



REPUBLIC OF KENYA



**Maina v Maina & another (Civil Case 310 of 2008)
[2022] KEHC 304 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 310 OF 2008
DAS MAJANJA, J
APRIL 28, 2022**

BETWEEN

JOHN MUKUHA MAINA PLAINTIFF

AND

PENINAH NYAMBURA MAINA 1ST DEFENDANT

PETSUM LIMITED 2ND DEFENDANT

RULING

1. The Plaintiff filed this suit on 10th June 2008 where he accuses the Defendants of fraud in respect of sale of Vumira House situated on Land Parcel No. 209/9738 (“the suit property”) being the property of Vumira Enterprises Limited in which he claims 25% of its shareholding as per a consent order dated 27th January 1999 in HC Succession Cause No. 778 of 1990. In the Plaintiff dated 10th June 2008, he prayed, inter alia, for a declaration that the sale of Vumira House to the 2nd Defendant by the 1st Defendant was null and void.
2. In response to the suit, the 2nd Defendant filed a Defence dated 14th December 2009 denying the allegations of fraud. It denies that there was consent order as alleged or that the Plaintiff was a beneficiary of the estate or that he was entitled to 25% shareholding in Vumira Enterprises Limited. The 2nd Defendant avers that in 2006, he purchased the suit property from the 1st Defendant acting as a director of Vumira Enterprises Limited and that the sale of the suit property was valid as it complied with all legal and mandatory provisions and procedures from the commencement to completion. He states that since he purchased the suit property from a limited liability company, the 1st Defendant lacks the standing to sue him hence the suit is incompetent.
3. By a Notice of Motion dated 12th October 2021 and made, inter alia, under Order 8 Rule 3 and Order 45 Rule 1 of the Civil Procedure Rules (“the Rules”), the 2nd Defendant seeks leave to amend



its Defence to include a counterclaim in the manner shown in the draft annexed to the application. The application is supported by the affidavit of Edward Madete Ndanyi, the 2nd Defendant's Property Manager. It is opposed by the Plaintiff through his replying affidavit sworn on 18th January 2022. The application was canvassed by way of oral submissions where counsel for the parties argued out their respective positions.

4. The thrust of the proposed Amended Defence and Counterclaim is that 2nd Defendant, as plaintiff, seeks to sue John Mukuha Maina, Peninah Nyambura Maina and Vumira Enterprises Limited and the Registrar of Titles. He claims that despite having purchased the suit property from Vumira Enterprises Limited, he has been denied possession thereof by John Mukuha Maina and Peninah Maina who have continued to occupy the same and collect rent from the tenants despite an order the court directing that rent be deposited in a joint account of the parties to the Plaintiff.
5. The 2nd Defendant further avers that since it purchased the suit property in 2006, it has been unable to effect registration of the transfer in its favour with the Registrar of Titles as a result of the fraudulent acts of John Mukuha Maina and Peninah Nyambura Maina which include ensuring that the records with the Registrar of Titles are lost. It therefore seeks a declaration, among other orders, that it is the registered owner of the suit property and is entitled to it and other consequential relief.
6. I have anxiously considered the arguments by the parties in support of and in opposition to the application. The Plaintiff's counsel drew the court's attention to the issue of jurisdiction when he suggested that the proposed amendment would be outside the jurisdiction of this court as it seeks to introduce an issue concerning the ownership of land which is the preserve of the Environment and Land Court.
7. The common thread running through the Plaintiff and the proposed Amended Defence and Counterclaim is the suit property. The Plaintiff contends that the suit property should not have been sold to the 2nd Defendant whereupon he seeks to annul the sale. On the other hand, the 2nd Defendant claims ownership of the suit property and seeks registration in its favour. In my view both the Plaintiff and proposed Amended Defence and Counterclaim call for determination of the ownership of the suit property.
8. The Environment and Land Court is established pursuant to Article 162(2)(b) as read with section 12 of the *Environment and Land Court Act*, 2011 to hear and determine disputes relating to, "the environment and use and occupation of, and title to land." As I have shown above, this case calls upon the court to ultimately determine who is the owner of the suit property which is an issue that implicates title to land. In the circumstances, this court lacks jurisdiction to not only hear and determine this suit but also determine the application before the court.
9. Even though the issue of jurisdiction was not raised by the parties directly, the court has a duty to satisfy itself that it has jurisdiction. If without jurisdiction, it must down tools (see *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Hafswa Omar Abdalla Taid and Others v Swalleh Abdalla Taib* [2015] eKLR). Since the suit was filed prior to the promulgation of *the Constitution* and enactment of the *Environment and Land Court Act*, 2011, I will transfer the suit to the appropriate court for resolution.
10. This suit be and is hereby transferred to the Environment and Land Court, Nairobi for hearing and disposal.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022.

D. S. MAJANJA



JUDGE

Court Assistant: Mr M. Onyango

Mr Ngari instructed by Njeru R. Ngari and Company Advocates for the Plaintiff.

Ms Kosgey instructed by Mogeni and Company Advocates for the 2nd Defendant.

