



**CIVIL PRACTICE AND PROCEDURE**

*What the court should consider in an application for judgment on admission.*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HIGH COURT CIVIL CASE NO. 136 OF 2009**

**JOHANA KAMOYO**

*(Suing as the legal representative and administrator of the estate of DAUDI M'CHEBERE M'ITANGURU).....PLAINTIFF*

**VERSUS  
M'NJIRU**

**M'MUNGANIA.....**

**.....1<sup>ST</sup> DEFENDANT**

**MAROO**

**M'MUNGANIA.....**

**.....2<sup>ND</sup> DEFENDANT**

**MUTHIINE M'MUNGANIA (Sued as the legal representative of the estate of M'MUNGANIA M'MWETHIRU**

**ALIAS M'MUNGANIA**

**MWATHERU).....3<sup>RD</sup>**

**DEFENDANT**

**RULING**

The plaintiff Johana Kamoyo sued in this case as the legal representative of the estate of his deceased father that is the estate of Daudi M'Nchere M'Itanguru deceased. He sued the three plaintiffs on behalf of the estate of their deceased father namely, M'Mungania M'Mwethiru *alias* M'Mungania Mwatheru. He pleaded in his plaint that his deceased father was registered as proprietor of parcel *Njia/Cia-Mwendwa/336* while the defendant's deceased father was registered as proprietor of *Njia/Cia-Mwendwa/1591*. He further pleaded by the plaint that during the process of adjudication, one acre of land belonging to the plaintiff's deceased father was incorporated in the defendant's deceased father's land parcel number 1591. Further, that the plaintiff has been living on that one acre of land having constructed 7 houses and planted *miraa* trees from which he derives his livelihood. He finally prayed that an order be made that one acre of land be excised from *Njia/Cia-Mwendwa 1591* and it be incorporated in *Njia./Cia-Mwendwa/336*. The defendants filed a Memorandum of appearance where it is noted that the 1<sup>st</sup> and 2<sup>nd</sup>

defendants did not sign but thumb printed but the 3<sup>rd</sup> defendant signed his name. The defence filed by the three defendants is headed “*defence on admission.*” It is essential to reproduce some of the paragraphs of that defence in order to understand the pleadings of the defendants.

**3** *“That it is true that during the process of land adjudication one acre of land was hived from parcel No. Njia-Cia Mwendwa/336 but was incorporated in the defendant’s father’s land No. Njia-Cia Mwendwa/1591 but was registered separately as Njia-Cia Mwendwa/2998 in the name of Daudi M’Nchebere M’Itanguru.*

**4** *That the boundary of parcel No. 1591 was extended into parcel No. 336 whereas (sic) the houses of the plaintiff were constructed.*

**5** *That defendants have discovered that the one acre hived from parcel No. 336 was registered separately and at the same time the boundary of parcel No. 1591 was moved to incorporate one acre into parcel No. 336 without compensating the plaintiff’s father.*

**6** *We the children of Daudi M’Nchebere and those of Mungania Mwethiru have realized there was an error made by the land adjudication committee and not by our father’s and that grandson of Mungania Mwethiru known as Mutuiri Kobia Mungania is living now on parcel No. 2998 (one acre) while the plaintiff and his brothers are living on the part allegedly hived from parcel No. 336.*

**REASONS WHEREFORE** *having realized that there was an error which was not may be of our father’s making which has now affected us we have agreed that the honourable court enter judgment in the following terms:-*

**a)** *That parcel No. Njia Cia Mwendwa/2998 which was registered in name of Daudi M’Nchebere M’Itanguru be surrendered in the estate of M’Mwethiru for distribution by the defendants as they wish.*

**b)** *That the area of one acre that was hived off parcel No. 336 be returned by altering the boundary such that the same in incorporated in parcel No. 336.*

