



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

**MILIMANI LAW COURTS
Civil Case 1266 of 2004**

NJANGO CHEGE.....1ST PLAINTIFF

RAPHAEL WAWERU CHEGE.....2ND PLAINTIFF

VERSUS

LAWRENCE WAMBAKI MUIRURI.....RESPONDENT

RULING

The plaintiffs brought this suit by way of Originating Summons seeking orders that they be registered as proprietors of the suit property being LR NO. NGENDA/MANGU/134 in place of the defendant having acquired the same by adverse possession.

The Originating Summons was supported by an affidavit sworn by the plaintiffs dated 24th February 2005 which was drawn in plural. Mr. Kinga for the defendant raised a Preliminary Objection on the ground that that affidavit supporting the Originating Summons is defective in that it offends the provisions of Order XVIII Rule 5 of the Civil Procedure Rules and applied for the same to be struck out.

Order XVIII Rule 5 provides as follow:

“5” Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be a distinct portion of the subject.”

Mr. Kinga further submitted that if the affidavit in support of the Originating Summons is defective and is struck out it follows that the Originating Summons ought to be struck out and he prayed that the Originating Summons too be struck out.

It is true that since there are two plaintiffs, the first plaintiff ought to have sought leave of the second plaintiff so that he could swear the affidavit and on behalf of the 2nd plaintiff.

Mr. Wandabwa for the plaintiffs concedes that the affidavit in support of the Originating Summons is defective but submits a pleading ought not be dismissed for want of form and sought leave to amend and

also referred to Order XVIII Rule 7 of the Civil Procedure Rules where court may receive any affidavit sworn for the purpose of being use din any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof.

Deviation from or lapses in form and procedure which do not go o the jurisdiction of the court or prejudice the adverse party in any

fundamental respect ought not to be treated as nullifying the legal instrument thus affected. In those instances the court should use to its higher calling to do justice by saving the proceedings in issue.

In the case of **PETER MBURU ECHARIA VS. PRISCILLA NJERI ECHARIA CIVIL APPEAL NO. 247 OF 1997** (unreported) the Court of Appeal comprised of a bench of 5 judges said this:

We agree that the Notice of Motion is defective but the defect is curable, and for that reason, and Ms Karua having applied for leave to amend the Notice of Motion, we grant leave for the respondent to amend the Notice of Motion so as to comply with the requirements of Rule 42(1) of the Rules of the Court.”

I think the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit. Mr. Wandabwa is granted leave to amend and put right the lapses in the offending affidavit.

Dated and delivered at Nairobi this 11th day of October 2006.

J.L.A. OSIEMO

JUDGE