



No.2932

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO.148 OF 2008

JAJEU OLE KAMASIA  
DAVID LESHU OLE KENTEYIA  
SAMSON OLE KENTEYIA  
WILSON KERUNKA OLE KENTEYIA  
NENKAI NAREYIO KENTEYIA  
LOLKIPAYANG KAMASIA KENTEYIA.....APPLICANTS

**-VERSUS-**

DANIEL KIPRONOH NAIMOJA..... RESPONDENT

RULING

The Respondent filed this suit against the applicants jointly and severally seeking inter alia for:-

- “a. Declaration that the registration of the applicants in respect of land parcel Nos. Transmara/Ololchani/429, 430, 431, 434, 745 and 746 was incorrectly, irregularly and unlawfully made and the same are null and void.***
- b). An Order that all the resultant parcels arising from land parcel No.7 Olochani Adjudication section be cancelled and registration be effected on Parcel No. 7 Ololchani Adjudication section upon sub-division into 2 equal portions between the respondent and the 1<sup>st</sup> applicant formerly known as Tarayia Kenteyia.***
- c). Eviction and an injunction restraining the applicants by themselves, their servants or agents or otherwise from remaining on, continuing with forceful occupation or entering or using the portion of land parcel No.7 Ololchani Adjudication section belonging to the respondent.***
- d). Damages***
- e). Costs***
- f). Interest***
- g). Any other relief that the court could deem fit to grant...”***

From the plaint, it would appear that the respondent and 1<sup>st</sup> applicant were proprietors in common of all that piece or parcel of land known as **No.7 Olochani Adjudication Section** in equal shares, hereinafter **“the suit premises”**, long before land adjudication in the area commenced. The suit premises were

however subsequently subdivided at the instigation of the applicants without his knowledge and consent. It's the respondent's contention that the subsequent subdivision of the suit premises into 6 portions was done fraudulently with intent to deprive him of his rightful share of the suit premises. The particulars of the alleged fraud are stated in paragraph 5 of the plaint. He discovered the fraud sometime in the month of September, 2004. The objection he lodged with the Land Adjudication Office was again wrongfully and improperly withdrawn without his consent or knowledge. He later mounted judicial review proceedings vide **Kisii HCC. Application number 221 of 2004** seeking to quash the decision of the District Land Adjudication officer, relating to the removal of the objection proceedings. However, the said judicial review proceedings and in particular the application for extension of time to file the requisite application for judicial review, was dismissed. Be that as it may, he had now filed the instant suit seeking to nullify the registration of the suit premises in the names of the applicants on various grounds, including fraud.

On being served with the suit papers the applicants entered appearance and filed a joint statement of defence. In the main they denied the respondent's allegations and averred that plot **Nos. 429, 431, 434, 745 and 746** were the creation of Adjudication and demarcation process. Since the process was legal and no appeal to the minister for lands and settlement having been lodged in accordance with the provisions of the land Adjudication Act, the respondent's claim was misconceived. Alternatively, they pleaded that the issues raised in the suit touching and or concerning the respondent's interest in respect of **plot 7, Ololchani** Adjudication Section were subjudice, **KISII HCCC.NO. 74 of 2006**.

Upon the filing of the defence to suit, the applicants took out the instant application dated 19<sup>th</sup> March, 2010 seeking to strike out and dismiss the respondent's instant suit. The grounds upon which the application was anchored were that the applicants were the registered proprietors of the suit premises which were created and or arose out of the adjudication process in **Ololchani Adjudication Section**. The alienation and registration of the suit premises as aforesaid could only be impeached vide objection proceedings and or appeals to the minister of Lands and Settlement. However, the objection and or appeal lodged at the instance of the respondent, was voluntarily withdrawn. Such withdrawal terminated and finally resolved the respondents claim to the suit premises. Thus this court was devoid of jurisdiction to entertain the suit. To the extent that the suit was premised on fraud, the same was time barred by dint of section 4(1) of **limitation of Actions Act**. Again the suit was barred by virtue of sections 10(1) and 12 of the Land Adjudication Act. Accordingly, the suit does not raise or disclose any reasonable cause of action known in law and was otherwise scandalous, frivolous, vexatious, an abuse of the due process of court and hopeless or irredeemably bad in law.

