



**Kalama (Suing as the Personal Representative of the Estate of Victor Karani Mkunzo) v Mwaro & 4 others (Environment & Land Case 5 of 2018) [2024] KEELC 1244 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1244 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 5 OF 2018  
MAO ODENY, J  
MARCH 5, 2024**

**BETWEEN**

**GLADYS KADZO KALAMA ..... PLAINTIFF  
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF VICTOR  
KARANI MKUNZO**

**AND**

**CHANGAWA SHADRACK MWARO ..... 1<sup>ST</sup> DEFENDANT  
PATTERSON GONO KALAMA ..... 2<sup>ND</sup> DEFENDANT  
MOMBASA CEMENT LTD ..... 3<sup>RD</sup> DEFENDANT  
REGISTRAR OF LANDS OFFICE IN KILIFI ..... 4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 11<sup>th</sup> January 2018 and amended on 5<sup>th</sup> August 2021 the Plaintiff herein sued the Defendants seeking the following orders;
  - a. An order of permanent injunction restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants from disposing, selling and or in any other manner dealing with plot No. Kilifi/Roka/104.
  - b. A declaration that the parcel of land number Kilifi/Roka/104 belongs to the plaintiff.
  - c. An order compelling the Land Registrar Kilifi to cancel the entries in the register for plot number Kilifi/Roka/104 and register the same in the name of the plaintiff.



- d. An order that in the alternative the 1<sup>st</sup> and 2<sup>nd</sup> defendant jointly and severally do refund the purchase price together with interest at bank rates from the year 1989. (sic)
  - a. General damages for breach of contract.
  - b. Any other or further relief that this court may deem just and fit to grant.
  - c. Costs of the suit generally and severally.
2. The 1<sup>st</sup> and 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants filed their statements of defence and denied the averments in the plaint and sought that the Plaintiff's suit be dismissed with costs.
3. The 3<sup>rd</sup> Defendant filed its statement of defence dated 7<sup>th</sup> February 2018 where it denied the averments in the plaint and stated that it conducted due diligence before purchasing the suit property. The 3<sup>rd</sup> Defendant also stated that the 2<sup>nd</sup> Defendant's title was a first registration which cannot be impeached.

### **Plaintiff's Case**

4. PW1 Gladys Kadzo Kalama adopted her Witness Statement dated 10<sup>th</sup> January 2018 and stated that she was the widow of the late Victor Karani Mkunzo who purchased the suit land vide an agreement dated 22<sup>nd</sup> April 1989 for a consideration of Kshs. 33,000/- from Changawa Shadrack Mwaro which they paid by instalments. It was her evidence that the 1<sup>st</sup> Defendant acknowledged receipt of the amounts paid.
5. PW1 further stated that they conducted due diligence before they purchased the suit property and were informed that the 1<sup>st</sup> Defendant had purchased the suit property from Amir Bakari Ngeo for Kshs. 13,000/=. She testified that the 1<sup>st</sup> Defendant was not able to transfer the land because it was under the Settlement Fund Trustees and promised that once she was registered as the owner, she would transfer the land to them.
6. PW1 stated that in 2008 she went to the Lands Office and found out that the land had been registered in the name of Patterson Gona Kalama which prompted her to file an objection through a letter dated 4<sup>th</sup> May 2010.
7. PW1 also gave evidence that they had been informed that the objection hearing had been rescheduled to 19<sup>th</sup> May 2011 but the Land Registrar and the 2<sup>nd</sup> Defendant were not present. That on 5<sup>th</sup> December 2017, PW1 went to inquire about the outcome of the objection, but were told that the same had been dismissed and the suit land transferred to Mombasa Cement.
8. Upon cross-examination by Mr Ananda, PW1 told the court that she accompanied her husband when he entered into the land sale agreement and made payments, built a house and planted coconut trees but the house had been destroyed.
9. On further cross-examination by Ms. Adoyo, she admitted that the 1<sup>st</sup> Defendant did not sign the sale agreement but only signed the final acknowledgement. She told the court that the 1<sup>st</sup> Defendant had verbally promised to transfer the land to their name after being registered by the Settlement Fund Trustees.
10. Upon cross-examination by Mr. Munga, PW1 told the court that the land was under the Settlement Fund Trustees when Amir Bakari sold it to the 1<sup>st</sup> Defendant and they got all this information from a Chief's letter that they were shown.



