



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT ELDORET  
CIVIL SUIT NO. 248 OF 2000**

**TRUFOSA C. MUDEMBEI .....  
PLAINTIFF**

**VERSUS**

**JOHN K. MALEMBI..... 1ST  
DEFENDANT**

**SETTLEMENT FUND TRUSTEES..... 2ND  
DEFENDANT**

**RULING**

This suit, which was filed on 23.10.2000, revolves around the ownership of Parcel No. **KAKAMEGA/MABUSI/14** ( hereinafter called the “subject land”), which was originally managed by the Settlement Fund Trustees and is now registered in the name of John Malembi. I shall herein after refer to the Settlement Fund Trustee as the “SFT” and to Malembi as the 1st defendant.

The suit has been brought by Trufosa Cheredi Mudembei, the widow of William J. Mudembei, who she claims, was the original allottee of the subject land, and who repaid the S.F.T. Loan, and later disposed the land to one Machungo.

Trufosa, who I shall hereinafter refer to as ‘the plaintiff’, claims that SFT and the 1st defendant acted fraudulently in that they ignored here husband’s claim to the said property and proceeded to have it registered in the 1st defendant’s name secretly and illegally through forged documents.

S.F.T. and the 1st defendant dispute the plaintiff’s claim, and the 1st defendant who has furnished evidence that he was registered as the proprietor of the subject land on 25.3.1998, has now raised a preliminary objection to the suit.

The grounds upon which the preliminary objection is founded are that the suit is an abuse of the process, that the plaint is not duly verified and that the suit is time barred. The last ground was however nor urged before me during submissions and I can safely assume it was abandoned.

I have taken into account the submissions of both counsels and I do note that in H.C.C.C (Eldoret) 78 of 1998, Charles Machungo sued this 1st defendant and S.F.T. Trufosa then moved the court seeking to be joined as a party to that suit as a plaintiff, on the ground that her husband, who was the original allottee of the subject land had died prior thereto in June 1982. Through her application was granted vide a ruling delivered by the Hon. Lady Justice Nambuye, in 1998, it however seems to have hit a snag, following an appeal and the Court of Appeal decision, that it was a nullity as it had not been dated and signed in open court at the time when it was pronounced.

In my mind, the effect of declaring of ruling anullity meant that the same could be effected or enforced, and in the circumstances, plaintiff could not, and was never joined as a plaintiff in H.C.C.C.(Eldoret) 78 of 1998. That being the case then, I am inclined to agree with Mr. Onyinkwa, learned counsel for the plaintiff herein, that bearing in mind the decision of the Court of Appeal, it cannot be said that this suit is an abuse the process in which case, her deposition in the verifying affidavit that “ *I am aware of another suit filed by Charles Machungo in this court claiming the same parcel of la nd but my efforts to be made a party in that suit have so far proved difficult and I now want to file my own suit directly*”, is correct for all purposes intent.. She cannot therefore be faulted on that account.”

Another issue which was urged before me, and which I am inclined to determine, is whether a preliminary objection can be raised in the manner in which the plaintiff did, as it was the submission of Mr. Onyinkwa that his client was denied an opportunity to reply to the issues raised therein by way of a replying affidavit. I can only shed light to the issue by re-emphasizing that *“a preliminary objection can only be raised only in a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained, or if which is sought is the exercise of a judicial discretion ”* (Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd (1960) EA 696).

The issues now being raised in the preliminary objection are not pure points of law, there are also points of facts. They cannot therefore be raised by way of preliminary objection.

The other issue which arises from the preliminary objection is whether the suit herein is duly verified. Mr. Gicheru urges the court to find that though there is a verifying affidavit on record, the plaintiff has not confirmed that all averments in the plaint are correct. I have looked at the deposition in the verifying affidavit, in which the plaintiff has reiterated some of the issues raised in the plaint and for which she finally depones that *“what is deponed by the above is true to the best of my knowledge, information and belief”* True, and I am inclined to agree with Mr. Gicheru, the verifying affidavit falls short of the required standards in that it doesn't verify all the averments contained in the plaint. Issues pertaining to the alleged fraud by the defendants the alleged illegal and unlawful acquisition by the 1st defendant, have not been verified. That in itself renders the verifying affidavit incompetent and the same ought to be struck out for contravening the requirements of Order 7 rule 1(2) which stipulates that: *“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint. ”* Indeed the legal position is that such an affidavit cannot lie. I do in the circumstances strike it out which would leave the contents of the plaint unverified and which if I understood Mr. Gicheru well, would mean the striking out of the plaint. But I am also well minded of the fact that the court has a discretion in the circumstances to allow the plaintiff to file a proper verifying affidavit. I do, in the interests of justice, order that the plaintiff do file and serve a verifying affidavit within the next 21 days.

The defendant shall otherwise have the costs of the application.

Dated and delivered at Eldoret this 12th day of May 2004.

**JEANNE GACHECHE**

**JUDGE**

Delivered in the presence of;