



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 3374 OF 1994**

**LALI SWALEH LALI**

**(suing through his legal administrator**

FAQIK KAHALE SKEKUWE.....1ST PLAINTIFF/RESPONDENT  
FAQIK KAHALE SKEKUWE.....2ND PLAINTIFF/RESPONDENT  
KHALID BWANA MBERE.....3RD PLAINTIFF/RESPONDENT  
KALUME KATUBU.....4TH PLAINTIFF/RESPONDENT

VERSUS

STEPHEN MATHENGE WACHIRA.....1ST DEFENDANT/RESPONDENT  
OMAR KHAMISI BALLETH.....2ND DEFENDANT/RESPONDENT  
COMMISSIONER OF LANDS.....3RD DEFENDANT/RESPONDENT  
HON. ATTORNEY-GENERAL.....4TH DEFENDANT/RESPONDENT  
LAND REGISTRAR, KILIFI.....5TH DEFENDANT/RESPONDENT  
JAMES RAYMOND NJENGA.....6TH DEFENDANT/RESPONDENT  
WILSON GACHANJA.....7TH DEFENDANT/RESPONDENT  
DIRECTOR OF SURVEYS.....8TH DEFENDANT/RESPONDENT  
ALEXANDRINO KIAMATI NJUKI.....9TH DEFENDANT/RESPONDENT  
SUM K. MWAITA.....10TH DEFENDANT/RESPONDENT  
HAGAI NYAPOLA.....11TH DEFENDANT/RESPONDENT  
DANIEL RICCI.....12TH DEFENDANT/RESPONDENT

**RULING**

The 12th Defendant/Applicant's application by Notice of Motion dated and filed on

11th April, 2003 was brought under Orders XXXIX rule 4, XLIV rule 1(1) and VI rule 13 (1)

(a), (b), (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap.

21). The prayers in this application were as follows:

- (a) that, the order of this Court made on 3rd February, 2003 be discharged and/or set aside;
- (b) that, the orders of 3rd February, 2003 be reviewed;
- (c) that, the plaint herein be struck out and the suit dismissed as against the 12th Defendant.

When this application came up before me for hearing on 18th October, 2004 learned counsel for the Plaintiff, **Mr. Ritho**, said he would raise preliminary objections. His Notice of Preliminary Objection on points of law, dated and filed on 30th May, 2003 had already been served on all the parties, and there was a return of service filed on 15th October, 2004.

What were the points of objection? Firstly, that the pleadings of Defendants numbers 1– 4 and 12

were res **judicata** as those matters had come before the Land Adjudication Officers' Court, a Court of exclusive jurisdiction, and had been the subject of the orders of that Court dated 28th February, 1978. Secondly, that the material facts pleaded in the re-amended Plaintiff had all been admitted by Defendants numbers 1 – 11 under Order VI rule 9; and these include the fact that the defences of Defendants numbers 1 – 4 are res **judicata** as aforesaid. Thirdly, that this Court has no jurisdiction to retry issues which had been tried by the Land Adjudication Officers' Court and determined on 28th February, 1978. Fourthly, that the 6th Defendant's draft defence dated 22nd February, 2002 carries no valid defence to the claims in the re-amended Plaintiff, claims which have been admitted by Defendants numbers 1 – 5 and 7 – 11 in this suit and in other identical suits involving land in the same area. Fifthly, that the 12th Defendant who purchased the suit land from the 2nd Defendant on or about 1st March, 2001 has no valid defence in view of the admission by Defendants numbers 1 – 11 of all the material facts pleaded in the re-amended Plaintiff under Order VI rule 9, and in view of the judgement obtained in more than 20 other identical cases involving land in the same area. Sixthly, the second Defendant sold the suit land when the Court of Appeal orders in Civil Application No. 249 of 1997, and Civil Appeal No. 271 of 1997, dated 7th June 1996 had been made and the Plaintiffs were still in actual possession. Seventhly, the Plaintiffs with their ancestors have been in actual occupation from time immemorial and they have never been disturbed by Defendants numbers 1 – 4 and number 12; and the Plaintiffs have obtained adverse possession of the whole of the suit land against Defendants numbers 1, 2 and 12 under the Limitation of Actions Act (Cap. 22). Eighthly, the 6th Defendant's Chamber Summons dated 12th May, 2003 should be dismissed and the interlocutory judgments dated 4th January, 2002 confirmed. Ninthly, all the defences of Defendants numbers 1 – 4 and 12 should be struck out because they are res **judicata** by reason of the pleadings; the ruling and orders of the Land Adjudication Officers Court dated 28th February, 1978; and the fact that the Plaintiffs have already obtained adverse possession of the suit land under the Limitation of Actions Act (Cap.22). Hence the suit should proceed to formal proof.

