



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 498 of 2004**

**MUTHITHI INVESTMENTS LIMITED..... PLAINTIFF**

**VERSUS**

**ANDREW S. KYENDO..... 1<sup>ST</sup> DEFENDANT**

**AMINA MOHAMMED..... 2<sup>ND</sup> DEFENDANT**

**WILLIAM K. MWANGANGI..... 3<sup>RD</sup> DEFENDANT**

**ROSEMARY NYOKABI..... 4<sup>TH</sup> DEFENDANT**

**JAMES BANGA..... 5<sup>TH</sup> DEFENDANT**

**MESHACK O. AMBUKA..... 6<sup>TH</sup> DEFENDANT**

**BERNARD MUTTAHA..... 7<sup>TH</sup> DEFENDANT**

**W. OKEYO MBATA..... 8<sup>TH</sup> DEFENDANT**

**J.M. KAGAI..... 9<sup>TH</sup> DEFENDANT**

**JANE WANGECI..... 10<sup>TH</sup> DEFENDANT**

**RAPHAEL K. THIMBA..... 11<sup>TH</sup> DEFENDANT**

**MARY N. KAGO..... 12<sup>TH</sup> DEFENDANT**

**DICK OUMA OCHIENG..... 13<sup>TH</sup> DEFENDANT**

**DAVID AUMA..... 14<sup>TH</sup> DEFENDANT**

**PATRICK NDIRANGU..... 15<sup>TH</sup> DEFENDANT**

**SAID ALI ABU..... 16<sup>TH</sup> DEFENDANT**

**SAMUEL NGATIA..... 17<sup>TH</sup> DEFENDANT**

JAMES NJOROGE..... 18<sup>TH</sup> DEFENDANT  
MARY NDUKU KIOKO..... 19<sup>TH</sup> DEFENDANT  
MAINA MUTAHI..... 20<sup>TH</sup> DEFENDANT  
JOHN MWAURA WAINAINA..... 21<sup>ST</sup> DEFENDANT  
MUDIA MUCHEMI..... 22<sup>ND</sup> DEFENDANT  
NAMAN OGEMBO OGWENO..... 23<sup>RD</sup> DEFENDANT

### RULING

The application before me was filed by the Plaintiff/Applicant on 5<sup>th</sup> July 2004 under Order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules and S. 3A of the Civil Procedure Act. The Applicant seeks to strike out the defence filed by the 1<sup>st</sup> to 12<sup>th</sup> Defendants/Respondents on 16<sup>th</sup> June 2004 and the additional one of the 5<sup>th</sup> defendant alone filed on 11<sup>th</sup> June 2004. The Plaintiff also prays for costs.

The grounds on which the application is based are that the defence is a mere denial of facts, since Plaintiff is the registered owner of the suit premises, namely, L.R. No.23917 Nairobi and that the Defendants have admitted on oath that they have settled and put up structures on the premises from which the Plaintiff by his plaint seeks their eviction and restraining orders. The applicant also argues that the two defences are contradictory as relates to the 5<sup>th</sup> Defendant who is included in the joint defence as well. The Applicant in its supporting affidavit sworn by its Managing Director Eric Maina has annexed documents to prove its ownership of L.R. No. 23917 among them a Court order dated 8<sup>th</sup> July 2000 in which the Applicant herein was declared the owner of the land in dispute in H.C.C.C. No. 457 of 1999.

The Defendants/Respondent's main defence is that the Applicant holds the title to the suit premises irregularly the same having been obtained through fraud. Paragraph 4 of the Defence of 16<sup>th</sup> April 2004 particularly states as follows.

**“4. The 1<sup>st</sup> to 12<sup>th</sup> Defendants aver that if the Plaintiff has any documents in respect of L.R. No.23917 then the same are phoney and/or were obtained irregularly and do not vest any ownership on the Plaintiff.”**

In his submissions, Counsel for the Respondents stated from the bar that the Respondents settled on the land under presidential directive and with the authority of the City Council. All he said about the Court order is that it is suspect. With respect I find Counsel's comment about this Court's order rather unbecoming as it suggests fraudulent dealings on the part of the Court. Counsel knows that the appropriate course to take where one is dissatisfied with an order of the Court is to move the Court to either set the judgment aside in a review application or on appeal. That the Respondents may not have been parties in H.C.C.C. No. 457 of 1999 does not give them any right to adopt an abusive attitude towards the Court in regard to its orders.

Much as I agree with the Respondents that striking out of pleadings ought to be allowed only in the clearest of cases, it is clear to me that the defence of 16<sup>th</sup> April 2004 falls under that category in that the order of the Court vesting ownership on the Applicant cannot be said to be “phoney and/or irregularly obtained” when the same remains unchallenged. It is true the court should allow a party who alleges fraud an opportunity to establish and prove the same by evidence adduced at a trial but, a defence which is obviously unsustainable or unarguable is one which ought not to be allowed. The Court of Appeal in NITIN PROPERTIES LTD –vs- JAGJIT SINGH KHALSI & ANOR CIV. APP. No.132 of 1989 held that the Court ought to strike out a pleading which is “incontestably or hopelessly bad.” I find the defence herein to be so since in the presence of the Court order relied upon by the Applicants and the

admission by the Defendants that they have entered the Applicants land, settled thereon and put up structures on the same, the defence as it stands is a sham and incapable of cure by amendment or otherwise. Moreover, the said Defence does not particularize the alleged fraud as required under Order VI Rule 8 (1) (a). In the premises I find that this application succeeds. I allow the same and grant the orders sought in paragraph 1 and 2 of the application, the latter order being granted at the request of the Counsel for the Respondents made during his submissions herein.

Costs of the application shall be borne by the 1<sup>st</sup> to 12<sup>th</sup> Respondents.

Dated, Signed and Delivered at Nairobi on 17<sup>th</sup> day of June 2005

**M.G. Mugo**

**Judge**

**In the presence of:**

***Ms Kilonzo h/b for Kariuki for the Plaintiff/Applicant***

***Mr. Gichugi for the Defendants/Respondents***