11. PW1 told the court that since the land belonged to them, they wrote to the Land Registrar who responded to their letters but the case never took off. On re-examination, PW1 stated that three people signed the agreement and by the year 2006 they had paid the full purchase price.
12. PW2 Harrison Biry Kondo adopted his Witness Statement dated 30<sup>th</sup> November 2021 as his evidence and stated that he witnessed the sale agreement dated 22<sup>nd</sup> April 1989 between the Plaintiff and the 1<sup>st</sup> Defendant and upon execution, the Plaintiff paid Kshs. 6,000/= and the deceased took possession of the property.
13. Upon cross examination by Mr. Ananda, PW2 admitted that he only came to know Changawa at the time they were entering into the agreement and that Changawa did not sign the agreement. That the same was signed on his behalf by his daughter Josephine Kalama. PW2 admitted that he was not present when the purchase price was paid but he was aware that the balance was paid.

### **Defence Case**

14. DW1 Patterson Gona Kalama adopted his Witness Statement dated 24<sup>th</sup> June 2020 and produced the documents on the list of documents dated 25<sup>th</sup> February 2020 as exhibits Dex 1 to 9. He testified that he was the initial owner of the suit property and that he had a dispute with Victor (deceased) who wanted to subdivide the land without his permission. He stated that he did not know the Plaintiff and so he reported the matter to the police and the Area Chief.
15. It was DW1's evidence that the Area chief wrote the letter dated 18<sup>th</sup> July 2017 and that the suit property neither had a house nor crops planted thereon. He further stated that he legally sold the land to Mombasa Cement.
16. Upon cross-examination by Mr. Kipola, DW1 admitted that there was an agreement between the Plaintiff and the 1<sup>st</sup> Defendant whereby the Plaintiff paid the purchase price by instalments. Further that he sold the land on 19<sup>th</sup> September 2017 after the restriction was removed on 7<sup>th</sup> July 2017.
17. Upon further cross-examination by Mr. Munga, DW1 told the court that he lodged an objection to the restriction but when the Land Registrar summoned Victor, he did not show up. That the Land Registrar therefore lifted the restriction after visiting the suit land and talking with the elders in the area.
18. DW2 Javeed Mohamed Sidik an Operations Manager of Mombasa Cement adopted his Witness Statement dated 7<sup>th</sup> February 2018 as part of his evidence in chief and produced Dex 1 to 8 which included a title, a search, and a consent letter amongst other documents.
19. Upon cross-examination by Ms. Mona, DW2 told the court that he had produced a sale agreement dated 9<sup>th</sup> September 2018 and a search dated 19<sup>th</sup> July 2018 and that the certificate of search did not show any restriction or encumbrances. He further stated that there were no buildings on the suit land.
20. DW3 Boaz Oketch, Kilifi County Land Registrar also adopted his Witness Statement and produced documents on his list of documents dated 9<sup>th</sup> March 2020 as Dex 1 to 10. The following documents were produced by DW3:
  - a. A copy of a letter from the Land Registrar dated 10<sup>th</sup> January, 2011
  - b. A copy of a letter from the Land Registrar dated 3<sup>rd</sup> May, 2011
  - c. A copy of an application for removal of caveat by Patterson Gona to the Land Registrar dated 16<sup>th</sup> January, 2013



