

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 86 OF 2002

MUASYA MUOKI WAVAI & ANOTHER.....PLAINTIFFS

VESUS

MUTISO MUMO KALAI.....DEFENDANT

R U L I N G

At paragraph 7 of the defendants defence the defendants gave notice that they would raise a preliminary on the issue of jurisdiction. Notice of preliminary objection was filed on 24.2.2003 to the effect that the suit is incompetent and an abuse of court process because the 1st plaintiff died on 22.5.1997 as per letter from the chief and burial permit produced in court and that the verifying affidavit in support of the plaint is a fraud since it was sworn on 3.7.2002 when the 1st plaintiff was long deceased.

The counsel for plaintiff was present for the hearing of the Preliminary Objection but claimed not to be prepared with a reply to the Preliminary Objection. He was given time by the court from 4.12.2003 till 11.12.2003. He never turned up on 11.12.2003. The court will rule on the Preliminary Objection without a response from the plaintiffs counsel.

A copy of a burial permit was produced by defendants counsel which indicates that Mwasya Mwoki Wavai the 1st plaintiff died on 23.5.1997.

Annexed to it is a letter from Assistant Chief's Office Kaani sub-location stating that the 1st plaintiff was a resident of that area and is deceased as indicated in the burial permit. The plaintiffs counsel has offered on evidence to the contrary.

The verifying affidavit sworn on 3.7.2002 when the suit was filed is false and contrary to provisions of order 7 Rule 2 which requires that a verifying affidavit must be sworn by a person filing the suit who must be alive. No substitution of parties has been sought. In any case by the time the suit was filed the 1st plaintiff was long dead. The court finds therefore that there is no suit before the court it having been filed by a non existent person and the verifying affidavit having been falsified. The Preliminary Objection is sustained and the suit is hereby struck out with costs to the defendants.

Dated, read and delivered at Machakos this 28th day of January , 2004.

R. WENDOH
JUDGE