



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL CASE NO 440 OF 2011**

**FORMERLY NAKURU HCCC NO 299 OF 2009**

**FORMERLY NAKURU HCCC 1227 OF 1996**

**FORMERLY NAKURU HCCC 125 /93 AND NAKURU 132/93**

**EDWARD KINGS ONYANCHA MAINA**

**T/A MATRA INTERNATIONAL ASSOCIATES.....PLAINTIFF**

**VERSUS**

**CHINA JIANGSU CORPORATION.....1<sup>ST</sup> DEFENDANT**

**JAMES OCHIENG ODUOL.....2<sup>ND</sup> DEFENDANT**

**RPV WENDOH.....3<sup>RD</sup> DEFENDANT**

**JOSEPH NYAMU.....4<sup>TH</sup> DEFENDANT**

**MARY G. MUGO.....5<sup>TH</sup> DEFENDANT**

**K.H. RAWAL.....6<sup>TH</sup> DEFENDANT**

**JOHN PHILIP RANSLEY.....7<sup>TH</sup> DEFENDANT**

**HON. CHIEF JUSTICE.....8<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....9<sup>TH</sup> DEFENDANT**

**RULING (1)**

1. In his Notice of Motion dated and filed on 26<sup>th</sup> October 2015, the Plaintiff herein sought several prayers which this court understood to have been as follows:-

- 1. THAT the Co- Plaintiffs be added and enjoined forthwith.**
- 2. THAT the trial court correct and rectify the patent slip omission errors and the patent slip omission apparent in the Ruling of the court date:- (sic)**
- 3. THAT the Ruling of 23<sup>rd</sup> September 2015 be rescinded and vacated restituting the Notice to Show Cause (NTSC) why execution should not issue dated 11.090. 2015 (sic).**
- 4. THAT the Ruling of 31.7. 2105 (sic)be rectified upon correction and vacation ab initio and the trial court issue forthwith**

whereupon *inter alia* committing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants including but not limited to Cecil Lazaro Kuyo and Ouma into (sic) two (2) years imprisonment and the contempt of undertaking entered on 26.7.1993.

5. THAT sequestration orders issue forthwith court against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants including but not limited to Cecil Lazaro Kuyo and Ouma for the payment and remittance to him of the sum of Kshs 37,139,330,782.

6. THAT orders issue forthwith barring the 2<sup>nd</sup> Defendant including but not limited to Cecil Lazaro Kuyo and Ouma be barred from legal practise for a period of 15 years.

7. THAT orders condemning issue forthwith against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants including but not limited to Cecil Lazaro Kuyo and Ouma with costs incidental to the subject the ruling on (sic):-

a. The subject ruling on 23.9.2015;

b. The subject ruling on 31.7.2015.

c. The subject ruling on 08.05.2104;

d. The subject ruling on 17.01.2013.

in Nairobi HCCC 440/2011 now subject of this application and incidental to this application at the higher scale (sic).

8. THAT the costs incidental to the present application be provide for (sic) and condemned upon the 2<sup>nd</sup> Defendant including but not limited to Cecil Lazaro Kuyo and Ouma jointly and severally at the higher scale.

2. In his Supporting Affidavit that was sworn on 26<sup>th</sup> October 2015, he attached the Rulings he wished to be vacated, affidavits, newspaper cuttings and several letters. He did not explain what his case was about in his said Affidavit but did so in the face of his application. He had stated that the Rulings dated 23.09.2015, 31.7. 2105, 08.05.2104 and 17.01.2013 had neither been drawn nor issued as final orders of the court nor appealed from so far.

3. He had also pointed out that on 23.09.2015, the trial court proceeded to deliver its Ruling *ex parte* when the court file showed that the matter was coming up for *inter partes* hearing on 24.09.15 and he was condemned unheard and to pay costs. He set out the grounds under which the said Ruling and the Rulings he had mentioned hereinabove had omissions, errors, patent accidental slips and mistakes.

4. In opposition to the said application, on 4<sup>th</sup> February 2016, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed Grounds of Opposition dated 1<sup>st</sup> February 2016. The grounds were as follows:-

a. THAT the Co-Plaintiffs had no cause of action against them and that there was a separate regime dealing with succession matters.

b. THAT this court lacked jurisdiction to set aside and/or declare null and void the Rulings the Plaintiff had complained of.

c. THAT the application had not been brought within the limits of review but was couched as an appeal.

d. THAT there was no judgment that was entered against them to warrant the execution that had been sought by the Plaintiff herein.

e. THAT the application to enforce the judgment and seeking the committal orders for contempt of court was *res judicata*.

f. THAT the Plaintiff had never appealed the Ruling of Odunga J delivered on 17<sup>th</sup> January 2013 in which he declared whatever judgment, decree or order the Plaintiff may have obtained as illegal, null and void.

g. THAT the application was an abuse of the court process.

