



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Suit 105 of 2001

MALINDI HOLDINGS

ESTATE AGENTS.....APPLICANTS/PLAINTIFFS

VERSUS

1. COMMISSIONER OF LANDS

2. MONDO LIMITED

3. ALI OMAR SAID ALAMUDI

4. ALMA HOLDINGS LIMITED

5. MALINDI DISTRICT HEALTH MANAGEMENT BOARD

6. MALINDI DISTRICT HOSPITAL RESP/APPLICANTS

R U L I N G

By an application by way of chamber summons, pursuant to the provisions of order V1 Rule 13(b) and (c) of the Civil Procedure Rules, section 2A of the Civil Procedure Act and all the enabling provisions of the law, the applicants (2nd and 4th defendants) seeks orders:

1. That the plaint herein by the plaintiff/respondent be struck out.

2. That in the result the suit against the applicant be dismissed with costs to the applicant.

The application is based on the grounds:

(a) The suit is incompetent as the Attorney General has not been joined in the suit.

(b) The orders sought cannot be granted against the 1st defendant yet they are sought jointly and severally and it is trite law that a case cannot be done piece meal.

(c) Orders for expunging the grants and or title can only be sought by way of the writ of **certiorari**

brought by way of a judicial review application.

(d)The plaintiffs have been barred by limitation of time.

(e)No notice to sue was issued to the Commissioner of Lands as required under the Government Proceedings Act (Cap 40) Laws of Kenya.

(f) The suit is scandalous, frivolous and vexatious.

(g)The suit is otherwise and abuse of the process of the court and should be dismissed with costs to the defendants.

(h)In the circumstances, it is in the interest of justice that the same should be struck out.

The application is predicated upon the annexed affidavit of **Giuseppe Passaglia** sworn on the 7th day of February 2008.

The application was served on the firm of Khaminwa & Khaminwa advocates who failed to file replying affidavit or grounds of opposition within the time prescribed by law. On application, I granted the applicant leave to proceed ex-parte. I was urged that the plaintiff's suit is defective since the orders sought cannot be possibly granted against the first defendant being an official of the good Government of Kenya.

That the instant suit is res-judicata since there was an earlier suit being **MALINDI HCCC NO.12/2004** in which the matter directly and substantially in issue in the current suit was directly and substantially in issue in the former suit between the same parties. In the former suit (HCCC 12/2004) the issues herein were raised, heard and finally decided by way of dismissal.

In their pleadings, the plaintiffs failed to disclose to this court that they had previously sued the 5th defendant in the former or earlier suit.

That the reliefs sought can only be granted jointly and severally to the plaintiff yet some of the reliefs sought cannot be granted as against all the defendants.

Moreover, the plaintiff has not provided particulars of fraud committed by any of the defendants. Hence the allegations of fraud against particularly the 4th defendant are far fetched, malicious and misplaced. Hence this application.

I have carefully perused the pleadings herein, analyzed submissions of the counsel for the applicant and married the facts to the law and authorities on the point.

By an amended plaint dated 26th day of March 2002, the applicant at paragraph 2 avers:

**“The first defendant is an officer of the
Government of Kenya holding office with
Power to sue and to be sued. Summons will
Be served through the plaintiffs advocate’s
Office”.**

At paragraph 6 of the said amended plaint the plaintiff further avers that:

“The plaintiff’s claim is that the Commissioner of Lands purported to cause the plaintiff’s said land to be re-demarcated and thereafter a portion measuring 0.3397 of a hectare or thereabouts was carved out and numbered LR 6512. The first defendant proceeded to unlawfully and illegally and fraudulently purported to grant a lease of the said portion to the 2nd defendant for a period of 99 years from 1st September 1992”.

At paragraph 7 of the said amendment plaint the plaintiff further avers:

“In similar manner the first defendant proceeded to carve out a second portion number 7551 measuring 0.3583 of a hectare or thereabouts and illegally, unlawfully, fraudulently and irregularly gave a lease for a term of 99 years from 1st November 1992 to the 3rd defendant”.

At paragraph 7A of the said amended plaint the plaintiff further averred:

“It is further stated that the 3rd defendant purported to transfer the said portion No. 7551 to the 4th defendant in 1996 and the plaintiff avers that the said transfer was null and void ab initio and of no legal consequence whatsoever by reason of the fact that the said parcel of land belonged to the plaintiff and hence the 3rd defendant had no title or interest to transfer to the 4th defendant”.

