



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

*(Coram: Ojwang, J.)*

**CIVIL SUIT NO. 34 OF 2010 (O.S.)  
IN THE MATTER OF REVOCATION OF TITLE**

**1. ABDALLAH SAID KUGOTWA  
2. MOHAMED RAJAB MBWATA  
3. OMAR JUMA MBOGA .....PLAINTIFFS  
4. JUMA MWINYI MBATA**

**-VERSUS-**

**SADIQUE GHALIA .....DEFENDANT/APPLICANT**

**RULING**

The main cause is an Originating Summons suit, dated **3<sup>rd</sup> February, 2010**. By the Notice of Motion of **18<sup>th</sup> March, 2010**, the defendant moves the Court, by virtue of Order VI, rule 13 (1) of the Civil Procedure Rules, and ss.3, 3A and 6 of the Civil Procedure Act (Cap. 21, Laws of Kenya), to “dismiss and/or strike out the plaintiffs’ suit for abuse of the process of the Court” and for being “bad in law for duplicity”.

The applicant’s grounds are thus stated:

- (i)                    The plaintiffs/respondents herein instituted suits No. HCCC Mombasa Misc. Application No. 311 of 2006 and HCCC Mombasa Misc. Application No. 500 of 2009, in 2006 and 2009 respectively, and the two suits are still pending in Court;**
- (ii)                   the plaintiffs/respondents have now instituted the same suit herein, and this was done without disclosing to the Court that the plaintiffs and the defendant are parties in the previous suits, in which the matter in issue is also directly and substantially in issue in the current suit, HCCC No. 34 of 2010, filed by the plaintiffs/respondents;**
- (iii)                  the plaintiffs’ act of filing the instant suit, HCCC No. 34 of 2010, is sub judice and an abuse of Court process and bad in law.**

The application comes with the supporting affidavit of **A.O. Wandera**, an Advocate, sworn on **18<sup>th</sup> March, 2010**. The deponent deposes that the said Originating Summons suit of **3<sup>rd</sup> February, 2010** was served upon the defendant by advertisement in **The Standard** newspaper on **23<sup>rd</sup> February, 2010**, and thereafter the plaintiffs listed the matter for hearing on **11<sup>th</sup> March, 2010**; M/s. Ghalia & Ghalia

Advocates entered appearance and filed their statement of defence on **3<sup>rd</sup> March, 2010**; it came to the applicant's knowledge that the plaintiffs had earlier sued the defendant in respect of the same subject-matter, in HCCC Misc. Application No. 311 of 2006, and HCCC Misc. Application No. 500 of 2009, and these earlier suits are still pending in Court. The deponent averred that the plaintiffs have instituted the instant suit without disclosing to the Court that the plaintiffs and the defendant are parties in the earlier suits, in which "the subject matter in issue is also directly and substantially in issue in the current suit filed by the plaintiff"; and that, in consequence, "the current suit No. 34 of 2010 is ....**sub judice** and an abuse of Court process and is bad in law, having contravened s.6 of the Civil Procedure Act".

The defendant's Notice of Motion of **18<sup>th</sup> March, 2010** elicited no evidence from the respondents; however, the respondents, through their advocates, M/s. Wambo & Co. Advocates, made submissions.

M/s. Ghalia & Ghalia, Advocates, for the applicant, submitted that in an earlier suit, Mombasa HCCC Misc. Application No. 311 of 2006, the parties are the same as those in the instant suit, and the subject matter, L.R. No. KWALE/GALU KINONDO/665, is the same. And in yet another earlier case, Mombasa HCCC No. 500 of 2009 which involves the same parties, the subject-matter is the same property, L.R. No. KWALE/GALU KINONDO/665. It was submitted that the two earlier cases have in the past been listed for hearing, notably on **31<sup>st</sup> March, 2010** and **13<sup>th</sup> April, 2010**, though hearing did not proceed.

Counsel relied on s.6 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which provides:

***"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties or between parties under whom they, or any of them, claims litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed"***.

Counsel submitted that the issues in the instant suit are directly and substantially in issue in Mombasa HCCC No. 311 of 2006 and Mombasa HCCC No. 500 of 2009 which are still pending in Court. Counsel urged that the claim in the Originating Summons suit is on a matter **sub judice**, and so the instant claim should be dismissed, for having contravened the provisions of s.6 of the Civil Procedure Act. Counsel submitted that the law bars the Court from proceeding with the instant suit before the earlier ones are concluded, or withdrawn.

Counsel submitted that the foregoing argument remained valid, regardless of the particular party who filed either of the earlier suits that are still pending: for, "as long as the matter in issue is also directly and substantially in issue in a previously-instituted suit or proceedings between the same parties", then the instant suit should be struck out.

