



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**Civil Case 39 of 2002 (OS)**

**IN THE MATTER OF LAND PARCEL NOS. BUNYALA/  
BUKOMA/45, 52 AND 62**

**AND**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA**

**BETWEEN**

**EDWARD ODEMBO AJULU )**

**BENEDICT MAKHULO ).....APPLICANTS**

**VS**

**WANGA ONIANGI.....RESPONDENT**

**RULING**

The firm of Ashioya and Co. Advocates for the applicants sought to withdraw the 1st applicant's claim against the defendant in a notice of withdrawal filed pursuant to the provisions of Order XXIV rules 1 and 2 of the civil procedure rules. The main reason advanced in support of such an action is that the 1st applicant, Odembo Edward Ajulu is dead.

Mr. Balongo who appeared for the Defendant/ Respondent opposed the withdrawal and urged this court to strike the whole action because the affidavit in support of the originating summons was purportedly sworn by a dead person.

Mr. Ashioya retorted that this court can only strike out the suit under Order XX IV if a formal application is made.

The facts leading to the dispute at hand started when the two applicants namely: Edward Odembo Ajulu and Benedict Makhulo filed an originating summons under the provisions of section 38 of the Limitations of Actions Act where they sought to be decalared to have acquired L.R. Nos.

BUNYALA/BKOMA/45, BUNYALA/BUKOMA 52 and BUNYALA BUKOMA/62 by adverse possession. The originating summons is dated 9th day of August 2002. The summons is supported by two affidavits one is said to be sworn by one Edward Odembo Ajulu on 15th August 2002 and another by Benedict Makhulo on the same date.

The former affidavit sworn by Edward Odembo Ajulu contains the annexures required under Order XXXVI rule 3 (c) (i) of the Civil Procedure rules. The later however does not contain any annexures.

I have been urged to grant leave to the applicant to withdraw the 1st applicant's claim against the Respondent because he is already dead. It is not denied that the proceedings were filed when Edward Odembo Ajulu was already dead. It is not denied that he died on 10th March 1988 and there is no evidence that he rose from death to file the affidavit in support of the originating summons. Who then signed the affidavit on behalf of the deceased? Such a person obviously committed perjury. The only persons who can answer the question are Mr. Ashioya and his surviving client Benedict Makhulo. None has explained to this court the circumstances under which such an affidavit was sworn. There is even a verifying affidavit allegedly sworn by the late Edward Odembo Ajulu. Whoever deposed the affidavits is a false witness. He committed forgery. Such acts cannot be countenanced by a court of law. The law contemplates that a suit which is being discontinued under Order XXIV was competent in the first place. There was no competent matter before the court. I agree with the submissions of Mr. Balongo that the best is to cleanse its record by striking out the claim which was filed on pretence.

I am convinced that the 2nd applicant and his legal advisers have not been candid to this court over the mystery of the pleadings. This court has no option in such a case but to have the whole pleading struck out. The same is tainted hence no amount of amendment will cure. Let the real parties begin the matter a fresh. This court in such circumstances can even act *ex debito justitiae* in view of the material non-disclosure by the applicants and their attorneys.

Consequently the originating summons dated 9th August 2002 is ordered struck out with costs to the Respondent.

**DATED AND DELIVERED THIS 4th DAY OF March 2005**

**J.K. SERGON**

**JUDGE**