



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 284 of 2003

JOSEPH KIMATU(alias CHANDA KAZI)

PATRICK NGUGI)

ELIJAH MSAGHA)

JOSEPHINE KASYOKA)

**PETER KAMAU NG'ANG'A) [to sue on their behalf and in
a representative capacity).....PLAINTIFFS/RESPONDENTS**

-VERSUS-

MRS. RUKIYA SOUD ALI BASHIRI)

SOUD HAFIDH RASHID)

HAIDER SOUD)

HEMED MOHAMED SOUD).....DEFENDANTS/APPLICANTS

RULING ON A PRELIMINARY OBJECTION

The applicants' Chamber Summons dated 26th August, 2009 and filed on 1st September, 2009 was brought under Order VI, rules 13 (1) (b) (c) (d) and 16 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The applicants were asking this Court to strike out the entire suit filed against them, "for being incompetent and fatally defective". In the general grounds it was stated that the prayer in the main cause for an order of adverse possession was against the express provision of the law regarding claims by adverse possession; it was asserted that the procedural defect was fundamental to the suit proceedings, and that this rendered the suit, *ab initio*, an incurable nullity; it was contended that the pleadings in the main cause were vexatious and meant to embarrass the process of the Court.

There were, however, preliminary objections to the defendants' application. The 1st, 3rd, 4th and 5th plaintiffs, through their counsel, M/s. E. M. Gichana & Co. Advocates, contended that the application could not be maintained because: the defendants although they did enter appearance in the main cause,

filed no defence and, on that account, interlocutory judgment had been entered; so at this stage the defendants could not purport to have the suit struck out without first seeking the setting aside of the judgment itself.

The 2nd plaintiff, through his advocates, M/s. Onchuru, Kibanya, Oyieko & Kamau Advocates, contended that the defendants' application is "bad in law, misconceived, mischievous, frivolous, vexatious and otherwise a gross abuse ofCourt process".

The 2nd plaintiff questions the applicants' reliance on Order VI, rule 13 (2) of the Civil Procedure Rules as the basis of the application. It is urged that, on the authority of *Mary Kaloli Mutisya V. Joel Ngui Mweu*, Machakos HCCC No. 41 of 2003 (*Wendoh, J.*), "for an application under Order VI, rule 13 (1) (d) for [an] allegation that the suit is an abuse ofCourt process, one needs to adduce evidence by way of affidavits and annexures....." ; but in the supporting affidavit and the annexures accompanying the instant application, "there is no evidence adduced to show that the suit is an abuse ofCourt process". Counsel urged that evidence had not been produced either, to show the suit in question as "scandalous, frivolous or vexatious or how it is meant to prejudice, embarrass or delay the [course of] trial".

Learned counsel *Mr. Mtana*, for 2nd plaintiff, urged that given the fact that there was already an interlocutory judgment, properly entered in favour of the plaintiffs, the defendants' application to strike out the suit was no more than a belated attempt to delay the course of justice.

Detailed written submissions were filed by counsel for the parties in this application, and after carefully assessing these, the main question remaining is, on what foothold do the defendants stand when they seek the striking out of the suit which had been brought against them? As a matter of law, they could challenge the suit by filing their defence, and later raising legal issues, adducing evidence or making submissions such as to lead the Court to the conclusion that the plaintiffs had failed to make out a case on the balance of probabilities. Or, alternatively, the defendants could have questioned the integrity of the suit as filed, at the very beginning, on points of law. In the further alternative, the defendants could have moved the Court to set aside the interlocutory judgment already recorded. Outside that scheme, the defendants have been unable to explain the legal basis for challenging the plaintiffs' suit which has already culminated in an interlocutory judgment.

I hold that the defendants' application is devoid of merit. I uphold the preliminary objections. I dismiss the Chamber Summons dated 26th August, 2009, and order that the defendants shall bear the costs of the plaintiffs in the application.

Orders accordingly.

DATED and DELIVERED at Mombasa this 28th day of October, 2009.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Defendants/Applicants: *Mr. Ojode*

For plaintiff's No. 1, 3, 4, 5: *Mr. Gichana*

For Plaintiff 2: *Mr. Mtana*