**c)** *That due to the relationship existing between the two families each party to bear their own costs.”*

The plaintiff filed an application by way of Notice of Motion dated 18<sup>th</sup> December 2009. That application is brought under order XII rule 6 of the Civil Procedure Rules. It seeks an order that judgment be entered for the plaintiff against the defendant on admission. In a short affidavit in support, the plaintiff relied on the defence filed in this matter in support of his application. When the matter came before me for hearing, I requested confirmation that the parties are administrators of their respective fathers’ estate. The learned counsel for the plaintiff handed to me two limited grants filed in two separate matters. The first is, Succession Cause Misc. No. 117 of 2007 and the other one is Succession Cause No. 108 of 2007. Although the grants that were handed to me indicate that Johana Kamoyo was appointed administrator of his father’s estate I was puzzled by the fact Johana had obtained two grants in two different succession causes. I therefore went about to peruse both succession files to confirm the position. In respect of Succession Cause Misc. 117 of 2007, I found that the limited grant that was issued by the court on 1<sup>st</sup> October 2007 related to a different estate from that of the plaintiff’s deceased father the grant that was issued in Succession Cause Misc. 117 of 2007 was issued to a person by the name of Hezron Njeru Nkuma in respect of Denis Njeru deceased. In that succession cause, Hezron Njeru described himself as the father of Denis Njeru who at the time of his death was five years old. In respect of Succession Cause No. 108 of 2007, the petitioner was Tabitha Mugure Henry who petitioned in respect of the estate of Henry Kirema Mborothi deceased. It therefore becomes very clear that there is no evidence before this court that Johana is the administrator of the estate of his deceased father or that he is authorized to sue on behalf of his said father. There was also no evidence before court that the defendants

were the administrators of the estate of their deceased father. An application for judgment on admission will only be allowed in plain and obvious pleadings. In considering such an application I am guided by the following cases which were decided before the Civil Procedure Rules were amended but are still relevant.

***“The case of Choitram vs. Nazari [1984] KLR, 327 the court found as follows:-***

***For the purpose of Order XII rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.”***

***“The case Cassam vs. Sachania [1982] KLR 191, the court found that,***

***The judge’s discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment.”***

Bearing in mind those principles set out in the above two cases, I find that the pleadings in this case are not so obvious as to lead me to enter judgment for the plaintiff. From the reproduced paragraphs of the defendant’s defence, it will be seen that there has been subdivision of the parcel of land number 1591 resulting in parcel number 2998. Parcel number 2998 is occupied by a person known as Mutuiri Kobia Mungania. That person has not been made a party in this action. Despite that, it is the parcel that he occupies that is sought to be returned to the plaintiff’s deceased father’s parcel, that is, parcel number 336. Further, and perhaps more disturbing is that since this action begun, the defendants have been represented in court by the 3<sup>rd</sup> defendant. Even on 4<sup>th</sup> October 2010, the 3<sup>rd</sup> defendant did not object to the plaintiff’s application for inhibition orders to issue on the parcel number 1591. When the present application was urged, that is, on 6<sup>th</sup> June 2011, on the court making inquiry on whether the defendants were represented by an advocate, the 3<sup>rd</sup> defendant retorted that the defendants were represented by the same advocate representing the plaintiffs. The 3<sup>rd</sup> defendant in response to the present application stated:-

***“What we agreed with the plaintiff is we exchange our parcels of land.”***

In considering the present application, there is a suspicion within me that there is collusion between the plaintiff and the 3<sup>rd</sup> defendant in this case to the exclusion of the other two defendants. This is not a fit and proper case for judgment to be entered on admission. It is a case that should go for full hearing. Also, in view of what seems to be obvious forgery of court documents, I will recommend that the police do carry out their investigation to determine who has forged the grants in Succession Misc. 117 of 2007 and Succession Cause No. 108 of 2007. I make the following orders:-

- 1. The Notice of Motion dated 18<sup>th</sup> December 2009 is hereby dismissed with costs to the defendants.***
- 2. I direct that the Deputy Registrar of this court do refer this matter to the police for the purpose of the police carrying out investigation of who forged the letters of administration in High Court Meru Succession Misc. 117 of 2007 and High Court Meru Succession Cause No. 108 of 2007.***
- 3. I direct that this file be made a strong room file due to the matters raised in this ruling.***

*Dated, signed and delivered at Meru this 30<sup>th</sup> day of June 2011.*

**MARY KASANGO**  
**JUDGE**