



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1944 of 1998**

**ZAHIL MOHAMMED REHMTULLA .....PLAINTIFF**

**V E R S U S**

**THE PUBLIC TRUSTEE .....1<sup>ST</sup> DEFENDANT**

**PATRICK DONGA KANGETHE .....2<sup>ND</sup> DEFENDANT**

**RATAN SHIVJI BHUDIA .....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

On 31<sup>st</sup> March, 1999 Justice Amin ordered that the suit be disposed of by way of full hearing. Before this, on 15<sup>th</sup> February, 1999 Justice Mbogholi had made a consent order that the injunction that had been issued by Justice Aluoch (as she then was) on 14<sup>th</sup> September, 1998 do remain in place until the suit is heard and determined. The order of Justice Mbogholi effectively dealt with the chamber application of the Plaintiff which was dated 11<sup>th</sup> August, 1990.

On 4<sup>th</sup> May, 1999 the 2<sup>nd</sup> Defendant filed a chamber application under **section 3A** of the **Civil Procedure Act** and **Order 6 rule 13** of the **Civil Procedure Rules** seeking to have struck out the Plaintiff's suit because it was time-barred, it was unsustainable in law, it was an abuse of the process of the court and that the Plaintiff had no *locus standi*. The Plaintiff filed grounds of opposition to defend the application. On 30<sup>th</sup> September, 2009 the Plaintiff filed a notice of preliminary objection to say that the application was disposed of on 27<sup>th</sup> July, 1999 when Justice Amin ordered that the suit goes to full hearing. As indicated above, Justice Amin's order was made on 31<sup>st</sup> March, 1999. It was only reiterated on 27<sup>th</sup> July, 1999.

When Justice Amin made the order that the case do proceed to full hearing the competence of the suit or the capacity of the Plaintiff to bring the suit had not been attacked. It is notable that on 5<sup>th</sup> May, 1999 the application dated 4<sup>th</sup> May, 1999 was placed before Justice Githinji (as he then was) and he directed that it be heard on 9<sup>th</sup> June, 1999. It was adjourned severally until 27<sup>th</sup> July, 1999 when it went before Justice Amin for a mention. He reiterated that the suit be heard as indicated above.

With respect to the learned judge, the points being raised by the 2<sup>nd</sup> Defendant are such that, if sustained, may dispose of the suit. They are preliminary and go to the jurisdiction of the court to entertain the suit. They have to be disposed of before the suit can be heard. (**See MUKISA BISCUIT MANUFACTURING CO. LTD -VS- WEST END DISTRIBUTORS LTD. [1966] E.A 696**).

The result is that the objection taken by the Plaintiff is not sustainable and is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI**  
**THIS 26<sup>TH</sup> DAY OF APRIL 2010**

**A. O. MUCHELULE**  
**J U D G E**