



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI**

**Civil Suit 73 of 2008**

**KAHINDI FUNDI MUKAMBA & 4 OTHERS.....PLAINTIFFS**

**VERSUS**

**FLEETWOOD ENTERPRISES LTD.....DEFENDANT**

**R U L I N G**

Mr. Mayaka filed a notice of Preliminary Objection on behalf of the defendant/respondent stating that the suit as filed offends the mandatory provisions of the Civil Procedure Act Cap 21 Laws of Kenya and there is no cause of action as against the defendant/respondent.

Further that plaintiff's suit is improperly before court and is frivolous, vexatious and an utter abuse of the court process and should be dismissed.

Mr. Mayaka submitted that the supporting affidavit is sworn by one Kahindi Fundi Mkamba who purports to swear the same on behalf of five other plaintiffs yet he has not filed any authority to swear on their behalf, as proved under Order 1 Rule 12(1) and (2).

2) Further that under Order XXXVI 3D the Originating Summons must be accepted by an affidavit with a certified copy of extract of Title but here what is annexed is a copy of certificate of postal search which in any event is not certified.

3) This action is premature as the defendant/respondent took possession of the suit property on 7-9-07 after a transfer was done and defendant/respondent acquired the property from a 3<sup>rd</sup> party who is not a party to this suit which would mean applicants have not been in possession of the property for 12 months from date that defendants took title and then claim as anticipated under the Limitation of Actions Act cannot stand.

He has cited the case of **Anderson Mole & others V Magarini Sand Co-operative HCCC 44 of 2008** which held that non compliance with Order 1 rule 1 is fatal.

In opposing the Preliminary Objection Mr. Angima for the plaintiffs submitted that this is not a representative suit but rather this is a suit where plaintiffs have brought an action on their own behalf, by themselves and authorized one of them to authenticate the decretal sum by swearing a verifying affidavit. He explains that the practice has been that one plaintiff swears an affidavit on behalf of the other plaintiffs as they have common issues rather than encumber the court with multiple affidavits which say the same thing and so the case of **Anderson Mole** is not applicable.

To support this position, he has cited the case of **Wandege Co-op Savings and Credit Society V Tom Musiya and 5 others HCCC 1633 of 2000** which he states, addresses the question of one party swearing

an affidavit on behalf of others and that Hon. Justice Kassanga Mulwa held there was no need to obtain authority to swear an affidavit on behalf of other parties in the suit.

Mr. Angima states that the cause of action is clearly disclosed from the pleadings i.e how long plaintiff/applicant have been on the suit land as to entitle them to claim ownership by adverse possession and everything else will have to abide the evidence, so the question of when defendants got registered as proprietors does not arise to be dealt with now.

As for the extract of certificate of title, it is Mr. Angima's contention that all that is required is for the plaintiff/applicant to show that the person being sued is the registered proprietor and in that case an official search certificate is a better evidence of Title than the certificate of Title itself.

Now Mr. Mayaka in reply turns round to concede that the suit as filed is not representative in value, but in the spirit of Order 1 Rule 12(1) and (2) the plaintiffs have breached, that order which they should comply with.

Further that Order XXXVI Rule 3D is couched in mandatory terms and there can be no excuse for non-compliance.

I have looked at the pleadings which state that plaintiffs are in occupation of particular portions of the suit land and have been subjected to harassment by individuals at the instigation of the defendant/respondents. Order I rule 1 envisages situations where there are many plaintiffs joined in one suit seeking relief in respect of or arising out of the same act or transaction.

This is different from the situation envisaged by Order 1 rule 12 where there are more plaintiffs than one but one of them is authorized to appear plead on act in the proceedings – then there must be written authority signed by the party giving that authority and it shall be filed in the case. Anderson's case doesn't apply as it is agreed that what exists here is not a representative suit, each party is suing as a plaintiff but they have a similar cause of action and seek the same remedy but none is acting on behalf of the other in the suit. However there is a verifying affidavit in support of the claim, which is sworn by the first plaintiff on behalf of the other plaintiffs – should the first plaintiff have obtained written authority to swear that affidavit? The answer is in the affirmative and I can do no better than cite the decision in **CA 228 of 2002 Grace Ndegwa and others V Attorney General**, the first plaintiff ought to have written authority to swear the affidavit and the **Wandege** case must pay defence to the Court of Appeal decision.

As regards when the cause of action arose, it would seem to me that the decision in **Kisee Maweu and 19 others V Kiu Ranching and Co-operative Society Ltd** addresses the issue very well on grounds that adverse possession is a fact to be deserved upon the land, it is not to be seen in a title, any man who buys land without knowing who is in possession of it, risks has title just as he does if he fails to inspect his land for 12 years after he has acquired it. That would then take care of whether a cause of action is disclosed – indeed an action has been disclosed and that limb cannot hold.

This then takes us to the third limb of the Preliminary Objection i.e is with regard to the provisions of Order XXXVI Rule 3D (2) which require an extract of Certificate of Title to be annexed. What the plaintiff has annexed is not a certificate of Title, it is a copy of postal search which is not certified. A postal search is not the same as an extract of certificate of title otherwise the Rules would have clearly stated so. I recognize that the party in adverse possession is disadvantaged in accessing extract of a title which is not in their name and that it is easier for such a party to get a postal search rather than extract of title. I think the reason for that requirement was simply so that the party claiming can demonstrate that the other party has actual title but he has acted adverse to that title.

A search document is a record of information relating to the status of an item – it gives information as to what the contents and status of one's title document are.

The certificate of title is the document containing the actual information as regards the status of the property, it actually confers the title on the person so named in it: what both have in common is that they

disclose the relevant details as regards plot number, Title Number, size of the property, the tenure, the registered owner and any existing encumbrance. In the end the information required so as to assist the court in determining the matter is the same, and perhaps the best I can do is to recommend that the Rules Committee do amend the provisions of Order XXXVI rule 3D (2) to include a postal search as being sufficient. However as matters standard, the copy of the extract of title is a mandatory requirement which this court cannot ignore.

The Preliminary Objection is thus sustained on two limbs;

(a) The affidavit of verification is sworn on behalf of individuals who have not indicated that they had so authorized

(b) There has been non compliance with Order XXXVI Rule 3D (2) and the entire suit is dismissed.

Delivered and dated this **18<sup>th</sup>** day of **June 2009** at Malindi.

**H. A. Omondi**

**JUDGE**

Mr. Angima for plaintiffs

Mr. Mayaka for defendant