



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

**AT MOMBASA**

**HC.COMM. 136 OF 2014**

**MAVJI KARSAN HIRANI.....PLAINTIFF**

**VERSUS**

**(1) MWANALIMA MWINYIKAI CHIRIWACHO..... DEFENDANT**

**(2) SALIM ALI NYAWA..... DEFENDANT**

**RULING**

1. Before the court for determination is a Notice of Motion dated 29.3.2016 and filed in court on the 4.4.2016. The Application sought in the main an order that the summary judgment entered by the court on the 25.6.2015 (Kasango J) against the 1<sup>st</sup> & 2<sup>nd</sup> defendants together with all consequential decrees and proceedings be set aside.

2. The application is grounded on the facts that the subject matter of the suit is that parcel of land known as **Kwale/GaluKinondo/351** therefore the High Court lacks jurisdiction to entertain and should not have entertained the matter and issued the impugned orders and judgment hence the consequent proceedings including taxation of costs and ensuing decree ought to be set aside. As a parting shot the defendants/applicants contend that it would result in a miscarriage of justice if the summary judgment is allowed to continue subsisting having been issued by the court bereft of jurisdiction.

3. That application is supported by Supporting Affidavit of JOYCE CHESARO Advocate which reiterates the grounds of the application as summarised above and adds that by dint of the provisions of Article 165(5) b of the constitution as read with section 13(1) & (2) of the Environment and Land Court Act, 2011, the court lacked jurisdiction to entertain the suit but reserves inherent powers to set aside orders made without jurisdiction and to stay all consequential proceedings pursuant to such orders as the same amount to a nullity. The application is premised on the provisions of order 36, Rule 10 as well as the overriding objectives and inherent powers of the court.

4. The Respondent opposed that application and filed a replying affidavit of the plaintiff/decreed holder sworn before KM. Karimbhai on the 18/7/2016. That affidavit asserts that the dispute in this case is about commercial transaction between the parties and that the suit purely seeks to recover the sum of kshs.12,090,700 and no more.

5. The parties opted to offer oral submissions in arguing the application and did not refer the court to any decided case in support of opposition to the application. Mr.Oduor Advocate for the Applicant in his submission stressed the point that the matter proceeded *ex parte* when the defendant's advocate sought an adjournment which was declined. He equally underscored the fact that pleadings being coached as a

commercial transaction does not oust the provisions of the Environment and Land Court Act, Section 13.

6. In his response Mr.Omolo, on technical front submitted that the judgment sought to be set aside was never entered pursuant to the provisions of order 36 Rule 1 but under Orders 40 and 2 Civil Procedure Rules; that the object of the application is to embarrass the court by inviting it to sit on appeal on the decision of a court of concurrent jurisdiction and that an objection to jurisdiction ought to be taken at the earliest opportunity. He cited the decision by the Court of Appeal in “Re owners of Motor Vessel “Lillian S.” He pointed out the fact that, the defendant never contested jurisdiction in their statement of defence but instead filed a counter claim to demonstrate that they submitted themselves to jurisdiction of the court.

7. On the merit, the counsel submitted that the jurisdiction of the Environment and Land Court is donated by the provisions of Article 162(2) and limited to disputes involving environment use, and occupation and title to land and that the suit before the court did not touch on any of those aspects. He pointed out that the provisions of section 13 of the Environment and Land Court Act cannot be read to overreach the set boundaries of the Constitution.

8. In his rejoinder Mr.Oduor submitted that the provisions of section 13(2) d of the Environment and Land Court Act squarely put the dispute within the provision of the Environment and Land Court.

### **Determination**

9. When all is considered, the only issue for determination is whether or not this court has the requisite jurisdiction to determine the dispute as pleaded by the plaintiff. I say it is the only issue because if it be found that there is no jurisdiction then the resultant proceedings, orders and decisions would be a nullity and the court would be enjoined to correct that situation by reversing the impugned decisions and proceedings. If however the court finds that it had the necessary jurisdiction then other considerations on when a court would set aside its orders would set in.

10. In order to establish whether or not the dispute as pleaded fell within the jurisdiction of this court, one would as of necessity, resort to the plaint filed Paragraph 9 of the plaint was fashioned and expressed as follows.

