



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CIVIL APPEAL NO 6 OF 2016**

**(FORMERLY NAKURU HC CIVIL APPEAL NO 27 OF 1995)**

**(Appeal from original judgment and decree dated 16/12/1994**

**in Maralal RMCC No. 18 of 1994 – W N Nyarima, RM)**

**DAUDI ABDALLA.....APPELLANT**

**VERSUS**

**HAKIM YUSUF MOHAMUD.....SUBSTITUTED RESPONDENT**

***(ORIGINAL RESPONDENT:***

***YUSUF MOHAMUD ISMAEL, SINCE DECEASED)***

**J U D G M E N T**

1. The Appellant herein, **Daudi Abdalla**, was the plaintiff before the trial court while the deceased Respondent was the defendant. The plaintiff's claim as set out in his plaint dated 29/04/1994 was for a permanent injunction to restrain the defendant from distressing for rent against him, general damages for unlawful attachment of property and costs of the suit. He pleaded that on 27/04/1994 the defendant had unlawfully and without just cause instructed court brokers to levy distress on the plaintiff's property. His case was that he had acquired title to the property in question, **Plot No 265** (formerly **Plot No 124 Maralal**), and that therefore the distraint for rent was unlawful. The plaintiff did not plead in what capacity he had sued the defendant.

2. The defendant filed a defence and counter-claim. He denied that the plaintiff had acquired title to the property. He pleaded that one Mohamud Ismail (then already deceased) had purchased the property in the 1970's from Wodood Co Ltd which had been allocated the plot by *Samburu County Council*; that Mohamud Ismail had erected a commercial plot on part of the plot which comprised two shops and a hotel; that by written agreement dated 22/09/1981 Messrs **Mohamud Ismail & Co Ltd** agreed to lease to the plaintiff, who agreed to take a lease on, shop number 2 on the plot for the agreed monthly rent of KShs 350/00 per month with effect from 01/09/1981; that the plaintiff paid to the said company KShs 1,000/00 being rent for 3 months and continued to pay rent until April 1988 when he refused or failed to pay rent; and that therefore the company was entitled to distrain for arrears of rent.

3. The defendant further pleaded that by a written agreement dated 24/02/1986 Mohamud Ismail, since deceased, agreed to sell, and the plaintiff agreed to purchase, a portion of Plot No 124 Maralal, for the consideration of KShs 40,000/00. The defendant further denied that the plaintiff purchased the entire Plot No 124 Maralal, from the said Mohamud Ismail.

4. The defendant denied that the deceased Mohamud Ismail transferred Plot No 124 Maralal, to the plaintiff and averred that any instrument of transfer purported to have been executed by Mohamud Ismail was "fraudulently obtained" and the same did not convey unto the plaintiff any proprietary interest in the plot. He pleaded particulars of fraud.

5. The defendant did not set out in what capacity he was pleading all that has been set out above; nor did he state what *Mohamud Ismail & Co Ltd* was in respect to the suit land, Plot No 124 Maralal.

6. Finally the defendant pleaded that he was non-suited as the plaintiff did not disclose in what capacity he brought the suit against him, and that the suit did not disclose a cause of action against him.

7. In the counter-claim the defendant pleaded that Plot No 124 Maralal, belongs to the estate of the deceased Mohamud Ismail; that the

plaintiff was in possession of shop No 2 therein as a tenant and liable to pay arrears of rent of KShs 49,450/00 to *Mohamud Ismail & Co. Ltd* “who is the landlord”, which sum he counterclaimed. He also sought a declaration that Plot No 124 Maralal, belongs to the estate of the deceased Mohamud Ismail, and costs and interest.

8. The plaintiff filed an answer to the defence and defence to the counterclaim. The trial court ruled the same to have been filed out of time and struck them out.

9. Trial of the suit commenced and the plaintiff testified in-chief. Time apparently ran out before he was cross-examined and the matter was stood over to 02/09/1994 for further hearing. On that date the matter was stood over generally.

10. On 24/10/1994 the defendant, *ex parte*, fixed the case for further hearing on 07/11/1994. On that date there was no appearance for the plaintiff. The trial court ruled that he had been duly served with hearing notice. The court then dismissed the plaintiff’s claim with costs and allowed the defendant to proceed with his counter-claim. The defendant testified.

11. In a judgment apparently delivered on 05/12/1994 the court allowed the counterclaim as prayed. The trial court did not at all discuss in the judgment the relative capacities of the parties; nor even the place of *Mohamud Ismail & Co Ltd*. In his testimony the defendant stated that he was a son of the deceased Mohamud Ismail, and that the deceased was a director of *Mohamud Ismail & Co Ltd*. But he did not state whether the company was the owner of the property or merely managing it for the deceased Mohamud Ismail.

12. The defendant himself, though he said he was a son of the deceased Mohamud Ismail, did not state that he had a grant of representation to his estate duly issued by a competent court of law.

13. So, in what capacity did the plaintiff sue the defendant? It is not stated, nor does it emerge from the material placed before the trial court. In what capacity did the defendant purport to defend the suit? Again this was not stated; nor did it emerge from the material placed before the trial court.

14. In what capacity did the defendant counterclaim? He did not plead that he was the owner of the property. He did not plead that he was the administrator of the estate of his father Mohamud Ismail, deceased. If the company *Mohamud Ismail & Co Ltd* was managing the property on behalf of the deceased Mohamud Ismail, the defendant did not state his position in the company, or what capacity entitled him to counterclaim.

15. The entire suit was thus a mess and should never have been allowed to proceed to hearing.

16. That being my view, I will allow this appeal, but obviously not for the reasons advanced by the Appellant. The judgment and orders of the trial court are hereby set aside. I will substitute therefore an order striking out both the plaintiff’s claim and the defendant’s counter-claim with no order as to costs. It is so ordered.

17. As for costs of this appeal, the parties shall bear their own costs. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 30<sup>TH</sup> DAY OF OCTOBER 2018**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 1<sup>ST</sup> DAY OF NOVEMBER 2018**