While counsel for Defendants No. 3, 4, 5 and 8, **Mr. Raballa** was of the view that the application would not affect the other parties, as it had been filed only by Respondent No. 12, **Mr. Konyango** for the Applicant submitted that the preliminary objection touched on all the 12th Defendants. Counsel submitted that the direction of the preliminary objection would determine the line of defence taken by all the twelve. In **Mr. Konyango's** submission, it was desirable that all the 12th Defendants be heard; and therefore he was seeking direction whether the hearing of the preliminary objection should still proceed.

**Mr. Ritho** for the Plaintiffs stated that the purpose of his client's preliminary objection was to raise objections on points of law, to the several prayers in the 12th Defendant's Notice of Motion of 11th April, 2003. In learned counsel's view, the orders made by Mr. Justice Mbito on 3rd February, 2003 which the 12th Defendant had applied to have discharged, actually affected all the 12 Defendants. He noted that already, there was judgement on record against Defendants No. 5, 7, 8, 9, 10 and 11; but Defendants No. 1 – 3 would not be affected. Counsel stated that past practice has shown that the other Defendants were not interested in these proceedings. Mr. Ritho stated that this matter had come up before the Honourable Mr. Justice Ochieng on 23rd March, 2004 and thereafter, on 28th June, 2004 the learned counsel had compiled relevant notes which he had filed on 25th June, 2004 and served on all counsel on record.

Mr. Ritho noted that there were several preliminary objections on file. The 12th Defendant had purchased the suit premises from the second Defendant in February 2001, while the suit had started much earlier, in 1994. At that time there were three Defendants and this remained the case up to 2000. The Plaintiff had been amended for the first time on 5th October, 1994; but it was amended for the second time in 2000, to bring in seven more Defendants. After the seven new Defendants were served with the re-amended Plaintiff, the old Defendants filed no amended defence. The new Defendants also did not file a memorandum of appearance and defence as required. So the Plaintiffs obtained interlocutory judgement against the new Defendants. The sixth Defendant later got the interlocutory judgement against it set aside. On 7th June, 1996 consent orders were made by **Mr. Justice Ole Keiwua** – that the **status quo** at the suit premises be maintained until final determination of the suit. The effect was to bar a new Defendant from interfering with the

Plaintiffs' occupancy. Later, the first and second Defendants filed a notice of preliminary objection, dated 27th September, 1996; and the third and fourth Defendants did the same on 19th November, 1996. These preliminary objections were heard by **Mr. Justice Ole Keiwua** in March, 1997 and he struck out the Plaintiffs' suit. The Court of Appeal, in Civil Appeal No. 249 of 1997 and No. 271 of 1997 then granted stay, later heard the substantive appeal, and reinstated the suit. The 12th Defendant was not a party in 1994 when the Plaintiffs' suit was first amended; but subsequently the second Defendant sold the suit land to him – after the orders of the Court had been made. **Mr. Ritho** submitted that the effect of those orders was that the second Defendant had no capacity to dispose of the suit land. Counsel submitted that the sale to the 12th Defendant was illegal; for Sections 128 – 130 of the Registered Land Act (Cap. 300) provide that during the pendency of inhibition orders, all parties are required to preserve disputed land until determination of the suit. Counsel submitted that it did not, in the circumstances, lie in the mouth of the 12th Defendant to pray that the Court should strike out the re-amended Plaintiffs' suit and to have the inhibition orders discharged before the suit is heard and determined. **Mr. Ritho** urged that the main suit do proceed to a hearing on the merits. **Mr. Konyango** for the 12th Defendant remarked that his client was enjoined long after the suit had been under way – for the reason that the 12th Defendant purchased the suit property from the second Defendant in 2001. Upon being so enjoined, the 12th Defendant has filed a statement of defence and the Plaintiffs have replied to the same. **Mr. Konyango** stated that the 12th Defendant's Notice of Motion of 11th April, 2003 had sought the striking out of the Plaintiffs' suit and its dismissal as against the 12th Defendant. He stated that the 12th Defendant was a purchaser for value without notice, and he was now the holder of documents of title duly issued. He stated that there had been nothing in the land register to show that certain orders had been issued regarding the suit property. He urged that under the Registered Land Act, the land certificate was conclusive as evidence of ownership, and could not be challenged except for fraud.

