



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE 437 OF 2002**

**ISSA MASUDI MWABJMBA .....APPLICANT**

**VERSUS**

**ALICE KAVENYA & 4 OTHERS .....DEFENDANTS**

**RULING**

The subject matter of this ruling are two summonses filed under Order VI rule 13 (a), (b), (c) and (d) of the Civil Procedure Rules. The applications also cite that they are premised on Order VIA rules 1,2,3 and 8 of the Civil Procedure Rules. The first application dated 18<sup>th</sup> February 2003 was filed by the 5<sup>th</sup> defendant. The same is supported by the affidavit of Chanda Mohan Kohli sworn on 21<sup>st</sup> February 2003. The second application dated 5<sup>th</sup> March 2004 is that filed by the 4<sup>th</sup> defendant. In support thereof is the affidavit of Sadrudin Rajan Jamal sworn on the 9<sup>th</sup> day of March 2004. When the two applications came up for hearing they were argued together as though they were consolidated.

The main suit is expressed in a plaint dated 5<sup>th</sup> December 2002 in which Issa Masudi Mwabumba, the plaintiff /Respondent herein, sued Alice Kavenya, Hassan Hamisi Sauti, The Attorney General, Diani Promotion Services Ltd and Loita Development Ltd, the 1<sup>st</sup>,2<sup>nd</sup>,3<sup>rd</sup>,4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants respectively. In that plaint the plaintiff prayed for judgment against the defendants in the following terms:

- (a) An order declaring that the 1<sup>st</sup> and 2<sup>nd</sup> defendants obtained registration of plots Kwale/Galu/Kinondo/644 by fraud.
- (b) An order of declaration that their purported transfer or sale of the property to the 4<sup>th</sup> and the 5<sup>th</sup> Defendants was illegal null and void.
- (c) An order directing the 4<sup>th</sup> and 5<sup>th</sup> defendants to return the title deeds to Kwale Land Registry for cancellation or in the alternative an order deeming the titles cancelled with an order compelling the Land Registrar to register Issa Masudi Mwabumba as the proprietor thereof.
- (d) Mesne profits and exemplary damages.
- (e) Costs of the suit.

Each of the Defendants filed a defence against the plaint. At the moment the main concern of this court, are the summonses I have mentioned hereinbefore.

In those summonses the 4<sup>th</sup> and 5<sup>th</sup> defendants are seeking to have the plaint struck out on three main reasons. First, is that the suit is time barred in that the cause of action arose in 1974. Secondly, the applicants also claim that the particulars of fraud were not pleaded against them in the plaint. On his part the plaintiff has opposed the summonses in his replying affidavits. The plaintiff's response to this ground is that, leave to file suit out of time was granted him by this court on 3<sup>rd</sup> December 2002. He also invited this court to peruse the plaint to get proof that the particulars of fraud against the defendants were included therein. The defendants were of the view that this court had no jurisdiction to grant leave to the plaintiff to file a suit out of time in this matter. I have considered the submissions tendered by the defendants and those of the plaintiff. I have also perused the pleadings placed before this court. It is not contested that the honourable lady Justice Khaminwa gave an order of leave to the plaintiff to file this suit out of time on 3<sup>rd</sup> December 2002.

Lady Justice Khaminwa and myself are of concurrent jurisdiction. I cannot alter her decision because to do so would amount to making this court sitting on appeal on its own cause which is not permissible in law. The applicants have the option to apply for review or to appeal to the court of appeal. Consequently I see no merit on this ground. I have looked at the plaint dated 5<sup>th</sup> December 2002 and I am convinced

that the plaintiff has set out the particulars of fraud against the defendants on paragraphs 9<sup>th</sup> and 10<sup>th</sup> of the plaint. It was therefore unnecessary for the applicants to raise such a ground. In my mind the applicants were frivolous.

The third and last ground argued is that the plaint is incurably defective because it does not comply with the provisions of Order VII rule 1 (e) of the Civil Procedure Rules in that there is no averment that there have been no previous proceedings over the same subject matter. In response to this ground, the plaintiff claimed that he complied with rule 2 of Order VII. He did not however state whether or not he complied with Order VII rule 1 (e). I have perused the entire plaint and I agree with the submissions of Mr. Khanna, the 5<sup>th</sup> defendant's Counsel that the plaintiff did not comply with Order VII rule 1 (e) of the Civil Procedure Rules. The provision of Order VII rule 1 of the Civil Procedure are couched in mandatory terms. The plaintiff has not asked for time to correct the defect despite the objection having been raised way back in the year 2003. It is also within the knowledge of the plaintiff that this court struck out his suit vide Mombasa H.C.C.C. No. 339 of 2000 on the basis that his plaint did not comply with order VII rule 1 (2) of the Civil Procedure. He therefore knows that he has not complied with order VII rule 1(e). A plaint which does not comply with the above provision is fatally defective.

In the end I will allow the summonses on this ground. Consequently, the plaint dated 5<sup>th</sup> December 2002 is ordered struck out with costs to the defendants.

**Dated and delivered this 21<sup>st</sup> Day of March 2006.**

**J.K. SERGON**

**J U D G E**

In the presence of Miss Osino for the 5<sup>th</sup> defendant,

Miss Odhiambo h/b for Khanna for the 4<sup>th</sup> defendant

N/A for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants

Plaintiff present in person.