5. The 3<sup>rd</sup> to 9<sup>th</sup> Defendants' Grounds of Opposition were dated 23<sup>rd</sup> September 2019 and filed on 24<sup>th</sup> September 2019. Their grounds of opposition were as follows:-

a. THAT the Co-Plaintiffs could not be enjoined without their consent.

b. THAT the applications for execution were improper and could not be granted.

c. THAT there were no slips and omissions identified by the Plaintiff.

d. THAT the application was an abuse of the court process.

6. Having considered the pleadings and Written Submissions in respect of this application, this court determined that the following were the questions this court was mandated to answer:-

- a. **Whether the Co-Plaintiff's herein could be enjoined as parties to the proceedings herein;**
- b. **Whether this court could set aside and/or vacate the Rulings that Plaintiff had complained to have had mistakes, errors, patent slips and omissions; and**
- c. **Whether this court could sequester the 2<sup>nd</sup> Defendant, Cecil Lazaro Kuyo and Ouma for alleged contempt of court orders and contempt of an undertaking.**
- d. **Whether this court could order that the 2<sup>nd</sup> Defendant, Cecil Lazaro Kuyo and Ouma be barred from practice for a period of fifteen (15) years for alleged contempt of court orders and contempt of an undertaking.**

7. This court therefore dealt with the following distinct and separate heads.

## **I. ENJOINING OF THE CO-PLAINTIFFS**

8. Notably, the Plaintiff did not set out his case why the Co-Plaintiffs ought to be enjoined in the present proceedings. In the grounds on the face of his application, he did, however, state that he wanted them to be enjoined to pre-empt (sic) need for succession cause litigations in future.

9. In Order 1 Rule 1 of the Civil Procedure Rules, 2010, it is stipulated as follows:-

**“All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”**

10. Order 1 Rule 13 of the Civil Procedure Rules further stipulates that:-

- 1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.**
- 2. The authority shall be in writing signed by the party giving it and shall be filed in the case.**

11. The Plaintiff did not demonstrate that the Co-Plaintiffs had similar reliefs against the Defendants as he did. He did not also annex any written authority from them to demonstrate that they were interested in being enjoined in the proceedings herein. Indeed, parties are not to be enjoined in proceedings for the sake of it as they would be busy bodies and have the potential of delaying or embarrassing the trial of a case.

12. The Plaintiff had sought to enjoin the Co-Plaintiffs herein to avoid any disputes during Succession. This was completely speculative as was rightly pointed out by the 3<sup>rd</sup> to 9<sup>th</sup> Defendants because even if he was trying to avert any disputes during succession, there was a distinct and separate law in Kenya governing succession matters. This is the Law of Succession Cap 150 (Laws of Kenya).

13. In addition, the Civil Procedure Rules provide that any plaintiff who dies can be substituted. Order 24 Rule 2 of the Civil Procedure Rules states that:-

**“The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.”**

14. Without belabouring the point, this court was not persuaded that the said Co-Plaintiffs should be enjoined in the proceedings herein as the law had adequate safeguards to protect their interests and those of the Plaintiff, if at all.

## **II. REVIEW OF RULINGS**

15. The questions that arose out of this issue were:-

- a. **Whether the Plaintiff had demonstrated the ingredients permitting the review of the Rulings he had complained of;**
- b. **Whether this court had jurisdiction to review the same on account of the patent omissions, errors, mistakes and slips that had been complained of by the Plaintiff herein.**

16. Whilst Section 3A of the Civil Procedure Act provides that, **“Nothing shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”**, the court must operate within the confines of what it can do. This court therefore had due regard to the provisions of the Civil Procedure Act Cap 21 (Laws of Kenya) and Civil Procedure Rules that deal with the question of review of decrees and orders.

17. Section 80 of the Civil Procedure Act provides as follows:-

**“Any person who considers himself aggrieved:-**

**a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

18. It is important to point out that an order for review is not granted as a matter of course. This is because Section 80 of Civil Procedure Act has to be read together with Order 45 Rule 1 of the Civil Procedure Rules which has set down the circumstances under which a decree or order can be reviewed.

19. Order 45 Rule 1 of the Civil Procedure Rules states as follows:-

**“Any person considering himself aggrieved**

**a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

20. For an applicant to succeed on an application for review therefore, he must demonstrate that:-

**“1. There was discovery of new and important matter of evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order was made; or**

**2. There was a mistake;**

**3. There was an error on the face of the record; or**

**4. There was a sufficient reason; and**

**5. That the application had been made without undue delay.”**

21. Applying the provisions of the Order 45 Rule 1 of the Civil Procedure Rules to the facts of this case, it was evident that the Plaintiff had not demonstrated any of the ingredients therein. As he had failed to demonstrate the same, this court came to the firm conclusion that it could not review the Rulings he had complained of.

22. Going further, the Rulings were given by courts of equal and competent jurisdiction. In determining the Plaintiff's application to review the Ruling of Odunga J delivered on 17<sup>th</sup> January 2013, in her Ruling of 8<sup>th</sup> April 2014, Ougo J relied on Order 45 Rule 1(b) of the Civil Procedure Rules and stated as follows:-

**“I have carefully gone through his affidavit and his application and find that what he deposes does not fall within any of the limbs as provided under this Rule.”**

23. This court did not therefore have the jurisdiction to set the said Rulings aside and/or vacate them and in any event, it could not entertain any arguments relating to the Ruling of Odunga J of 17<sup>th</sup> January 2013 as the same was *res judicata*.