- d. A copy of a letter from the Land Registrar dated 6<sup>th</sup> March, 2015
  - e. A copy of a letter from the Land Adjudication and Settlement office dated 6<sup>th</sup> March, 2015
  - f. A copy of a letter from the Land Registrar dated 15<sup>th</sup> October, 2015
  - g. A copy of a letter from the Chief Ngerenya location dated 18<sup>th</sup> July, 2017
  - h. A copy of a memorandum for the removal of the restriction dated 27<sup>th</sup> September, 2017
  - i. A copy of a transfer document dated 29<sup>th</sup> September, 2017
  - j. A copy of the Green card for Kilifi/Roka/104.
21. DW3 told the court about the process of removal of a restriction by a Land Registrar who summons the parties to his office and upon hearing them decides whether to remove the restriction. If at the hearing a party does not attend, the Registrar will proceed to remove the restriction if there is evidence of service.
  22. He testified that the restriction was removed procedurally and the transfer to the 3<sup>rd</sup> Defendant was also done legally. Upon cross examination by Mr. Ananda, DW3 reiterated that the restriction was removed procedurally.
  23. On further cross-examination by Ms. Mona DW3 told the court that Victor Karani had filed an objection and he was given a twenty-one-day notice to appear before the Land Registrar on 23<sup>rd</sup> March 2011 at 11 am. He further stated that Victor paid for a hearing and was issued with a receipt. That Victor wrote a letter stating that he would not be available on 23<sup>rd</sup> March 2011 and the Land Registrar wrote a letter dated 3<sup>rd</sup> May 2011 inviting him for a hearing on 15<sup>th</sup> June 2011.
  24. DW3 confirmed that from the green card, the restriction was removed on 27<sup>th</sup> September 2017 and that spousal consent is only required if the land is matrimonial property. He told the court that the land was under the Settlement Fund Trustee and that there was a sale agreement between Amir Bakari Ngao and Changwa Shadrack Ngao under the Tezo Settlement Scheme.
  25. Upon re-examination, he told the court that the 2<sup>nd</sup> Defendant wrote the letter dated 16<sup>th</sup> January 2013 seeking for the removal of the restriction which letter had the Plaintiff's address of which he responded to.

### **Plaintiff's Submissions**

26. Counsel gave a background of the case and identified issues for determination as to whether the Plaintiff paid the purchase price, whether the transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was legal.
27. Counsel relied on the case of *Samuel Kamere v Land Registrar Kajiado* [2015] eKLR as was cited in *Lucy Wangari Mwangi (suing as the legal representative of the estate of Benson Mwangi Macharia) vs Chief Land Registrar and 2 others* [2022] eKLR and submitted that the 2<sup>nd</sup> Defendant failed to provide proof that the 1<sup>st</sup> Defendant held the title as a trustee while the Plaintiff produced a letter from the chief affirming that the 1<sup>st</sup> Defendant purchased the said land from one Amir Ngao Bakari.
28. Counsel submitted that they gave a Notice to produce documents dated 23<sup>rd</sup> March 2018 requesting the 2<sup>nd</sup> to 5<sup>th</sup> Defendants to produce various documents that included the spousal consent and the Kenya Revenue Receipt for stamp duty but the said documents were not produced.



29. Ms Mona relied on Sections 9, 28 and 46 of the [Land Registration Act](#) and submitted that the letter of consent was applied for and issued on the same day and therefore there was fraud and collusion between the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
30. Counsel submitted that the Plaintiff had proved his case on a balance of probability and urged the court to enter judgment as prayed against the Defendants.

#### **1<sup>st</sup> and 2<sup>nd</sup> Defendants' Submissions**

31. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants adopted the submissions of the 4<sup>th</sup> and 5<sup>th</sup> Defendants' submissions dated 7<sup>th</sup> September 2023. Counsel submitted that the Plaintiff's suit has been overtaken by events as the same was filed in court on 11<sup>th</sup> January 2018 when the 2<sup>nd</sup> Defendant had already passed title to the 3<sup>rd</sup> Defendant by 9<sup>th</sup> September 2017 and therefore the Plaintiff had no cause of action against the 2<sup>nd</sup> Defendant by the time the suit was filed.
32. Mr. Ananda submitted that the documents produced by the 2<sup>nd</sup> Defendant showed that correct procedure was followed to get the title which he passed to the 3<sup>rd</sup> Defendant. Counsel argued that the chief's letter dated 18<sup>th</sup> June 2017 produced by the 2<sup>nd</sup> Defendant clearly showed that the suit property belonged to him.
33. It was counsel's submissions that the letters sent by the Land Registrar to the Plaintiff were received and since he did not attend the said meetings, the restrictions were properly removed. Counsel further submitted that the Plaintiff did not produce any documents in support of any proprietary interest and therefore he is not entitled to any orders sought.

