



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL CASE NO. 316 OF 2013**

**JACOB KASIMWAKA MACHACHA..... PLAINTIFF**

**VERSUS**

**1. MOSES WESWA MABONGA**

**2. FRANCIS MUKORO .....DEFENDANT/RESPONDENT**

**RULING**

1. This notice of motion dated 2<sup>nd</sup> April 2014 is premised under order 2 rule 15 (1) & (2) and order 51 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. In it, the defendants/Applicants seek two prayers to wit;

(a). That the suit be struck out.

(b). The costs of the motion be borne by the respondent.

It is further supported by the supporting affidavit and six grounds listed on the face of it. The grounds include inter – alia, that the suit does not disclose any cause of actions against the defendants and the purported purchase of L.R. W. Bukusu/N. Mateka/2401 on or about 24<sup>th</sup> December 2009 is a red herring.

2. The application is opposed by the plaintiff/respondent via replying affidavit sworn on 16<sup>th</sup> day of May 2014. The respondent deposes his suit discloses a reasonable cause of action. He deposes that this application is premature as discovery and directions are still pending. Further he deposes the documents in respect of purchase of the suitland are in possession of the 1<sup>st</sup> defendant and that he intends to serve him with notice to produce. Finally the respondent deposes that he has developed the suitland. He asked the court to dismiss the motion.

3. The parties' advocates made oral submissions. The applicant's counsel anchored his submissions on the following case law;

1. *Mombasa HC Misc. Civ App. no. 171 of 2000 – Zachariah Nyamai Makau vs. Republic & 2 others*. Stating that, “affidavit should not end with jurat following over lead”

2. *Eldoret HC Misc. Civ. Appl, no. 135 of 2001 – Republic vs. Selly Jemutai* which held that, “jurat must appear within the text to give the affidavit authenticity.”

3. *Nbi HC civ. Case no. 1098 of 1998 – Saki holdings ltd. vs. Diamond Trust Bank* which said, “jurat must appear within the text of the affidavit to give it credence.”

4. *Auto garage vs. Motokov [1971] E.A page 514* – referred to holdings no (ii) & (iii).

The respondent on his part relied on the following;

(i). *Kisii HC. Misc. Civ no. 66 of 2004 James Nyatenga vs. Town Clerk, Keroka Town council.*

“Mr. Kerosi did not tell the court the provision of the law which requires attestation and jurat to be on same page as main body of affidavit.

(ii). *Nbi. HCCC no 514 of 2005 – Jimok enterprises vs. DPF Board & 2 others at pg 3.*

(iii). *The Constitution and Oaths & Statutory Declarations Act*

4. I have considered the submissions and case law referred to by the parties. Except for the *Auto Garage* case supra, all the other decisions are persuasive on me as they are decisions of courts of concurrent jurisdiction. There are only two issues requiring my determination which are;

(a). If the replying affidavit is defective.

(b). Whether the plaintiff's suit discloses a reasonable cause of action.

In regard to point (a), the applicant asked the court to strike out the replying affidavit as the jurat was not on the same page with the body of the affidavit. I have looked at that replying affidavit; the following part of the jurat is on same page as the body of the affidavit i.e; ***Applicant's name and signature plus the date and place where the affidavit was sworn at.*** What was carried to the next page was the stamp and signature of the commissioner for oaths. In section 5 of Oaths & Statutory Declarations Act cap 15 requires every commissioner of oaths to state in the jurat at what place and on what date the affidavit was made. It makes no mention that the jurat must be on the same page with body of the affidavit. In any event in this instance, the key parts of the jurat fall on the same page with the content of the affidavit. Secondly, the case laws cited were decided before the present Constitution was passed. The current Constitution has included many provisions to protect the litigants inter alia article 159 which requires courts to administer justice without undue regard to procedural technicalities. In my view the jurat not being on the same page is a procedural technicality that can be disregarded. I find this line of objection to be without merit and dismiss it.

5. On the aspect of non-disclosure of a cause of action against the defendants, I begin by referring to the pleadings. In paragraph 4 & 5 of the plaint the plaintiff/respondent pleads he purchased a portion of the suitland from the 1<sup>st</sup> defendant and gives date of completion of their transaction as 24<sup>th</sup> December 2009. In paragraph 6, he pleads to have undertaken developments on the plot totaling Kshs. (six) 6 million only with the knowledge of the 1<sup>st</sup> defendant and he runs a business from the suit premises. Para 8 of the plaint contains facts that on 14<sup>th</sup> April 2012 the 2<sup>nd</sup> defendant took possession of the hotel rooms developed by the respondent. The respondent has also pleaded fraud against both defendants and has sought an order for specific performance. The respondent also included a list of documents which accompanied his plaint. It is this scenario which the defendants jointly submit does not disclose any cause of action.

6. From the court records, it is only the 2<sup>nd</sup> defendant who has filed a statement of defence. The 1<sup>st</sup> defendant entered appearance on 3<sup>rd</sup> December 2013 and at the time of filing his application on 7<sup>th</sup> April 2014 or on any date after, he had no statement of defence on record. The inference I draw is that so far he does not contest the matters raised by plaintiff through his plaint. He cannot therefore purport to oppose the suit by way of an application. In the alternative pleadings have not closed and hence it is premature for the defendants to bring this application. In the statement of defence filed by the 2<sup>nd</sup>

defendant, at paragraph 8 he says he has a right to purchase the suit property if such property is put up for sale by the 1<sup>st</sup> defendant. In paragraph 7 he denies the contents of some paragraphs of the plaint. He did not annex any list of documents to his defence. He has also denied the plaintiff is entitled to any compensation. Order 2 rule 15 (I) (a) does not allow parties to adduce evidence on application brought under that rule. Yet I find the plaint raises several triable issues which require evidence to be adduced. For instance, whether there was a sale transaction between the 1<sup>st</sup> defendant and the Plaintiff, are there any developments existing on the plot and who carried out such development. In regard to the provisions of order 2 rule 15 (I) (b), the applicants have not submitted why they feel the suit is scandalous and vexatious. The respondent's claim is that his right to property is being violated. Such an averment cannot be said to be scandalous. I find this ground to be without merit and also dismiss it. In conclusion, I find the entire notice of motion dated 2<sup>nd</sup> April 2014 without merit and dismiss it with costs to the respondent.

**DATED and DELIVERED** in Bungoma this 2<sup>nd</sup> day of October 2014.

**A. OMOLLO**

**JUDGE.**