



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL APPEAL NO. 68 OF 2007**

SOLOMON MUKINDIA.....APPELLANT

VERSUS

NCHANI KITHUNGURU.....1ST RESPONDENT

PERMANENT SECRETARY MINISTRY OF LANDS &

SETTLEMENT.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

*(Being an appeal from ruling/order of Hon. M. S. G. Khadambi, SRM, delivered on 30.5.2007 in Meru CMCC No. 673 of 1995)*

In his Memorandum of Appeal dated 29.6.2007, the appellant appeals against the entire ruling of Hon. M. S. G. Kadhambi, SRM, delivered on 30.5.2007. His grounds of appeal are:

1. **That the learned trial magistrate erred in law and in fact in holding that the amended plaint must be supported by a verifying affidavit contrary to clear provisions of CAP 21 and precedents.**
2. **That the learned trial magistrate erred in law and in fact in misapplying the provisions of Order V11 Rule 2 of CPR CAP 21.**
3. **That the learned trial magistrate erred in law and fact in totally disregarding the appellants submissions on record.**
4. **That the ruling of the learned magistrate was against the weight of evidence and submissions adduced.**

Relying upon the above grounds, the appellant prays that the ruling/order of the trial magistrate be quashed and the respondent's preliminary objection dated 2.5.2006 be dismissed with costs to the appellants.

The parties canvassed this application by way of written submissions.

In his submissions, the appellant explains that this appeal was spawned by a Preliminary Objection by the respondent in the lower court to the effect that an Amended Plaint ought to be supported by a verifying

affidavit failing which it would be fatally and incurably defective. It is explained that the lower court in a ruling dated 30.5.2007 upheld the Preliminary Objection and struck out the Appellant's Amended Plaintiff.

The appellant explained that the provisions of order VIII Rule 2 Cap 21 provided:

**1. The plaintiff shall be accompanied by an Affidavit sworn by the plaintiff verifying the correctness of the averment contained in the plaintiff.**

**2. The Court may on its own motion or an application by the Defendant order to be struck out any plaintiff which does not comply with sub-rule 2 of this rule.**

It is submitted that the requirement of Order VII Rule 2 did not apply to an amended plaintiff but **ONLY** to the plaintiff. It was also submitted that even assuming that the rule applied to an amended plaintiff, the court had discretion to either strike out the plaintiff or to allow the Affidavit to be filed to cure the situation. It was submitted that this position had been embraced by the Court of Appeal's decision in **Josephat Kiphirchir Sigilai Versus Gotab Sanik Enterprises Ltd & 4 others, Civil Appeal 98 of 2003, Eldoret.**

The appellant submitted that this position was buttressed by the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 which stresses the need to eschew undue regard to technicalities in favour of substantial justice. The Court was also urged to embrace Sections 1 A and 1B of the Civil Procedure Act and apply the overriding objective to facilitate just, expeditious, proportionate and affordable administration of justice. The appellant concluded his submissions by saying that it would be fair for the court to allow the appeal to facilitate the hearing and determination of Meru CMCC 673 of 1995 which had stalled for years.

The respondent opposed this appeal and introduced his submissions by saying that the learned senior magistrate upheld the preliminary objection in the lower court by exercising her judicial discretion due to the appellant/plaintiffs failure to comply with mandatory provisions of the Civil Procedure Rules.

The respondent gave a conspectus of the facts that spawned this appeal. He said that the appeal emanated from a matter involving a purported claim on land which was adjudicated and registered way back in 1965. The appellant, who is the plaintiff in the suit in the lower court, filed a suit on 4.8.1995 which, according to the respondent, was filed out of time as per the Limitation of Actions Act. On 30th September, 2004 after a whole nine years after filing his suit, the plaintiff filed a suit seeking to amend the plaintiff. He then, according to the respondent, proceeded on 28.8.2005 to file the amended plaintiff dated 1.9.2004 without abiding by the mandatory provisions of the Civil Procedure Rules and without leave of the Court. This prompted the 1st defendant/respondent to file a notice of preliminary objection dated 2.5.2006 seeking the amended plaintiff to be struck out, which objection was upheld.

