



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**

**Civil Appeal 47 of 2004**

**FELISTUS MMBONE NDOLI ..... APPELLANT**

**V E R S U S**

**DONALD CHAGALA NDOLISON ..... RESPONDENT**

**J U D G E M E N T**

On 11.5.2004 the Appellant raised a Preliminary Objection before the lower court. The Objection as per the notice dated 14<sup>th</sup> April, 2004 was based on the following grounds:-

- 1. The Defendant is neither the owner nor the registered title holder of Plot Number N.MARAGOLI/CHAVAKALI/784 nor is she the proprietor of the housing units erected on it.*
- 2. The Defendant was not a party to the alleged agreement by the plaintiff in his plaint.*
- 3. The Defendant has been wrongly sued by the plaintiff.*
- 4. The suit is bad in law as it is based on an incurably defective plaint which does not even raise a cause of action and it is frivolous, vexatious, scandalous and an abuse of the court process.*
- 5. The suit is based on a stale action as it is time barred and it offends the provisions of limitation of actions Act.*

The objection was fully heard and the trial magistrate made a ruling on 29/6/2004 whereby the Preliminary Objection was dismissed with costs. Being dissatisfied by the ruling, the defendant filed this appeal and listed the following grounds:-

- 1. THAT the learned magistrate erred in law and fact in failing to admit the appellants evidence by way of an official search from Vihiga Lands Office proving that she is not the proprietor of Land parcel No. North Maragoli/Chavakali/784 on the basis that she could not tender the same as evidence on the hearing of her objection.*
- 2. THAT the learned magistrate erred in law in failing to take judicial notice of the official search tendered since it was a government document bearing a government seal.*
- 3. THAT the learned magistrate erred in law in failing to recognize the fact that the appellant had been wrongly sued by virtue of not being the owner of land and therefore ought to have dismissed the respondent's suit in the lower court.*

4. *THAT the learned magistrate erred in law and fact in failing to recognize the fact that the suit in question was time barred as the respondent did not tender evidence to prove that the cause of action arose in 1999.*

The Appellant acted in person and relied on his grounds of Appeal. The appellant further submitted that the suit plot No. MARAGOLI/CHAVAKALI/784 was not hers and that she was wrongly sued. The suit is time barred and that she ought to have been allowed to produce an official search from the Lands office. The trial magistrate did not allow the appellant to produce the Official Search.

Mr. Amendi for the Respondent opposed the appeal. He submitted that there is no decree or order upon which the appellant could appeal against. The Preliminary Objection was based on facts. The suit is based on the sharing of profits and not on ownership of the land. Whether the appellant was wrongly sued was a matter of evidence that was not adduced.

On the first ground of Appeal, the appellant is complaining that she was not allowed to produce evidence by way of official search from the Vihiga Lands office proving that she was not the proprietor of the suit property. The plaintiff is claiming that the defendant is her partner in some properties located on the suit land. On her Amended Defence dated 8/3/2004 the Appellant denied that she had any business relationship with the Plaintiff. It is my finding that the non-production of the official search did not prejudice the Preliminary Objection raised by the appellant. Even if it was to be allowed, it was not going to disprove the allegations that the parties have a partnership agreement. The second ground of Appeal is still on the issue of the official search. The appellant should understand that exhibits should be properly produced before court and the court cannot take judicial notice of a document that is not properly produced. The document could only have been produced through an affidavit or when oral evidence was being taken. The case was not heard.

On the 3<sup>rd</sup> ground of Appeal, the appellant submitted that she was wrongly sued as she is not the owner of the suit property. Since the plaintiff has not claimed that the appellant is the owner of the suit plot, this ground is unfounded. Even the Appellant's amended Defence did not raise the issue of ownership of land and the objection on this ground is an afterthought.

Lastly, the appellant submitted on her ground four that the Plaintiff's case is time barred. The Plaintiff's claim started to run from the time of the alleged breach. Since this court is not determining the case, it is upto the appellant to establish by way of evidence before the lower court that indeed the plaintiff's claim is time barred.

It is unfortunate that this matter has been kept pending for five years yet it ought to have been concluded by now. Parties should know that Preliminary Objections should be relevant and capable of disposing of suits once and for all. Objections based on facts and meant to draw court's discretion are not valuable Preliminary Objections. The overall objective of litigation is to have a suit fully concluded and each party to be given an opportunity to be heard at the earliest possible time. The appellant herein shall have the opportunity to call in evidence, produce the official search and any other documents before the trial magistrate in order to prove her case. Again the appellant will have the opportunity to appeal in the event that the case is decided against her.

I therefore find that this Appeal has no merit and the same is dismissed with costs.

***Dated, Signed and Delivered at Kakamega this 23<sup>rd</sup> day of July, 2009***

**SAID J. CHITEMBWE**

**J U D G E**