



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**Civil Case 271 of 2003**

**HON. HENRY RUNG'UNO CHEMBOIWO...PLAINTIFF**

**VERSUS**

**WILFRED CHEMOLO CHEPKURGAT**

**CO-OPERATIVE BANK OF KENYA LTD.**

**MOROP FARM COMPANY**

**LTD.....DEFENDANTS**

**R U L I N G**

The Chamber Summons dated 23/8/04, under Order 6 rule 13 (1) (b) and (d) of the Civil Procedure Rules, and Section 3A of Cap.21, Laws of Kenya, seeks two orders:-

- 1. That the Plaintiff's suit be struck out with costs.**
- 2. Costs of the application.**

The application is supported by an Affidavit of Regina K. Anyika of even date and on the grounds that:-

- (i) The suit is frivolous, vexatious and an abuse of the court process.**
- (ii) At the time the suit property was charged to the 2nd Defendant, there was no interest whatsoever noted in the register in favour of the Plaintiff.**
- (iii) The 2nd Defendant's rights over the said land cannot in any way be defeated or impeached by the Plaintiff as the 2nd Defendant has a legal charge over the said land.**

In opposition, the Plaintiffs Replying Affidavit, dated 10/9/04, Avers, *inter alia*, that:

- 1. The 1st Defendant is his son-in-law and he obtained the title in respect of the suit property fraudulently.**
- 2. Plaintiff had given the 1st Defendant possession of the suit property in 1980 to lease at**

**the rate of K.shs.30,000/= p.m. which Plaintiff is claiming against the 1st Defendant in this suit.**

**3. The circumstances of the fraud by the 1st Defendant are particularized in Plaintiff's statement of claim in the suit herein.**

**4. That Plaintiff did not realize that the 1st Defendant had committed the said fraud until he, Plaintiff, did search in the Nakuru Lands Office, as averred in the Plaint.**

**5. The 1st Defendant has not filed any defence against the Plaintiffs allegations of fraud, and there is already an interlocutory judgment against the 1st Defendant, entered by this Court.**

**The 1st Defendant only filed appearance through his lawyers, but did not file any defence within the stipulated period.**

**6. The 1st Defendant attempted to set aside the interlocutory judgment, but the application was dismissed by this court, and the suit is fixed for formal proof on 7/10/04, and the 2nd Defendant was invited to the fixing of that date.**

**7. That Plaintiff has even talked with the 2nd Defendant Bank, on settling the matter out of court, and the negotiations have crystallized where the 2nd Defendant agreed that Plaintiff pays K.shs.500,000/= in full and final settlement of the secured loan by the 1st Defendant on the fraudulently obtained title – [then enclosed copies of the correspondence with 2nd Defendant].**

**8. The court cannot drive Plaintiff out of the seat of judgment when he has already proved fraud against 1st Defendant.**

**9. The application is ill-conceived, premature and bad in law, and it should be dismissed with costs.**

I have carefully gone through the pleadings and considered the submissions by counsel for both sides.

From the pleadings, I have come to the conclusion that this application to strike out the suit herein, must fail and be dismissed with costs to the Plaintiff. This is because of two overriding factors. The arguments based on the provisions of Chapter 300, Laws of Kenya, cannot hold water where fraud has been alleged and particularized in the Plaintiff's claim for the suit property. There is an interlocutory judgment in favour of the Plaintiff, which the Defendants failed to have set aside, and while the formal proof was being awaited, the 2nd Defendant filed this application. To grant this application – that is strike out the suit herein, would be a back door entry by the Defendants to a suit where an interlocutory judgment against the 1st Defendant has been granted and a date for formal proof had been agreed and scheduled.

The argument that the Plaintiffs interests were nowhere in the documents when the 2nd Defendant granted the loan facility secured on the suit premises, overlooks a key factual situation as to who was the proprietor of the head lease when the Plaintiff gave the land to the 1st Defendant, on terms which have not been contraverted. That is how the Plaintiff's name or interests are not, on that Title Deed, which again, was fraudulently obtained by the 1st Defendant before the property was charged to the 2nd Defendant.

Of even greater concern is the fact that the parties to the suit agree that the title deed was fraudulently obtained by the 1st Defendant, and negotiations had been finalized on how the loan by the 2nd Defendant was to be sorted out and the charge discharged. This is clearly so in the exchange of letters between the 2nd Defendant, letter dated 27/4/04, and the acknowledgement by the 2nd Defendant of receipt of K.shs.500,000/= vide its letter of 4/6/04, even though without prejudice, as a follow-up to paragraph 2 of

the letter of 27/4/04.

In light of all the foregoing reasons, it is my humble view that to grant the application herein, would be to unseat the Plaintiff from the seat of judgment and fairness when he already has an interlocutory judgment in his favour and all that was remaining is formal proof. Parties are bound by their pleadings [and the annexures thereto]. Having agreed to receive, and actually received, K.shs.500,000/= as final settlement for the loan granted on the strength of the fraudulently obtained title deed, it sounds very strange that the 2nd Defendant should file the application herein, and pray for reliefs that it now seeks.

The application is mischievous, frivolous and an abuse of this court's process.

Accordingly, I grant the following orders:-

- 1. Dismiss the application herein, in favour of the Plaintiff/respondent, and against the 2nd Defendant/applicant.**
- 2. Order that the 2nd Defendant/applicant do pay costs for this application to the Plaintiff/respondent.**
- 3. Order that the suit proceeds to formal proof as earlier ordered.**

**DATED** and delivered in Nairobi, this 24th day of June 2005.

**O.K. MUTUNGI**

**JUDGE**