



**No. 126**  
**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO. 121 OF 2009**

**FRANCIS KUWAWE OKOMO** suing as the Administrator of the estate of  
**the late SABIANO OKOMO ONGU** .....PLAINTIFF/RESPONDENT

-VERSUS-

**SIMON ODIRA OLIMO**.....DEFENDANT/APPLICANT

**RULING**

On 23<sup>rd</sup> November, 2009, **Simon Odira Olimu**, hereinafter “*the applicant*” filed an application by way of Chamber summons. That application is the subject of this ruling. The application was expressed to be brought under order VI rule 13(1) (b), (c) and (d) of the **Civil Procedure rules**, sections 3A and 7(4) of the **Civil Procedure Act** and all enabling provisions of the law. The applicant sought that the plaint dated 29<sup>th</sup> June, 2009 and filed in court herein on 30<sup>th</sup> June, 2009 be struck out. Consequent, upon the above prayer being granted, this court do proceed to dismiss the suit with costs. The applicant also prayed for costs of the application.

The application was anchored on the grounds that the applicant was the registered proprietor of all that piece or parcel of land known as **Muhuru Kadem/Macalder/290**, hereinafter “*the suit premises*”. Previously the suit premises had been registered in the name of one, **Petro Owuor**, now deceased. The transfer and registration of the suit premises in the name of the applicant was lawfully done by the said **Petro Owuor** and any allegations of fraud made by **Francis Kuwawe Omomo**, “*hereinafter respondent*” in the plaint against him did not lie, in the absence of a claim and or suit against the previous registered owner and or the administrator of his estate thereof. At any rate, the claim based on fraud was statutorily time barred. The issues captured and raised in this suit, were directly and substantially in issue in **Kisii HCCC NO. 73 of 2008**. Consequently, the instant suit was *res judicata*. The plaint contravened the provisions of order VII rule 1(e) & (2) of the **Civil Procedure rules**. The suit too was time barred by virtue of the provisions of section 143 (1) of the Registered Land Act and was at the same time prohibited by section 4 of the Limitation of Actions Act and finally that the respondent was non-suited.

In support of the application, the applicant swore an affidavit. That affidavit merely helped to reinforce and expound on the grounds in support of the application aforesaid. Suffice to add that in so far as **Kisii HCCC No. 73 of 2008** was concerned the same had been determined vide a ruling delivered on 2<sup>nd</sup> March, 2009 in which the suit was dismissed. That being the case and the issues in this suit having been directly and substantially dealt with in the said suit, this was *res judicata*. It was incumbent upon the respondent to disclose the existence of any previous proceedings, if any. Having failed to do so the pleadings herein as well as the verifying affidavit reeks of and or is fraught with deliberate falsehoods.

In response to the application, the respondent filed a replying affidavit. Where pertinent he deponed that this suit was substantive and cannot be dismissed summarily as it raised issues of fraud and therefore the

respondent should not be condemned unheard. With regard to **HCCC No.73/08** he deponed that he was never party to the consent order that compromised the suit nor was he consulted. Accordingly this suit was not **res judicata HCCC No. 73/08** as it was never determined on merit. That this court had jurisdiction under Section 143 (1) and (2) of the Registered Land Act to determine matters pertaining to land where there is need for rectification of title and where elements of fraud had been established as in the circumstances of this case. That this suit was not time barred as he had lived on the suit premises for over 30 years and his case was one of adverse possession. Finally he deponed that the suit disclosed reasonable cause of action based on fraud.

When the application came up for interpartes hearing before me on 17<sup>th</sup> May, 2010, **Mr. Oguttu** and **Mr. Odero** both learned counsel for the applicant and respondent respectively agreed to canvass the same by way of written submissions. Those submissions were subsequently filed and exchanged and I have had the time to read and consider them albeit carefully as well as cited authorities.

As I understand it, the applicant is seeking to have the suit struck out on grounds that the registration of the suit premises in the name of **Petro Owuor** was a first registration and therefore the subsequent transfer cannot be defeated, the respondent is non-suited and finally that the suit was time barred as well as being **res judicata**.

On the other hand, the respondent takes the position that this is not a fit and proper case for striking out as the suit raises serious and triable issues based on fraud, that HCCC NO. 73/08 was not heard on merits and his previous counsel recorded a consent which had the effect of striking out his said suit without his instructions or consent. Thus the instant suit was not **res judicata** and finally that this suit was not time barred as fraud was only discovered on 30<sup>th</sup> April, 2008 and this suit was filed in 2009. Accordingly the threshold of 3 years had not been attained by the time the instant suit was filed.

In my view the fate of this application will turn on whether or not the case raises triable issues and or whether it is **res judicata**. However it is important that I warn myself of the trite law that striking out a pleading is a drastic remedy that should only be invoked in plain, clear and obvious cases. Indeed such jurisdiction must be exercised with abundant caution. A plaint should only be struck out if the claim is incontestably or hopelessly bad such that it cannot even be resurrected by an amendment.

