



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**Civil Suit 47 of 2009**

**LA MARINA LIMITED.....PLAINTIFF**

**VERSUS**

**JOSEPH KASHURU MUMBO &**

**MASUMBUKO YERRY KOMBE.....DEFENDANTS**

**R U L I N G**

By Notice of Preliminary Objection dated 14-5-09, the 2<sup>nd</sup> defendant states that the entire suit and 1<sup>st</sup> applicant is bad in law, vexatious and is an abuse of the court process.

Secondly tht the plaintiff lacks locus standi to bring this suit as they have no interest in the subject matter i.e the suit property, having transferred the same to Soft White Beach Ltd and Titles purportedly issued.

However on the date set for hearing, the application dated 6-5-09 was withdrawn but Mr. Mouko indicated he would still pursue the Preliminary Objection in relation to the entire suit.

Mr. Mouko submitted that in spite of the amendment bringing in a second party, that still did not cure the case. He points out that the amended plaint visa vis the defence by first defendant, makes it clear that first defendant in particular has no interest in the suit property upon which he can litigate and so the entire suit is an abuse of court process.

He argues that this suit is intended to confuse the court so that first defendant is unable to deal with his property. He has referred the court to paragraph 3 of the amended plaint which reads:-

***“The first plaintiff, was still until December 2006, the registered proprietor of all those pieces of land known as Chembe/Kibambashe/635,637, 638,641, 646, 651, 652, 655 and 665...referred to as the suit plots 3A. In 2006, the first plaintiff transferred Plot Title No. Chembe/Kibambashe 651 and 652 to the 2<sup>nd</sup> plaintiff and they are referred to as the suit plots”***

It is Mr. Mouko’s contention that plaintiff having given ten plots which he refers to as the suit plots and that he was the registered owner until 21-12-06, means that thereafter he was not the registered owner and he wonders why plaintiff gives all the other plot numbers, which are irrelevant, then in paragraph 3A he introduces two plot numbers which are part of what is pleaded in paragraph 3 and says this is just intended to create confusion.

Then in paragraph 4 the plaintiff gives original plot numbers which he now refers to as the other bigger

plots and wonders why make such reference when the dispute is only on plot No. 393 and which they even refer to as the “original plot”

He says plaintiff does not want to come out clearly and say that the plot subdivided and added was actually 393.

Mr. Mouko submits that La Marina (1<sup>st</sup> plaintiff) has no interest in the property as it was transferred to Soft White Beach (2<sup>nd</sup> plaintiff) and it is therefore the second plaintiff who should pursue the claim and not first plaintiff. Attention is also drawn to paragraph of the plaint which is to the effect that first defendant has sold the original plot to second defendant and presented it to the Registrar of Land for registration and there is no way plot No. 393 (which is in dispute) can be owned by two people, when plaintiff admits he has transferred his interest.

It is further submitted that first plaintiff filed HCCC 770 of 2006 (MInd) and first plaintiff admits to having sold its interest to Soft White Beach, then in paragraph 6 it is stated that the suit is still pending – Mr. Mouko wonders how then first plaintiff transferred the interest in 2006 if the suit is still pending and there is even an embargo on land dealings in the area and that it then means that HCCC 72 of 2006 is sub-judice.

Mr. Mouko asks this court to consider the prayers in the plaint and wonders how both plaintiffs can ask that defendant’s title be declared null and void and whether first and second plaintiffs have the same interest – saying there is mischief in the entire suit.

The Preliminary Objection is opposed and Mr. Mutugi has referred the court to paragraph 4 of the plaint, which he says gives history of the suit property – he concedes that the dispute relates to the original Plot 393, which first defendant purports to have title and yet first plaintiff holds the title to eight plots. He says there is a typing error, as the amendment was only intended to refer to 651 and 562 which are held by second plaintiff.

Mr. Mutugi explains that first plaintiff has eight plots and second plaintiff has two, and what first plaintiff is saying is that 393 has never been subdivided but plaintiffs say it was subdivided into ten plots which are currently in the names of the plaintiff – so there are two different sets of plots (pray which ones are these?) As regards the existence of another suit which was transferred from Mombasa, Mr. Mutugi submits that the same relates to Judicial Review whereas the present seeks a declaration that the Title deed held by first defendant is null and void.

(b) a prohibiting order restraining the defendants from registering the transfer from 1<sup>st</sup> defendant to 2<sup>nd</sup> defendant or any other person.

(c) an order directing the Chief Land Registrar to cancel the Title. He maintains that defendant is relying on the purported transfer of ten plots among them eight to Soft White Beach, and that is something which must be proved by documents and viva voce evidence and that the amendment has cured the question of plots by introducing a second party.

The main issue here is how the pleadings have been drafted and presented to this court – I will admit its confusing and quite a mouthful. The attempt at explanation by Mr. Mutugi does not help much. It raises more questions than answers. What is the relevance of referring to so many other plots which are not in dispute? I fail to comprehend what history is being given about plots, which are not in dispute, when in the same breath paragraph 4 refers to plot no. 393 as the one in dispute. Is 651 and 652 part of 393? If second plaintiff holds title for 651 and 652, then what business does first plaintiff have in the matter, since the other enumerated wealth of plots cited are not a subject of this suit?

Order VI Rules 2-6 offers a useful guide on formal requirements for pleadings, and what should be pleaded – it would appear to me that what plaintiffs have done is collect every available information and just pile it up in the plaint, thereby creating a total confusion and lack of clarity.

If each plaintiff is making a claim in relation to different plot then the allegation by each as regards ownership must be pleaded separately and specifically since indeed as observed by Mr. Mouko, there is no allegation regarding joint ownership and I concur that when each does not raise its claim on a separate paragraph, the only legal inference is that they are joint owners and are seeking the same relief – yet it would seem that in the case of 651 and 651, the first plaintiff's interests were extinguished when it transferred the same to second plaintiff in 2006.

Pleadings must be clear and not be so mixed up as to leave the court and the other party guessing what property which party is claiming. Then there is the Judicial review Matter No. 72 of 2006 (MInd) which I called for and perused – it seeks inter alia commerce proceedings against the Land Adjudication and Settlement Department, the ministry of Land and Settlement, the Commissioner of Lands and the Chief Land Registrar in relation to Titles on the same suit property mentioned herein.

My view is that this application suit is instituted to defeat the Judicial Review Proceedings – the result is the same, if the findings were to be that the issuance of those titles was improper or proper, it would have a bearing to the findings of this court and in fact place the judicial system in an embarrassing situation where different orders may end up being given relating to the same subject matter.

The entire suit is mischievous in the manner pleadings have been drawn and even the reason why it has been filed, I have no hesitation therefore in striking out the entire suit with costs to the defendants.

Delivered and dated this 7<sup>th</sup> day of **July 2009** at Malindi.

**H. A. Omondi**

**JUDGE**