At paragraph 13 the plaintiff sought remedies of:

“(a) A declaration that grants issued as CR

**23478 and CR 23953 to the second
and third defendants are invalid and
void and of no effect.**

**(b) That the said grants be expunged from
the record of the Registrar of Titles Act
Cap 281 Laws of Kenya.**

**(c) A perpetual injunction restraining the
defendants their respective servants, agents
and others whatsoever from entering, interfering or in any way trespassing,
dealing or disposing of the plaintiff's freehold
title comprised in Certificate of Ownership
No.11601 issued under Land Titles Act
(Cap 282)".**

By a further amended plaint, dated 27th June 2005, the plaintiff by paragraph 4B introduced the 5th defendant thus:

**" The fifth defendant is a statutory board
established under the Public Health Act
invested with the power to operate, run,
manage the 6th defendant and both are capable
of being sued in their own names (service of
court process upon the 5th and 6th defendants
shall be effected through the plaintiff's
advocate's offices)".**

The Commissioner of Lands, the 1st defendant entered appearance on 13th October 2006 by a Memorandum of Appearance dated 13th October 2006. Equally, the Memorandum of Appearance was filed on behalf of the 5th and 6th defendant on 29th July 2005 by the Attorney General. On 2nd September the Attorney General filed defence for 5th and 6th defendants.

By a chamber summons dated 13th October 2006, the 1st defendant sought to set aside the interlocutory judgment entered herein against the 1st defendant on 20th January 2000 and all consequential orders.

On 24th November 2006, M/s Khaminwa & Khaminwa for the plaintiff and Jane .A. Umara, Senior Litigation Counsel for the 1st defendant entered a consent in the following terms:

**“ By consent the chamber summons application
dated 13th October, 2006 be and is hereby
allowed as prayed with no orders as to costs
and the matter be and is hereby listed for
full hearing on 20th February 2007”.**

By a notice of preliminary objection dated 4th February 2008, J.A. Umara, Senior Litigation counsel for the Attorney General contended thus:

**“.....the plaintiffs’ suit is incompetent, does
not lie and ought to be struck out on grounds
that it has been filed in breach of section 13A of
the Government Proceedings Act (Cap 40)
Laws of Kenya”.**

In effect the 1st, 2nd and 4th defendants have raised the issue of the competence of the suit.

Section 13A of the Government Proceedings Act (Cap 40) Laws of Kenya provides:

(1)No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.

(2)The Notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars-

(a) the full names, description and place or residence of the proposed plaintiff;

(b)the date upon which the cause of action is alleged to have accrued;

(c) the name of the Government department alleged to be responsible and the full names of any servant or agent form it is intended to join as a defendant;

(d) a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;

(e) the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

3. The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of proviso (i) to section 16(1), make an order declaratory of the right of the parties in lieu of an injunction”.

The plaintiff/respondent was served with the application dated 7th February 2008 and has failed to file

grounds of opposition or replying affidavit. The application therefore stands unchallenged.

It is trite law that in a dispute revolving around an allegation of wrongful transfer it is difficult to see how the title of the proprietor can be impeached without joining in the Commissioner of Lands. The joining of the Commissioner of Lands necessitates compliance with section 13A of the Government Proceedings Act. If the Government Proceedings Act is not complied with before filing suit, then there cannot be any amendment. A defence that cannot be rescued by an amendment is one that cannot lie and ought to be struck out. If a party is faced with an application to strike out his pleadings, it is his duty to ask the court to be allowed to breath life into his otherwise lifeless case (**See THE TOWN COUNCIL OF OL KALOU V NG'ANG'A GENERAL STORE: CIVIL APPEAL NO.269 OF 1997**) decided on 13th March 1998.

The plaintiff was duly served with the notice of preliminary objection by the advocate for the 1st, 5th and 6th defendants. The plaintiff was equally served with the application. There is no response forthcoming from the plaintiff. Against that background, I find and hold that the plaintiff filed the suit in breach of the mandatory provisions of section 13A of the Government Proceedings Act (Cap 40) Laws of Kenya. The suit is thus incurably defective, bad in law and incapable of amendment.

In the circumstances I have no alternative but to strike out the entire suit, which I hereby do.

Dated and delivered at Malindi this 19th day of May 2008.

N.R.O. OMBIJA

JUDGE

Kilonzo for Machuka for 2nd and 4th defendants

Mr. Mwadilo for applicant

Mr. Mutungi for 1st, 5th and 6th defendants