The respondent submitted that the lower court exercised its judicial discretion properly and had looked at the history of the matter before it considered its peculiar particularities including the whole issues regarding hearing of the suit and the likely success or genuineness of the issues in the case. It was argued that an appellate court could only reverse a decision of the court appealed from, if the court considered immaterial facts or if the court declined to consider relevant matters before it, thereby arriving at the wrong decision. It was opined that in this case, the lower court had considered provisions of the Civil Procedure Rules which were mandatory, and therefore the court cannot be faulted in any way. The respondent concluded by saying that since each individual matter was unique in its own way, in this matter the ruling of the Learned Senior Resident Magistrate was the most appropriate in the circumstances. The respondent urged this Court to dismiss the appeal with costs to the 1st respondent as he had been kept awaiting the hearing and determinate of the main suit since 1995.

I have considered the submissions of the parties. I have read the judgment delivered in the lower court which instigated this appeal. The judgment said that order V11 Rule 2 of the defunct Civil Procedure Rules was couched in mandatory terms. The learned magistrate was unequivocal that the failure by the plaintiff to support the amended plaintiff by a verifying affidavit could not be cured. For this reason and this reason only, the plaintiff was struck out. The issue of the alleged filing of the plaintiff without leave of

the Court was not considered by the Learned Senior Resident Magistrate. This then means that the issue of the lack of a verifying affidavit is key to the determination of this appeal.

I find that the Learned Senior Magistrate had a solid legal basis to exercise her judicial discretion. It was not exercised capriciously, without a sense of proportionality or unreasonably. There is no doubt that the amended Plaintiff was not supported by a verifying affidavit.

I disagree with the appellant's contention that an amended plaintiff was not the sort of plaintiff contemplated by Order VII rule 2 of the defunct Civil Procedure Rules. Indeed, rule 3 of Order VII says; "the Court may on its own Motion or an Application of the defendant Order to be struck out **ANY** plaintiff which does not comply with the sub rule (2) of this rule." The use of the word "**ANY**" brings into the ambit of the order 7 rule 2, an Amended Plaintiff. I may also ask a rhetorical question, "If an Amended Plaintiff is not a Plaintiff, what is it and what is its purpose?". An amended Plaintiff is a Plaintiff and nothing more and nothing less. As Shakespeare opined in Romeo and Juliet, a rose by any other name would smell as sweet. What matters is what something is, not what it is called.

I find that some of the submission's made by the respondent such as matters to do with the Limitation of Actions Act and success and genuineness of the suit not relevant to my determination of this Appeal. Those are matters which the parties will canvass during the hearing of the suit in the lower court.

The suit in the lower court was filed almost 20 years ago in 1995. This appeal was filed in 2007, seven years ago. Whether the Appeal succeeds or not CMCC No.673 of 1995 is still awaiting hearing and determination. If it succeeds the plaintiff will base his suit on the Amended Plaintiff. If it does not succeed, he will proceed to prosecute his case on the basis of the Original Plaintiff.

I find that the case of **Josephat Kipchirchir Sigilai (Appellant) AND Gotab Sanik Enterprises & 4 others (respondents)** is relevant. Since this suit is involving land, it is my view that it is not frivolous, vexatious or scandalous. I will apply the principles enunciated in this case to pronounce that the omission by the appellant to support his plaintiff with a Verifying Affidavit is curable by the filing of an affidavit which should veritably abide by the requirements of the provisions of Order VII Rule 2 of the defunct Civil Procedure Rules.

I need to say something about the provisions of the Sections 1A and 1B of the Civil Procedure Act. These provisions have been buttressed by the supreme anchor provided by Article 159 (2) (d) of the Constitution of Kenya 2010. In my view these provisions allow courts to be seized of Equitable Jurisdiction. Once a Court is in possession of equitable jurisdiction, it must do the minimum to achieve the most proportionate and desirable result that accords substantial justice. In the present case, the minimum is to allow all parties to be heard so that at the end of the day the Court hearing and determining the suit will access the required evidence.

In the circumstances, I will allow the appellants appeal and set aside the lower court's order dated 30.5.2007 striking out the appellant's Amended Plaintiff. I direct that the appellant do swear a Verifying Affidavit complying with the provisions of Order VII Rule 2 within 30 days of the date hereof. In view of the fact that the appellant was rather indolent in not complying with the provisions of Order VII Rule 2, I direct that the appellant shall bear the respondent's thrown away costs of the preliminary objection before the lower court.

Regarding costs of this appeal, the appellant was to blame for the precarious situation he found himself in. Although his appeal has been allowed, this is one situation where costs should not follow the event. In the circumstances, each party shall bear own costs of the appeal.

**Delivered in Open court at Meru this 14th day of July, 2014 in the presence of:**

Cc. Daniel

Miss Kiome for Appellant

Advocate for Respondent Absent

**P. M. NJOROGÉ**

**JUDGE**