Starting with whether or not the case raises triable issues, it is claimed by the respondent that he became aware of the applicants fraud following official search of the title with regard to the suit premises on 30<sup>th</sup> April, 2008. That may well be the case. However that contention is not borne out by his plaint nor replying affidavit. It only pops out in his written submissions. Written submission cannot be a substitute to the pleadings. Further the suit premises were initially registered in the name of **Petro Owuor**. This is the registration that the respondent feels was fraudulent. That was way back in 1982. If that be the case, then the respondent should have filed the suit predicated on fraud within 3 years meaning therefore that the latest that this suit should have been filed should have been sometimes in 1985. Yet this case was filed on 30<sup>th</sup> June, 2009, 25 or so years after the cause of action accrued. Still on the question of fraud, even if I am wrong on the foregoing, the respondents claim based on fraud still fails since he is obliged to plead specifically fraud and give the particulars thereof pursuant to the provisions of order VI rule 8(1) of the Civil Procedure Rules. Those provisions are couched in mandatory terms. The respondent is guilty for non-compliance with the aforesaid. Finally, from the plaint it is quite apparent that the alleged fraud was committed by **Petro Owuor**, deceased. The fraud committed by **Petro Owuor** if at all is not inheritable by the applicant nor is it transmittable. That being the case it was incumbent upon the respondent to join the estate of the deceased or its legal representative to the suit. This is not evident in the plaint as filed. In view of all the foregoing, the respondent's claim is so hopeless that it cannot be resurrected from its death bed by an amendment.

The respondent filed suit, **HCCC No. 73 of 2008** against the applicant. In that suit the respondent prayed for a rectification of the register and registration of himself as the sole proprietor of the suit premises in place of the applicant. The basis of that suit was that the applicant had fraudulently, unlawfully and deceitfully secured the registration of the suit premises in his name without the consent and or authority of the respondent's father. These are the same allegations being leveled against the applicant in this

suit. As can be seen, the parties in the previous suit are the same as in the instant suit. The subject of litigation is the same suit premises. The cause of action in both suits is the same, fraud. Is it possible then that this subsequent suit is **res judicata**? To rely on the defence of **res judicata**, there must have been:-

- i) Previous suit in which the matter was in issue.
- ii) The parties were the same, or litigating under the same title.
- iii) A competent court heard the matter in issue.
- iv) The issue had been raised once again in a fresh suit.

**See Abok James Odera V. John Patrick Machira, court of Appeal Civil application number Nai 49 of 2001 (UR)** and also **Section 7 of the Civil Procedure Act**. There is no denying in the circumstances of this case that this suit is *res judicata*. However, the respondent's answer is that though the earlier suit was compromised, his advocate did so without his consent or instructions. It should be noted that the previous suit was struck out and dismissed. This is according to the decree annexed to the supporting affidavit to the application. Apparently, the applicant had filed a chamber summons application dated 25<sup>th</sup> July, 2008 in which he sought to strike out the respondent's suit. It would appear that the said application was in similar terms as the instant one. However it appears that when the same came up for interpartes hearing a consent order was recorded allowing the application and consequently striking out and dismissing the suit. Much as the respondent claims that the consent was not entered into on his authority, he never sought to set it aside. He has not done so to date. As it is therefore that suit which was on all fours with the instant suit stands dismissed. The respondent cannot be heard to say that merely because the earlier suit was not heard on merits because no evidence was tendered the instant suit cannot be held to be **res judicata**. *Res judicata* does not only apply where a case has been heard on merits and evidence tendered. It can apply to cases where the suit is dismissed or struck out on application or by consent order as it happened in this case. Perhaps the story would have been different had the said suit been marked as withdrawn. Had it been the case the respondent would have been at liberty to bring a fresh suit subject of course to limitation. The issue of the lawyer entering a consent without his instructions should have been canvassed in the earlier suit. It cannot be the basis of fresh litigation in this suit. He cannot invite the court in these proceedings to hold that the said consent order was entered into by way of misrepresentation. The authority of **Samson Munikah V Wedube Estates Limited C.A No. 126 of 2005 (UR)** cited by the respondent in support of his submissions on the point is therefore irrelevant in these proceedings.

I may also add that the respondent in paragraph 13 of his plaint failed to disclose the existence of previous suit. It was a mandatory requirement that he does so. In essence therefore the verifying affidavit sworn by the respondent contains as correctly submitted by the applicant conscious and deliberate falsehoods which should disentitle him to the exercise of this court's discretion in his favour.

It is also interesting that the respondent in his replying affidavit as well as written submissions has introduced the concept of adverse possession. Suffice to say that the claim does not form part of the plaint. In any event it is trite law that a claim anchored on adverse possession can only be entertained by way of originating summons. See **order XXXVI rule 3D** and **Ndatho V Ilutho & 2 others (2002) 2 KLR 637**.

The upshot of the foregoing is that I find merit in the application. Accordingly it is allowed in terms of prayers 1, 2 & 3. It is so ordered.

**Ruling dated, signed and delivered** at Kisii this 16<sup>th</sup> July 2010.

**ASIKE-MAKHANDIA**

**JUDGE**