



1. Land Law

2. Subject of main suit

- a) Land
- b) LR 631/IV/60 Kericho
- c) FRAUD
- d) Sale Agreement to purchase property
- e) Property registered to 2nd defendant
- f) Sale by 1st defendant to 2nd defendant instead of plaintiff is defective.
- g) Claim for specific performance.
- h) 2nd plaintiff registered proprietor of suit premises added to pleadings.
- i) Plaintiff No.1 Johnson Makori Onduko

Plaintiff No. 2 Benard Gesora Makori

- j) Plaintiff No. 1 passes away
- k) Suit aliates.
- l) Files suit application to amend plaint. Struck out as filed without leave of court.

3. Application dated 31.3.09

Prayers for

- a) Amendment of

Plaint 20.12.05

Filed on 21.12.05

- b) Hellen Makori be substituted instead of Johnson
- c) Makori Onduko
- d) Seen Plaintiff 1 and 2 properly on record. Expunge Plaintiff No. 1 Kepha Makori Onduko from court record

4. **Held**

1. Application defective seeks too many prayers
2. Main prayers to substitute original plaintiff No. 1 defective suit abated. The original plaintiff is a donor of a power of Attorney.
3. Application dismissed.

5. **Case Law**

6. **Advocates**

E.M. Orina advocate instructed by M/S Orina & Co. advocates for the Plaintiffs/Applicants – present

S.K. Bundotich advocate instructed by M/S Kale Maina & Bundotich advocates for the 2nd defendant/Respondent - present

N/A for O.A. Kenyatta advocate instructed by M/S Kyalo & Co. advocates for the 1st defendant/Respondent.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT 46 OF 2008

JOHNSON MAKORI ONDUKO 1ST PLAINTIFF

BENARD GESORA MAKORI2ND PLAINTIFF

VERSUS

COOPERATIVE MERCHANT BANK LTD1ST DEFENDANT

EMERG INVESTMENT LIMITED..... 2ND DEFENDANT

RULING

NO. 2

I. Application Notice of motion 21st March, 2009

1. Four Omnibus prayers are sought for by the plaintiffs/applicants, namely

a) Leave be granted to amend the plaint dated 20.12.05 and filed 21.12.05 in terms of the annexed draft amended plaint.

b) Hellen Makori be substituted as a duly appointed Attorney of the 1st plaintiff in place of Johnson Makori Onduko who is deceased.

- c) *The draft amended plaint annexed to the supporting affidavit be admitted to the court record on payment of court filing fees.*
- d) *To deem plaintiff 1 and 2 properly on record.*
- e) *Status quo on LR 631/10/60 Kericho be maintained.*
- f) *Suit be transferred to High Court of Kenya Nairobi for trial.*
- g) *Any reference to the date of 1st No. 1 plaintiff Kepher Makori Onduko be expunged.*
- h) *Costs be provided for.*

II: Background

2. Johnson Makori Onduko filed suit against the 1st defendant Cooperative Merchant Bank Ltd and M/S Emerg Investments Ltd.
3. This matter concern land and is still subject of hearing to the main suit (*which is being challenged by the respondent*).
4. The original plaintiffs Johnson Makori Onduko entered into a sale agreement of land parcel LR. 631/IV/60 situated at Kericho. The sale was instead given to the 2nd defendant M/S Emerg Investments. The 1st defendant sued for specific performance of that sale agreement.
5. By consent of the parties the original HCCC 1534/05 file recorded on 23rd March, 2006 enjoined the 2nd plaintiffs Bernard Gesora Makori as the registered owner of the suit land.
6. The two plaintiffs are represented by two separate advocates M/S Muthaura Kiome & Mwarania for Plaintiff No. 1 applicant. M/S Otieno Ochich & Associates for 2nd plaintiff.
7. On 3rd March, 2007 the 1st plaintiff passed away. The 1st plaintiff, it turned out was not the plaintiff but was actually one who held a power of Attorney. As he has now died the 1st plaintiff/applicant seeks to be substituted i.e. Hellen Makori be substituted as the Attorney to Kepha Onduko Makori. The Plaintiff is said to be actually alive in this matter.
8. The amendments earlier Plaintiff was then struck out despite the enjoinder of the party being permitted.

III: In reply

9. To the application 31st March, 2009 the two defendants objected to the same on grounds that there is no Plaintiff in existence to amend. The deceased passed away 3rd March, 2007 and the suit abated on 4th March, 2008. There is no explained delay. There are four prayers in one and the application is defective. M/S Otieno Ochich & Associate failed to comply with seeking leave of court to come on record under **order III r 9** Civil Procedure Rules. The 2nd defendant in reply stated that the main suit is for and against 2nd defendant only. The applicant cannot care own this case. Further the deceased should have filed the suit under the real plaintiffs name and not his own name as drawn of the power of Attorney.
10. M/S Mukite Musangi has never had a practicing certificate since 1982 and continued to make representation to July, 2006.

IV: Opinion

11. The issue herein is mainly concerning plaintiff No. 1. He is deceased. This is one Johnson Makori Onduko according to the announcement of death in the newspaper, the proposed applicant who wishes to be substituted is his daughter. It also transpired that Johnson Makori Onduko was not the holder of the title nor was he the actual plaintiff but one Kepha Onduko Makori his son.

12. When Johnson Makori Onduko passed away his suit abated. The Law requires suits filed under a donor of power of Attorney be filed in the name of the actual person. This is because such person is alive. The task of a donor of the power of Attorney is just to hold and sign documents and thereafter represent the interest of the donor.

13. I find herein that the application to be substituted is defective in subsistence. Even if the 1st original plaintiff was the correct person to sue his suit has abated.

14. The prayers sought include three others besides and is not useful to the parties. That the 1st plaintiff Kepha Makori Onduko's name be expunged must be an error as he is said to be alive and not dead. That status quo be maintained and further this case be transferred to Kisii at one time and now Nairobi High Court.

15. I find that the 1st plaintiff requires to re-think his case carefully. To this end the application is dismissed. The Preliminary Objection and grounds of opposition by the defendants raised for the movement is accordingly up held.

16. The advocate practicing without a practicing certificate has composed this suit extensively.

17. I accordingly dismiss this application with costs to the 2nd defendant. The 1st defendant being absent no costs is to be awarded to them.

DATED this 25th day of May, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

E.M. Orina advocate instructed by M/S Orina & Co. advocates for the Plaintiffs/Applicants – present

S.K. Bundotich advocate instructed by M/S Kale Maina & Bundotich advocates for the 2nd defendant/Respondent - present

N/A for O.A. Kenyatta advocate instructed by M/S Kyalo & Co. advocates for the 1st defendant/Respondent.