, which Ms. Chesaro claimed had raised new issues. Any challenge to the replying affidavits ought to have raised in those further affidavits. Instead of proceeding as directed by the court the Plaintiff chose to file this present application which in my view is not merited. In as much as this court does not wish to shut out any party from being heard the court will not allow the Plaintiffs to go off on a tangent pursuing a fishing expedition by calling the Defendants to testify on oath. No application has been made to seek further and better particulars from the Defendants. In my view the present application has no merit, and is displaced and I do dismiss the same with costs to the Defendants. However I do note that as per the consent, which provided for the oral highlighting of submissions this was not done. As such this court will give the parties a date to appear and highlight their written submissions before court.

It is so ordered.

Dated and Delivered in Mombasa this 8th day of April 2011.

M. ODERO

JUDGE

In the presence of:-

Mr. Buya holding brief for Mr. Guram for 1st Defendant

No appearance for the Applicants