24. The only remedy open to the Plaintiff was to obtain orders from the Court of Appeal overturning the same to correct any historical injustice and inequities he may have felt were in this case. In the absence of such orders, the Rulings he complained about remained firmly in place and were binding upon all parties herein.

25. It is also important to point out that following the doctrine of precedence, this court had no colour or right or jurisdiction to vary the Ruling of the Court of Appeal dated 24<sup>th</sup> October 2015. The Plaintiff was at liberty to approach the court to review and/or set aside and/or vacate its orders.

### **III. BARRING OF THE 2<sup>ND</sup> DEFENDANT, CECIL LAZARO KUYO & OUMA**

26. The Plaintiff did not elucidate why the 2<sup>nd</sup> Defendant, Cecil Lazaro Kuyo and Ouma ought to be barred from practising as advocates. In fact, there was no evidence that the said Cecil Lazaro Kuyo and Ouma were aware of institution of these proceedings against them. They were no parties to the suit and hence no adverse order could be given against them without them being heard. Giving such an order would be

against the rules of natural justice.

27. There was a distinct and separate procedure seeking removal of advocates from practise under the Advocates Cap 16 (Laws of Kenya). In such matters, the High Court could only seat as an appellate court and not exercise its original jurisdiction in that regard.

28. Section 60 of the Advocates Act stipulates that:-

**“A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.”**

29. Section 62 (1) of the Advocates Acts sets out the appellate role of the High Court:-

**“Any advocate aggrieved by order of the Tribunal made under [section 60](#) may, within fourteen days after the receipt by him of the notice to be given to him pursuant to [section 61\(2\)](#), appeal against such order to the Court by giving notice of appeal to the Registrar, and shall file with the Registrar a memorandum setting out his grounds of appeal within thirty days after giving by him of such notice of appeal.”**

30. It was therefore the considered view of this court that the Plaintiff’s prayer to have the 2<sup>nd</sup> Defendant, Cecil Lazaro Kuyo and Ouma barred from practising as advocates was misplaced and if there was any complaint against them, then the same ought to be lodged at the correct forum.

#### **IV. SEQUESTRATION OF THE 2<sup>ND</sup> DEFENDANT, CECIL LAZARO KUYO & OUMA**

31. In his Ruling of 17<sup>th</sup> January 2013, Odunga J set aside the interlocutory judgment and he granted the Defendants leave to file their Defences. He had found that the said judgment was premature as the same was entered before time stipulated in the Summons to Enter Appearance had expired. The said learned Judge had found that time had stopped running from 21<sup>st</sup> December 2010 to 6<sup>th</sup> January 2011 and hence entry of interlocutory judgment against the Defendants herein was a nullity and irregular.

32. The Plaintiff did not present any evidence that the said Ruling was overturned by the Court of Appeal. There was no indication that the suit herein proceeded for full trial and judgment was entered against the Defendants herein. This court therefore agreed with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that there was no decree which was capable of being executed. The Defendants could not therefore be said to have been in contempt of any orders as there was no decree they were mandated by law to satisfy.

33. Further, the issue of contempt of court orders was also addressed by Mabeya J in his Ruling of 31<sup>st</sup> July 2015 where he pointed out that the issue of committal proceedings may have been previously litigated upon and could not therefore be raised. He further averred that the orders and judgments were made between 1993 and 17<sup>th</sup> February 2003 and being over twelve (12) years, they could not be enforced outside the limitation period provided in Section 4 of the Limitations of Actions Act Cap 22 (Laws of Kenya).

34. Bearing in mind that Mabeya J’s court was of equal and competent jurisdiction like this one, the issue of contempt of court was thus *res judicata* and his decision could only be overturned by the Court of Appeal. This court had no mandate whatsoever to review it on the grounds the Plaintiff had relied upon. Indeed, he did not demonstrate how such Ruling contained patents omissions, slips, mistakes or errors.

35. Further, the procedure that was adopted by the Plaintiff in instituting contempt of court proceedings against the 2<sup>nd</sup> Defendant, Cecil Lazaro Kuyo and Ouma was wrong and irregular.

36. The question of where the orders were to be directed as was argued by the 3<sup>rd</sup> to 9<sup>th</sup> Defendants was not within the purview of this court. Suffice it to state that it was the considered opinion of this court that the prayer for sequestration was also not merited.

#### **DISPOSITION**

37. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s Notice of Motion application dated and filed on 26<sup>th</sup> October 2015 was not merited and the same is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Costs will not be awarded to the 3<sup>rd</sup> to 9<sup>th</sup> Defendants as they are State Officers being represented by the 9<sup>th</sup> Defendant herein.

38. However, to avoid numerous applications being filed against them as well as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein

39. In respect of the same complaints that have been raised herein, it is hereby directed that the Plaintiff shall not file any application against them without leave of the court.

40. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2020**

**J. KAMAU**

**JUDGE**