



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 1693 OF 1979**

**ERASTUS NDUNGU MUNGAI.....PLAINTIFF/RESPONDENT**

**VERUS**

**MUNGAI GACHUI.....1ST DEFENDANT**

**WANJIRU WAWERU.....2ND DEFENDANT**

**TABITHA NDUTA KAHUKI.....INTENDED DEFENDANT/APPLICANT**

**RULING**

The application by Chamber Summons, dated and filed on 29th April, 2004 arises from the decision which this Court had delivered on 26th March, 2004 in relation to the Plaintiff's Originating summons application of 4th June, 1979. On the occasion of hearing the case, neither party was represented by counsel; but this time the Applicant is an intended Defendant and has instructed the firm of M/s. D.N. Mburu & Co. Advocates.

The application is made under Orders XXXIX, rule 2; I, rule 13; XLIV, rule 1; XXIII, rules 4(1), 4(3), 8(1) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21).

The prayers are as follows:

- (a) that ***Tabitha Nduta Kahuki*** be joined as a Defendant in this suit;
- (b) that, the Chief Land Registrar and the District Land Registrar, Muranga be restrained from implementing the orders issued by this Court on 26th March, 2004 till the hearing and final determination of this application;
- (c) that, the Court do review and set aside the ruling and orders delivered on 26th March, 2004 pending the hearing and determination of this application;
- (d) that, the costs of this application be provided for.

Several grounds are stated in support of the application:

- (i) that, the suit had proceeded to hearing on 2nd February, 2004 in the absence and without the knowledge of the intended Defendant herein, yet she had an interest in this suit as a purchaser of LOC.5/KABATI/566;
- (ii) that, had the Plaintiff/Respondent informed the intended Defendant of the hearing, the said

**Tabitha Nduta Kahuki** would have applied to be joined as a Defendant herein and thus defend her interest as a purchaser for consideration;

(iii) that, the intended Defendant was already in possession of a valid title deed to LOC. 5/KABATI/566; and if the Plaintiff had pointed out this fact to the Court, the orders made over LOC.5/KABATI/566 would not have been made;

(vi) that, the Plaintiff admitted in the evidence never having occupied LOC.5/KABATI/566;

(v) that, the Plaintiff/Respondent acted in bad faith at the time of the hearing of the suit, by failing to inform the Court that - ·

- both the Defendants were long deceased and no substitution had been made;
- · the suit had already been dismissed for want of prosecution; ·
- the suit had abated, because one year had already elapsed since the death of the Defendants, but there had been no substitution of parties;

(vi) that, had the Court been apprised of the pertinent facts, it would not have made the orders it did make.

Further support for the application is in the evidence of **Tabitha Nduta Kahuki**, by affidavit dated and filed on 29th April, 2004. She avers that the suit involves two parcels of land, LOC. 5/KABATI/566 and LOC.5/KABATI/567. She says she is the registered proprietor of LOC.5/KABATI/566 and is a purchaser thereof who paid consideration. She avers that her entitlement to LOC.5/KABATI/566 has all along been with the full knowledge of the Plaintiff/Respondent. When the matter was heard on 2nd February, 2004 the Plaintiff had given no information to the deponent, regarding the hearing; and thus she lost the opportunity to apply to be made a party.

The deponent believes to be true her counsel's advice that the Plaintiff had failed to disclose to the Court that the Defendants in the suit proceedings had died, and so no orders were made for the substitution of the parties. She also believes to be true the information given by her advocate on record, that the Plaintiff failed to disclose to the Court that this suit had already been dismissed by the Court for want of prosecution. The deponent stated that she stood to suffer irreparable loss and damage if the orders of the Court now on record are not evacuated.

This matter seems to have been both important enough and complex enough to have called for representation by counsel right from the beginning. Unfortunately the Plaintiff who had appeared in person had not fully appreciated the importance of certain fundamental factual disclosures. So for instance, he failed to disclose that both Defendants were long dead; and he did not mention that the present Applicant appeared to have a major interest in the resolution of the dispute, even though she was not a party.

Learned counsel, **Mr. Mburu** relying on the depositions of the Applicant, has repeatedly stated that the Court had already acted on its own motion to dismiss the suit for want of prosecution. This kind of statement also adds to the confusion because the latest records entered before 2nd February, 2004 when the matter came before me, carry no orders of dismissal. Before the late **Mr. Justice Pall** , on 19th December, 1994 the matter was stood over generally. And before the Honourable **Mr. Justice Sheikh Amin** , on 28th July, 1997 again it was stood over generally. Nothing further took place on the file until 23rd January, 2004 when the matter was listed before me for hearing. There is *no record of dismissal* that I can find on file.

I have carefully read the Intended Defendant's application by Chamber Summons of 29th April, 2004, the prayers, the supporting grounds and the depositions. I have also heard the submissions of learned counsel, **Mr. Mburu** , and noted that he took due action to serve the application and the hearing notice. On that basis I have formed the clear impression that the ruling and the orders which I had given on 26th March, 2004 cannot be allowed to stand. *A Court decision stands as a final decision only when a proper*

*hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity. As those conditions had not been satisfied when I heard the matter and that hearing led to the said ruling, it is apparent that some of the most crucial matters of fact were inadvertently or deliberately distorted, and so a just outcome could not have been arrived at. It is apparent, for instance, that some of the parties were already dead but were not substituted because the Court was not apprised of the prevailing situation.*

I, therefore, grant prayers Nos. 2, 3 and 4 of the Intended Applicant's application by Chamber Summons of 29th April, 2004.

Hearing of this matter shall begin afresh after the Plaintiff has taken action as required under Order XXXIII, rule 3 for the substitution of the deceased parties.

This matter is, in the circumstances, stood over generally; parties have the liberty to apply if need be.

The costs shall be in the cause.

Orders accordingly.

DATED and DELIVERED at Nairobi this 4th day of February, 2005.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Mwangi**

**For the Intended Defendant/Applicant: Mr. Mburu, instructed by M/s. D.N. Mburu &**

**Co. Advocates**

**Plaintiff/Respondent absent and unrepresented**

**1st and 2nd Defendants - awaiting substitution.**