



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CIVIL CASE 65 OF 2003**

**OCHIENG SESE ..... PLAINTIFF**

**VERSUS**

**JOHNSON OCHARO ..... DEFENDANT**

**RULING**

The plaintiff OCHIENGI SESE sued the defendant seeking him to be evicted from land No.KITARU SCHEME/735 and the registration of the land in the defendants name to be cancelled and the same to be registered in his name. When the matter came up for hearing the counsel for the defendant Mr. Nyariki raised three preliminary points of law. First he sought the plaint to be struck out as verifying affidavit accompanying it offends provisions of S.34 and 35 of the Advocates Act in that it is not endorsed with the name of the person or firm which drew and filed it.

Secondly he submitted that the plaintiff lacks locus standi to bring the suit as he brought it on behalf of the Estate of his late father SESE SAISI yet he had not obtained letters of Administration.

Thirdly it was submitted that the suit was time barred as the defendant has been in possession of the suit land since 1966. No suit was instituted within 12 years.

Mr. Sagwe submitted that the affidavit verifying the plaint was proper as per Order of rule 3(a) CPR. Further under Order 18 Rule 7 CPR Court can accept an affidavit even if it has irregularities. The omission was just a formality.

Secondly he submitted that plaintiff applied and obtained letters of Administration on 17th June 2002 and as such he has locus standi to bring the suit. As for the third issue he said that they had pleaded fraud in para. 7 of the plaint and as the suit was not time barred.

There is no dispute that the affidavit verifying the plaint is not endorsed with the name of the person who drew and filed it. It therefore clearly offends provisions of S.35

(1) Advocates Act which states:

“Every person who draws or prepares or causes to be drawn or prepared any document or instrument referred in S.34(1) shall at the same time endorse or cause to be endorsed thereon his name and address of the firm of which he is a partner and any person omitting to do so shall be guilty of an offence and liable to a fine not exceeding five Hundred shillings in the case of an advocate.”

The provisions are mandatory. A person drawing or causing to be drawn a document shall endorse it. S.34(1) tabulates documents or instruments which must be so endorsed. They include documents “relating to any legal proceedings.”

An affidavit is a document relating to legal proceedings and must therefore conform with provisions of S.35 (1) of the Act. The affidavit in this case do not conform. The plaintiff cannot find refuge in provisions of Order 18 rule 7 CPR.

Provisions of S.35 of Advocate Act are in an act of Parliament. The omission therefore is not a mere irregularity as Mr. Sagwe submitted.

I find the rulings of my brothers in the case of BARCLAYS BANK OF KENYA Ltd VS DR. SOLOMON OTIENO ORERO HCCC (MILIMANI) NO.1736 of 2001 and JOHAN DISTEBEGER VS JOSHUA KIVINDA MUINDI & ANOTHER HC.MISC.

APPL.NO.1587 of 2003 on this point valid. Failure to endorse the affidavit is not an Irregularity to form and provisions of Order 18 rule 7 CPR cannot cure the defendant. This being so the courts find the affidavit not proper and expunge it from record. Once this has been done the plaint is left with no verifying affidavit Order 7 rule 1(2) provides.

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

The plaint is left without any affidavit and therefore offends the said rule. Rule 3 of the same order provides that a plaint filed without a verifying affidavit be struck out. The plaint by the plaintiff will therefore have to be struck out as it is not supported by a verifying affidavit.

As to the 2nd ground the plaintiff through counsel stated that he obtained Letters of Administration. This may be so but no copy was produced. This issue was raised in the defence and no reply to the defence was filed. Further the plaintiff filed his list of documents he intended to rely on 4th July 2003 after defence was filed. Grant of Letters of Administration is not one of those documents.

Defendant has been in the land since 1966 a fact not disputed. No suit was filed within 12 years. Clearly suit was brought out of time. True the plaintiff in Para. 7 of the plaint talked of fraud on part of the defendant.

However there are no particulars of fraud specifically pleaded. Order 6 rule 4 provides clearly that particulars of fraud must be specifically pleaded. No such particulars are given and as such the plaintiff cannot rely on issue of fraud. Cause of action arose in 1966 when the plaintiff’s father was still alive and not in 1998 when he died.

The suit was filed in April 2003, 37 years later. It is time barred.

From the above therefore I strike out the plaint with costs to the defendant.

**Dated 26th April day of 2005**

**KABURU BAUNI**

**JUDGE**

**cc. Mobisa**

**Mr. Sagwe for Mokamba for Plaintiff**

**N/A for Defendant.**