#### **3<sup>rd</sup> Defendant's Submissions**

34. Counsel submitted on whether the 3<sup>rd</sup> Defendant was a bonafide purchaser without notice and whether the 3<sup>rd</sup> Defendant acquired a legitimate title from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
35. On the first issue, counsel relied on the case of *Katende vs Haridar & Company Limited* [2008] 2 EA 173 and submitted that the 3<sup>rd</sup> Defendant had a certificate of title for the suit property which he purchased from the 2<sup>nd</sup> Defendant upon conducting due diligence.
36. Ms Adoyo submitted that the 3<sup>rd</sup> Defendant was not aware of any fraud and it purchased the suit property for valuable consideration from a vendor who had a valid title. She further submitted that the 2<sup>nd</sup> Defendant acquired the suit property through allotment from the government and once the property was discharged he, sold it to the 3<sup>rd</sup> defendant legally without any encumbrance. Counsel relied on the case of [Muikamba Kiranga & another v Faith Muthoni Maringa & 4 Others](#) [2020] eKLR.
37. With regard to the second issue, counsel relied on Section 26(1) of the [Land Registration Act](#), the case of [Nancy Kaboya Amadira vs Expert Credit Limited & another](#) [2015] eKLR and submitted that the Plaintiff failed to prove that the suit property was acquired illegally and urged the court to dismiss the Plaintiff's suit with costs.

#### **4<sup>th</sup> and 5<sup>th</sup> Defendants' Submissions**

38. Counsel gave a summary of the evidence by the parties and identified the following issues for determination;
  - a. Whether the removal of the restriction was lawful.



- b. Whether the 3<sup>rd</sup> defendant's title was lawfully issued.
39. On the first issue counsel relied on Sections 78(1) and 87 of the *Land Registration Act* and submitted that the 2<sup>nd</sup> Defendant vide the letter dated 16<sup>th</sup> January 2013 applied for removal of a restriction that was placed on the suit property. It was counsel's submissions that the Land Registrar sent letters to the Plaintiff inviting him to attend hearings on the removal of the restrictions but he failed to do so.
40. Mr. Munga submitted that the Land Registrar complied with the provisions of Section 87(1) (c) by according the plaintiff an opportunity to be heard and that the restriction which was lodged in 2008 was removed in 2017.
41. On the second issue counsel relied on the case of *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR and submitted that the 3<sup>rd</sup> Defendant had demonstrated that it was the registered owner of the suit property. That the Plaintiff had failed to discharge the standard of proof required for this court to grant the orders sought.

### Analysis and Determination

42. The issues for determination are as to whether the Plaintiff is the rightful owner of the suit land, whether the restriction on the suit land was procedurally and lawfully removed, whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acquired their titles procedurally and whether the Plaintiff is entitled to the orders sought in the plaint.
43. This is a case involving sale of land that under the Settlement Fund Trustee and it was the Plaintiff's case that her late husband Victor Karani Mkunzo purchased the suit land parcel No. Kilifi/Roka/104 from Changawa Shadrack Mwaro the 1<sup>st</sup> Defendant vide a land sale agreement dated 22<sup>nd</sup> April 1989 where he paid the agreed purchase price of Kshs. 33,000/= by instalments.
44. It is on record and admitted by the Plaintiff that Changawa Gona Kalama did not sign the said sale agreement alleging that it was signed by a daughter known as Josephine Kalama. The acknowledgement receipt produced as Pex2 showed that Peterson Gona and Moses had received a sum of Kshs. 20,000/= on behalf of the 1<sup>st</sup> Defendant Changawa Shadrack Mwaro on 25<sup>th</sup> June 1989 in respect of the sale of the suit property.
45. It was further the Plaintiff's case that they realized that the suit property was registered in the name of Peterson Gona Kalama which necessitated the filing of an objection on 24<sup>th</sup> April 2008 which was removed and the suit property transferred to the 3<sup>rd</sup> defendant.
46. DW3 Kilifi Land Registrar produced a copy of the green card for land parcel No. Kilifi/Roka/104 which showed at entry No. 1 that on 8<sup>th</sup> September 1980 the suit property was registered to the Settlement Fund Trustees. Entry No. 2 showed that on 29<sup>th</sup> August 2006 the suit property was registered in the name of Patterson Gona Kalama who was issued with a title deed on the same day as per entry No. 3.
47. Entry No. 4 in the green card indicated that on 24<sup>th</sup> April 2008, a restriction was registered by Victor Karani and entry No. 5 showed that on 27<sup>th</sup> September 2017, the restriction was removed by the Land Registrar under Section 73(3) of the *Land Registration Act*. Entry No. 6 showed that on 6<sup>th</sup> December 2017, Mombasa Cement Limited was registered as the owner and was issued with a title deed on the same date.



