



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL CASE NO. 317 OF 2002**

**SABRY OMAR HASHIM.....PLAINTIFF**

**=V E R S U S=**

**1. MOHAMMED HASSAN.....1ST DEFENDANT**

**2. KASSIM HASSAN.....2ND DEFENDANT**

**R U L I N G**

By application dated 27/1/04 brought under Section 10 Judicature Act, Cap.8. And also under Order IXA rule 10 & 11, Order 21 rules 22 and Section 3A and 91 of Civil Procedure Act, Cap.21. The main order sought is for setting aside interlocutory judgment entered herein on 11/12/2003 and to allow the Defendant to file Defence out of time. Application is grounded on the grounds set out in the application and that the failure to take necessary steps to file defence was due to the mistakes and omissions of the advocates then acting for Applicant and that the suit is based on fraud and it is just that the Defendants should be heard.

It is to be noted that the dispute concerns land, the title and possession of which is now in the Respondent. However, the law does not prohibit a party from challenging a title where fraud is alleged and proved. In this case the Defendants were charged with criminal cases in respect of the transaction but were acquitted on appeal by this court. There is remedy if the Defendants are successful.

On the facts of this case it is my view that the dispute is so fundamental that if the contract of sale is invalidated the Respondent has nothing to stand on. Title Deed cannot confer an interest in land if not properly grounded on an agreement of purchase. Any agreement can be invalidated if the court is satisfied that the same was not entered lawfully. In the circumstances and seeing that the Applicants were let down by their legal advisers I exercise my discretion and set aside judgment. The Defendants shall be at liberty to defend the suit.

I notice in HCC. No. 244 of 2003 I allowed an application to strike out the suit on the ground that that suit was raising similar issues as in this suit and therefore this suit being first in time was sustained. There is exhibited now a Notice of Appeal against that my ruling. It is not clear whether that Appeal has been pursued.

It is not the duty of the court to pursue a policy whereby an aggrieved party is kept out of the judgment seat.

As I have said above the circumstances of this suit demands that the Defendants be given a chance to be heard. However, they shall pay to Respondent/Plaintiff all throwaway costs.

Judgment is therefore set aside and orders granted as prayed. Leave is therefore granted to the

Applicants to file defence within the next seven days from the date hereof. Costs to the Respondent.

Dated this 16th day of July, 2004.

JOYCE KHAMINWA

J U D G E

Mr. Were

I apply for a copy of Ruling and proceedings. I apply for stay of order of court. I apply for leave to appeal. Court

- 1) Right of Appeal is as of right.
- 2) Copies to be provided upon payment of copying charges.
- 3) Temporary stay for 7 days is granted to make a formal application.

JOYCE KHAMINWA, J.

16/7/2004

Khaminwa, J.Chege – Court Clerk

Mr. Were – for Ananda

N/A – for Oddiaga

Ruling read in their presence in Open Court.

JOYCE KHAMINWA, J.