In response, the respondent deponed that he did not voluntarily withdraw the objection proceedings he had lodged but the same were withdrawn without his consent or knowledge and the issue should be the subject of hearing in this suit on merit. He acknowledged filing judicial review proceedings but the same were dismissed. However the dismissal order did not act as an estoppel against him to bring this suit in the nature of a declaration. That the issue of limitation cannot be dealt with summarily. Otherwise his plaint disclosed various triable issues which can only be ventilated through plenary hearing. When the application came before me for interpartes hearing on 2<sup>nd</sup> June, 2011 **Mr. Oguttu**, learned counsel for the applicants and **Mr. Bosire**, learned counsel for the respondent agreed to canvass the same by way of written submissions. Subsequently those submissions and authorities were filed and exchanged. I have carefully read and considered them.

It is trite law that striking out a pleading is such a drastic and draconian act that, it is a jurisdiction that must be invoked or exercised with utmost caution, care, restraint and in the clearest of cases. As correctly observed in the case of **ICDC –vs- Dafer Enterprises Ltd (2001) IE.A. 75** “...*unless the matter is plain and obvious a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial...*”. Looking at the pleadings so far filed, there is no doubt at all that several triable issues have arisen. First and foremost, there is the issue whether the suit is time barred. The case for the applicants is that fraud was allegedly committed in 2004. To the extent that the suit is based on fraud same ought to have been filed within 3 years of discovery of fraud. This suit having been filed in 2008, it was well outside the statutory period aforesaid. But to the respondent, according to section 30 of the **Land Adjudication Act**, time to institute any proceedings concerning an interest in land in an adjudication section starts running upon obtaining a written consent from the Adjudication Officer herein

to file suit. The written consent herein was given on 17<sup>th</sup> September, 2008 and not in September, 2004 as alleged by the Applicant. The written consent was to last for a period of 6 months as stipulated therein. Therefore the suit was filed in time. Given this contrasting position, I think that this is a matter which must be determined during the plenary hearing and on evidence.

Next is the question of jurisdiction. According to the applicants, the respondent having exhausted the remedies under the land **Adjudication Act** for disputes arising in an adjudication area, cannot again come to court to attempt to reopen and or revisit the adjudication and demarcation process. On the other hand the respondent takes the view that a person can only institute civil proceedings in court and the same be entertained by the court upon the consent in writing of the Adjudication Officer, concerning an interest in land in an adjudication section. He has such consent. Further he did not withdraw his objection proceedings but the same were purportedly withdrawn by a stranger to the proceedings without his knowledge and/or consent. According to the respondent, it is an issue that this court has jurisdiction to deal with at trial. The issue whether or not the adjudication register is complete and final is a matter of evidence and to that extent the Adjudication officer could not have given consent to commence Civil Proceedings, if at all, it had been closed completely.

Then there is the issue of whether the plaint discloses reasonable cause of action. The respondent's contention is that the 2<sup>nd</sup> to 6<sup>th</sup> applicants conduct, to have themselves included in the sharing out of the suit premises that belonged to and ought to have been shared between the respondent and the 1<sup>st</sup> applicant only in equal shares was illegal and wrongful. They also had a hand in causing the objection proceedings commenced by the respondent to be withdrawn by a stranger to the proceedings. Their conduct was thus fraudulent. Since the **Land Adjudication Act** does not provide for setting aside of any order made by the Adjudication Officer at the request of any party or *suo moto* then the only option available is to institute civil proceedings in a court of law. This is a moot point.

Finally, it is the question of failure to enjoin the adjudication officer in the proceedings. Is such failure fatal to the respondent's case?

For all the foregoing reasons, I am satisfied that the plaint as filed discloses several triable issues that can only be dealt with in a plenary hearing. Accordingly I order that the application dated 19<sup>th</sup> March, 2008 be and is hereby dismissed with costs to the respondent.

**Judgment dated, signed and delivered at Kisii** this 23<sup>rd</sup> September, 2011.

**ASIKE- MAKHANDIA**  
**JUDGE**