48. From the entries in the register, it is evident that Changawa Shadrack Mwaro was never registered as an owner of the suit property. It is also on record that the vendor never signed the sale agreement that the Plaintiff relied on.

49. In the case of *Ocra Realtors Ltd v Abdulghani Kipkemboi Komen & 2 others* [2019] eKLR the court held as follows;

“The agent has no capacity to purport to enter into a sale agreement with a purchaser unless such agent holds a power of attorney that allows him to deal with the seller’s land. It was completely wrong for the plaintiff to purport to execute sale agreements on behalf of the defendants without holding any power of attorney.”

50. Josephine Kalama did not have the capacity to sign the land sale agreement on behalf of Changawa Shadrack Mwaro as she did not have a power of attorney from the 1<sup>st</sup> Defendant to enable her do so.

51. On the issue whether the restriction was procedurally removed, the Land Registrar produced several letters in respect of notification of the parties to attend the hearing of the removal of the restriction on the suit land. The Land Registrar stated that he wrote a letter to the parties giving them a twenty-one-day notice to appear before the Land Registrar on 23<sup>rd</sup> March 2011 at 11 am. He further stated that Victor Karani wrote a letter stating that he would not be available on 23<sup>rd</sup> March 2011 and therefore the Land Registrar wrote a letter dated 3<sup>rd</sup> May 2011 inviting him for a hearing on 15<sup>th</sup> June 2011. This is an indication that the Deceased was in communication with the Land Registrar and got all the notices and letters for the hearing of the removal of the restriction.

52. The Land Registrar also took the court through the process of removal of a restriction, which he stated that was strictly followed before the restriction was removed. Section 78 of the *Land Registration Act* provides as follows;

“(1) The Registrar may, at anytime and on application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

53. The court in the case of *Mukuria James Chacha & 2 others v Land Registrar Muranga* [2019] eKLR held as follows;

“ 11. The Registrar of Lands has power to register a restriction in three instances; prevention of fraud; or improper dealings on land; or for any sufficient cause. The Registrar may be moved suo moto or on application of any persons interested in the land. The Registrar on receipt of the application is duty bound to direct inquiries to be made, notices to be served and hearing such persons as he considers fit and make an order prohibiting or restricting dealings with any land. The restriction may be for a particular period, until the occurrence of a particular event or until a further order is made. The Registrar shall give notice in writing of a restriction to the proprietor effected by the restriction.



12. In the case of *Matoya vs Standard Chartered Bank (K) LTD & others* (2003) I EA 140 it was held that;

“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented”.

54. It is clear that the Land Registrar summoned the late Victor Karani Mkunzo before the restriction was removed and had complied with the provisions of Section 78 of the [Land Registration Act](#).

55. Section 24(a) of the [Land Registration Act](#) provides as follows;

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and...”

56. Section 26 of the [Land Registration Act](#) provides as follows;

“26.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

57. The court in [Ali Wanje Ziro v Abdulbasit Abeid Said & another](#) [2022] eKLR held as follows;

“The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the



land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

58. The 3<sup>rd</sup> Defendant is the registered owner of the suit property and a title can only be challenged if it was obtained through fraud or misrepresentation and secondly if the certificate of title was obtained through a corrupt scheme.
59. From the plaint, the basis upon which the Plaintiff sought to be declared as the owner of the suit property was on the ground that the removal of the restriction was done unprocedurally. The Plaintiff also claimed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ titles were procured fraudulently.
60. A claim of fraud must be specifically pleaded, particularized and evidence must be led to prove the allegations of fraud as was held in the Court of Appeal case of Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR where it was held that:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

61. Looking at the amended plaint, I have not seen anywhere in the body of the plaint where the Plaintiff has alleged and particularized fraud on how the titles were acquired. You cannot allege fraud in submissions, as they do not form part of pleadings in stating a case of fraud on behalf of a party. Submissions are meant to clarify and emphasize what is in the pleadings and what came out in evidence by the parties.
62. I have considered the pleadings, the evidence on record, the submissions by counsel, the relevant authorities and find that the Plaintiff has failed to prove her case against the Defendants and it is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 5<sup>TH</sup> DAY OF MARCH 2024.**

**M. A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