Is it relevant, the categorization of the earlier suits or proceedings, in relation to the Originating Summons suit? Counsel urged that this was not a relevant question – whether some were judicial review proceedings, or ordinary civil suits: and so, the **sub judice** rule was in any case applicable.

Counsel for the respondents submitted that the instant Originating Summons suit was occasioned by a decision of the Msambweni Land Disputes Tribunal: and that decision had led to the applicant herein filing a judicial review matter, in Mombasa HCCC Misc. Application No. 311 of 2006, against that tribunal – to quash the proceedings of the tribunal; and to prohibit the tribunal from proceeding to hear and determine Land Dispute No. 44 of 2005 in relation to L.R. No. KWALE/GALU KINONDO/665; so, the respondents herein are not parties to proceedings.

Counsel stated from the Bar that the applicant herein had not served the said judicial review application upon the Msambweni Land Disputes Tribunal, with the consequence that the tribunal proceeded to determine the question on **1<sup>st</sup> September, 2009**.

Counsel urged that since the applicant filed the judicial review proceedings in 2006 but did not prosecute

the same, his suit was “overtaken by events”, and his inaction “should not be visited upon the respondents”.

Counsel urged that the instant Originating Summons suit was seeking to affirm the decision of the Msambweni Land Disputes Tribunal, as adopted in orders of the Subordinate Court.

It comes out more clearly in the respondent’s submissions than from the applicant’s submissions: that, by Mombasa HCCC Misc. Civil Application No. 500 of 2009, the **applicant** herein is seeking judicial review orders of **certiorari**, to quash the decision of the tribunal, and orders of **prohibition** against the Kwale Lands Registrar issuing a new title deed in favour of the respondents herein.

Counsel urged that Mombasa HCCC Misc. Civil Application No. 500 of 2009 (by the applicant herein) was against the Msambweni Land Disputes Tribunal, and not against the respondents herein.

Counsel submitted that the respondents’ Originating Summons suit is not **sub judice**; and that “the applicant is out to defeat the respondents’ suit on [the basis of] technicalities, and not on merit”.

As already noted, the applicant has not placed before this Court open and transparent information which sheds light on his gravamen; and a broadly similar shortcoming attends the respondents’ case: they rely on documents (including case law) which are not on the Court file and which, in the light of great pressures on judicial time, it is not possible to conduct a fresh search for.

Though limited by such shortcomings in the laying of the stage for decision-making, the Court has adequately perceived the gravamen and the issues; and on that basis I will conduct the final assessment as follows.

Prior to the filing of the instant Originating Summons suit, there were two judicial review applications pending, namely, Mombasa HCCC Misc. Application No. 311 of 2006 and Mombasa HCCC Misc. Application No. 500 of 2009, both filed by the **applicant** herein. It is clear that the applicant herein did not diligently prosecute Mombasa HCCC Misc. Application No. 311 of 2006 and, for all practical purposes, that case has been overtaken by events, and, upon a suitable application, it could be withdrawn, and its file closed.

It is obvious that the respondents herein could not have been the respondents in the two judicial review matters, since the applicant therein could only be seeking orders against some **public body**.

Consequently, the **sub judice** rule is inapplicable, in relation to the Originating Summons suit by the respondents herein. In principle, therefore, the respondents’ suit of **3<sup>rd</sup> February, 2010** is properly filed and should be prosecuted in the normal manner.

The critical decision to be made by this Court is as regards the sequencing of two matters: (i) the applicant’s judicial review matter, Mombasa HCCC Misc. Civil Application No. 500 of 2009, and (ii) the respondents’ Originating Summons suit of **3<sup>rd</sup> February, 2010**. As the two matters are in respect of one property, namely L.R. No. KWALE/GALU KINONDO/655, appropriate procedure rules out the possibility of running the two matters in parallel, as the ultimate findings and orders must not be contradictory. On the basis of these considerations, I will now make orders as follows:

**(1) The applicant in the Notice of Motion of 18<sup>th</sup> March, 2010 shall effectually prosecute his judicial review matter to conclusion within 100 days of the date hereof.**

**(2) The Registry shall assign priority hearing dates for Mombasa HCCC Misc. Civil Application No. 500 of 2009, within the terms of Order No. 1 herein.**

**(3) Following compliance with Orders No. 1 and 2 herein, the respondents’ Originating Summons suit of 3<sup>rd</sup> February, 2010 shall be listed for mention and directions.**

**(4) The applicant's Notice of Motion of 18<sup>th</sup> March, 2010 is hereby dismissed; costs to the respondents herein.**

**DATED and DELIVERED at MOMBASA this 24<sup>th</sup> day of September, 2010.**

.....  
**J. B. OJWANG**  
**JUDGE**

Coram: *Ojwang, J*  
Court Clerk: *Ibrahim*  
For the Defendant/Applicant:  
For the Plaintiffs/Respondents: