



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 71 OF 2013**

**HALIMA AMIR BOI.....PLAINTIFF**

**=VERSUS=**

**1. OBADIAH OTIENO WESONG**

**2. DIVINE DOVE PROPERTIES LIMITED**

**3. DISTRICT LAND REGISTRAR – KWALE.....DEFENDANTS**

**RULING**

1. For determination is the notice of motion dated 5<sup>th</sup> May 2017 brought under the provisions of order 2 rule 15 (1) (b) (c) & (d) of the Civil Procedure Rules. The 2<sup>nd</sup> defendant/Applicant seeks orders that:

a) **That the plaint dated 22<sup>nd</sup> April 2013 and filed on the same day be struck out as being an abuse of the court process.**

b) **Costs of this application and the suit be provided for.**

2. The application is premised on the grounds that the plaintiff is not the owner of the suit property. The application is also supported by the affidavits of Najmuddin Hassanali sworn on 5<sup>th</sup> May 2017 and 13<sup>th</sup> October 2017. In the further affidavit of 13<sup>th</sup> October 2017, Mr. Hassanali deposed on how the 2<sup>nd</sup> defendant acquired the title to the suit property. He also gave a narrative of how Amir Ali Boy – deceased subdivided the original parcel Kwale/Galu Kinondo/677 into seven portions and sold to various persons. The 1<sup>st</sup> defendant was one of the purchasers of one of the subdivisions Kwale/Galu Kinondo/724 now referred to as the suit property. Amir Ali Boy – deceased later filed a complaint that he never sold the parcels and that he was defrauded. Mr. Hassanali deposed that the police conducted investigations and found Amir of having given false information and he was charged, convicted and sentenced to pay a fine.

3. Not giving up easily, Amir also filed judicial review proceedings seeking orders of Mandamus to compel the land registrar to cancel the titles issued to the seven purchasers. He did succeed temporarily before the orders were reversed and or set aside vide the ruling in High Misc. No.131 of 1991 by I. C. C Wambilyangah J.(retired) on 23<sup>rd</sup> November 1992. The applicant annexed the said decision as “NHN 2” adding that no appeal was lodged to date. It is his contention that at the time of death of Amir Ali Boy in 1997, the property did not belong to him therefore the plaintiff could not inherit it. Consequently the plaint does not disclose any reasonable cause of action to proceed to trial.

4. The application is opposed by the replying affidavit of John Muthini Kamia who holds a special power of attorney from the plaintiff dated 29<sup>th</sup> June 2010. Mr. Kamia deposed that if the plaintiff's suit is dismissed, she will suffer substantial loss as the suit property is hers. He deposed that the plaintiff is the daughter of Amir Ali Boy – deceased who was the registered owner of the suit property **Galu Kinondo/724**. That Amir left a will which made the plaintiff as the legal representative and he annexed annexed copies of the grant issued by the court in Mombasa **HCC suit cause No.90 of 1999**. Mr. Kamia also deposed that the plot was fraudulently transferred to the 1<sup>st</sup> defendant. He further annexed orders of mandamus issued to Amir directing the 3<sup>rd</sup> defendant to register Amir – deceased as owner of the suit land. The plaintiff also annexed an exhibit memo form marked as **JMK5** to confirm that that finger prints on the transfer document in favour of the 1<sup>st</sup> defendant did not belong to the late Amir. The plaintiff urged the court to dismiss the application and allow the suit to proceed to trial on merits.

5. The plaintiff and 2<sup>nd</sup> defendant/applicant filed written submissions which I have read and considered. I am alive to the principle in law that striking out of suits is a draconian measure that courts should use sparingly. In the case of **D.T. Dobie (Kenya) Limited vs Muchina (1982) KLR 1** the court of Appeal held that suits should only be struck out if it's completely hopeless that it cannot be cured even by amendment. That where an amendment could breath life to the suit, such one should not be struck out. I have perused the plaint as filed and do agree with the applicant that the plaintiff/Respondent has not pleaded anything linking her to the suit property. In par 1, the plaintiff described herself as a female adult of sound mind. Par.2 – 4 gives descriptions of the defendants. In par. 5, she pleaded that the suit plot was registered in the name of Amir Ali Boy – deceased. Paragraph 6 – 8 describes the particulars of fraudulent transfer of the land in 1976 to the 1<sup>st</sup> defendant and later to the 2<sup>nd</sup> defendant without the plaintiff's consent and or knowledge.

6. As at 1976, the plaintiff was not the owner of the suit property but his father was. Therefore it was her father to contest the transfer of the suit property to the 1<sup>st</sup> defendant. Indeed her father the late Amir did file judicial review proceedings vide **Mombasa HCC 131 of 1991** contesting the transfer of the suit land to the 1<sup>st</sup> defendant. He obtained orders of mandamus on 22<sup>nd</sup> October 1991. The same court on 23<sup>rd</sup> November 1992 upon being moved by the seven purchasers referred to as affected parties stated thus, **“I order that the order of mandamus issued on 22. 10. 1991 be set aside and the affected persons be re-registered as owners of their respective plots. It is now clear to me that the application for order of mandamus was clearly misconceived and was a gross abuse of the court process. I strike out and dismiss it under order VI rule 13 of the Civil Procedure Rules.”** The court also granted leave to appeal.

7. At page 4 of that ruling, the judge noted that Amir had a complaint lodged with the police that plot no.677 had been fraudulently sold by his co-proprietors without his knowledge. That in the criminal proceedings which ensued it was proved to the trial court's satisfaction that Amir Ali boy had lied to the police officer that he had not taken part in the sale transaction. It was found as a fact that he had executed the documents of transfer. He was convicted and sentenced to pay a fine. He never filed an appeal against the conviction or sentence.

8. The plaintiff presenting an exhibit memo form without giving the results of the criminal case is intended to mislead this court to re-open a matter that was heard and determined. She did not file a response to all these facts set out by the further affidavit of the applicant. I have also noted that she did not annex the will of Amir Ali Boy to her replying affidavit. Neither is the suit property listed as an asset of the deceased in the succession documents annexed. Further it is also a lie for the plaintiff to plead that there has never been any suit regarding the same subject matter yet she must have been aware of the proceedings in **MSA HCC Misc. case no. 131 of 1991**.

9. Given the decision in **Misc. App. No. 131 of 1991** this matter of ownership of the 1<sup>st</sup> defendant over the suit property was determined by a court of competent jurisdiction. Secondly, the issue of fraud if any was also determined by the criminal proceedings again undertaken by a court of competent jurisdiction. In both instances no appeal was preferred and these decisions stands todate. Therefore even if I was to grant the plaintiff leave to amend her plaint, no life would be breathed into this suit as her title arises by

inheritance from the rights of Amir Ali Boy – deceased over the suit land which rights had been extinguished by the sale and transfer found by the high court as valid that he indeed signed the transfer documents.

10. In the result, I am satisfied that the application has merit as the present suit if allowed to proceed will infringe on the principle of res judicata the suit as filed is therefore an abuse of the court process. It is hereby ordered struck out. The costs of the suit and the application is awarded to the 2<sup>nd</sup> defendant/applicant.

**Dated and Delivered at Mombasa this 16<sup>th</sup> Day of January 2018**

**A. OMOLLO**

**JUDGE**