**Mr. Konyango** submitted that the preliminary objection was improper, as it addressed issues to which the 12th Defendant was not a party. He also objected to the preliminary objection **because it raised many matters of a factual kind, which could only be addressed through evidence**. To support his argument, learned counsel cited the Court of Appeal decision in **Nitin Properties Ltd v. Jagjit Singh Kalsi & Kaldeep Kaur Kalsi, Civil Appeal No. 132 of 1989**, and also the Court of Appeal decision in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. In the latter case the learned Judges of Appeal had thus stated the law (P. 701):

***“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”***

**Mr. Konyango** submitted that the preliminary objection in this instance was addressing many issues that involved facts and were not strictly matters of law; for instance, the avowal that the 12th Defendant purchased the suit land from the second Defendant without notice is not a pure point of law. Counsel further submitted and, with respect, quite properly, that as an issue such as **adverse possession**, such as asserted in the preliminary objection, referred

to **nature of entry, time, and relations between parties**, it cannot be said that one is concerned with pure issues of law, and hence it is a subject that cannot properly be taken by way of preliminary objection. **Mr. Konyango** contended that the preliminary objection was brought in an attempt to foreclose the outcome of the 12th Defendant's application by Notice of Motion, of 11th April, 2003. The effect would be, counsel submitted, to deny the 12th Defendant his constitutional right to a hearing. He urged that the 12th Defendant be given an opportunity to show why he ought not to be a party to the suit.

**Mr. Raballa** for Defendants numbers 3, 4, 5 and 8 associated himself with the submissions for the Plaintiffs and stated that his own clients had been parties at the Court of Appeal hearing, when it was held that the Plaintiff had an arguable case. He argued that as the 12th Defendant claimed to have purchased

the suit property, and that property was the subject-matter of the suit, it would be improper for the 12th Defendant to seek the dismissal of the suit against himself. Learned counsel urged that the suit be heard on the merits. The substantive matter before the Court at this stage was the 12th Defendant's Notice of Motion of 11th April, 2003. ***This ruling combines my determination of that application with a resolution of the very substantial preliminary objection which was raised on behalf of the Plaintiffs.***

The main suit is old, long and extremely involved, dating back to 1994; entailing several amendments to the pleadings over the years; involving several preliminary objections over the years; entailing a number of interlocutory applications over time; involving interlocutory judgements and appeals therefrom; entailing several different orders made by the Court; and being a matter of major interest for a rather large number of parties.

Features of this kind necessarily introduce complications in litigation and, I would say, by themselves render it prima facie untenable that any one party should consider himself entitled to solutions by interlocutory process. Moreover, consistent compliance with all the procedural rules, in such cases, often proves difficult, and I think in the circumstances, that the Court has a duty to exercise its discretion against any unyielding application of the most detailed procedural stipulations.

Being guided by those principles, I have not been persuaded by the prayer in the 12th Defendant's Notice of Motion of 11th April, 2003 that "the Plaint herein be struck out and the suit dismissed as against the 12th Defendant." Not only is this prayer not consistent with the relevant principles which I have enunciated, but it appears rather too slick to have been conceived in the overall interests of justice. The reason the 12th Defendant was enjoined is that he is the bearer of the title documents for the very suit land which is the basis of these proceedings; and he acquired the same from the second Defendant. How can the 12th Defendant, in those circumstances, be excluded from these proceedings?

Neither would I accept a good number of the contentions carried in the Plaintiffs' preliminary objection of 30th May, 2004. To give but one example, paragraph 9 of that notice of preliminary objection thus reads:

"Strike out all the defences of the 1st – 4th and 12th Defendants because they are **res judicata** the pleadings, ruling and orders of the Court of Exclusive Jurisdiction of Land Adjudication Officers dated 28th February, 1978 and also because the Plaintiffs have already obtained adverse possession of the suit land under [the Limitation of Actions Act], Cap. 22... and order the suit to proceed to formal proof."

Just as contended by counsel for the 12th Defendant, the preliminary objection if granted, would have the effect of denying the several Defendants their rights to a day in Court for the purpose of protecting what they perceive as their lawful claims. This Court cannot allow such a situation to prevail, as it would otherwise fail in its mandate of fair resolution of disputes.

I have to note, again in agreement with counsel for the 12th Defendant, that ***the many complex questions that lie at the centre of the Plaintiffs' preliminary objection are substantially matters of fact***, which can only be properly addressed in a normal trial, with the relevant evidence adduced.

This line of analysis leads me to the inevitable position that I must not only preserve the whole suit, but also set the stage for it to be heard and determined with some urgency. I will make the following orders:

1. The Plaintiffs' "Notice of Preliminary Objection on Points of Law" dated 30th May, 2003 is hereby dismissed.
2. The 12th Defendant's Notice of Motion dated 11th April, 2003 is hereby dismissed.
3. The Plaintiffs shall, within 30 days of the date hereof, secure from the Registry a hearing date for the main suit, hearing notice being served upon all the parties within 10 days after

the date is allocated. The date shall be given on the basis of priority.

4. Costs in the cause.

DATED and DELIVERED at Nairobi this 21st day of January, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Plaintiffs/Respondents: Mr. Ritho, instructed by M/s. S.K. Ritho & Co. Advocates**

**For the 3rd – 5th, 8th Defendants/Respondents: Mr. Raballa, instructed by the Hon. The Attorney-General**

**For the 12th Defendant/Applicant: Mr. Konyango, instructed by M/s. Kariuki Muigua & Co. Advocates**