***“By a letter dated 10.10.2014 and addressed to the defendants the plaintiffs said advocates demanded the refund of the deposit of kshs.12,090,700 with interest within 15 days of the said letter but the defendant have neither completed the sale nor refunded the said deposit.”***

11. The plaint then proceeded to pray as follows:-

***“Wherefore the plaintiff claim for the defendant jointly and severally:-***

***(a) Return of the said sum of kshs.12,090,700***

***(b) Interests on the said sum of kshs.12,090,700 or court rates.***

***(c) costs.”***

12. From the pleadings and prayers in the plaint, this court is in no doubt that the suit was limited to a claim for refund of the sum of ksh.12,090,700 and had no concern whatsoever with the questions of **use, occupation or title to the land**, KWALE/GALU KINONDO/351. This court has had an opportunity to render itself on this point, not once but severally an in particular in the case of **ESHER NYANGANYI ONYANGO -VS- HOUSING FINANCE COMPANY OF KENYA & ANOTHER**, (MOMBASA HCC. NO.04 OF 2014 the court said:-

***“For the foregoing reasons I refuse to construe the statute, section 13 (2) d of the Environment and Land Court Act, with the strictures Mr. Kongere has sought from the court. I hold that***

***commercial transactions even If grounded on land must remain commercial transaction unless they vest or create rights that can result in and touch on Environment, the use and occupation or title to land. In the instant case the question is whether or not the bank should recover its debt in terms of the collateral and not otherwise. I therefore find no merit in the preliminary objection and dismiss the same with costs.***

13. Put in the context of the matter before me, as pointed out earlier, the plaintiff never sought to specifically enforce the agreement for sale of land. Infact it was averred in ground 9 of the Notice of Motion dated 19.3.2015 that the defendant proposed to sell to the plaintiff the property, **Kwale/GaluKinondo/351** and received the deposit when the suit property was not and never lawfully owned by them and indeed when the title deed thereof was already surrendered to the lands Department and cancelled after the suit property was subdivided into 48 plots in or around April 2008.

14. It is not farfetched to say that the plaintiff was pleading that the defendants purported to sell to him what they did not own an therefore would not pass a good title over.

15. When Kasango J, determined the application, she found and held that

***“Since the defendant's did not controvert plaintiffs deposition the court accept them as being correct. Those depositions are that the suit property is registered in the name of elephant Oil Mills Limited and to that end the plaintiff annexed a title document of the suit property to prove that registration.***

***As deponed by the plaintiff and which has not been controverted by the defendants, the defendants undertook to have the transfer of the suit property tothe plaintiff with a title of the suit property registered in his name. However, on further inquiry the plaintiff found out that the suit property belonged to an entity called Elephant Oil Mills Limited. Before transferring the suit property in the plaintiff name, as aforesaid the defendant filed a suit in this court being Mombasa Environment and Land Court Civil Case No. 43 of 2014 and in that suit they sought and obtained exparte, a vesting orders against Elephant Oil Mills Limited. On obtaining that order that the suit property be vested into their names the defendants proceeded to have the suit property registered in the plaintiff's name.***

***Elephant Oil Mills Limited later had the exparte order set aside and obtained an order nullifying the plaintiff's title to the suit property. As a result of that failed transaction the plaintiff by this suit seeks an order for judgment against the defendants for Ksh.12,090,700.***

16. It is clear to me that there was no question of any interest in land sought to be determined between the parties and therefore the Environment and Land Court could not possible be vested with jurisdiction to entertain the matter. It squarely rested with this court and there is no merit in the allegation that this court lacked jurisdiction to determine the matter as it did.

17. I would conclude at this juncture and finding but, there is also the assertion that there were proceeding taken exparte on the 30.4.2014. The records of the file reveal that on that day the defendants was indeed represented by an advocate one Mr.Shimaka who applied for adjournment but the application was declined by the court. The court then ordered that the application proceeds at the end of the list. When the matter was called not later Mr. Shimaka was not in court. The question that has to be asked and answered is whether in the circumstances the ensuring proceedings were *exparte* proceedings. In my very humble view there were no *exparte* proceedings on that day. The defendant was indeed represented by Mr.Shimaka. If in his own choice he opted to walk out on the court or just failed to turn up at the appointed time, it was a choice deliberately taken for herself and on behalf of this client. It is still good law that he who acts by agent acts by himself. There were no *exparte* proceedings to warrant setting aside. See DIN MOHAMED -VS- VALJI VISRAM & CO.LTD 1937 EACA 1.

18. However even if there were *exparte* proceedings, the principle applicable and which must be considered were well set out in the now time tested decision in the case of SHAH -VS- MBOGO &

ANOTHER [1967] EA 166 at page 123 paragraph B line 3 where the court held, and the decision was upheld by the court of appeal that:-

***“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course or justice.”***

19. Before Judge Kasango, an adjournment was sought on the basis that Mrs.Chesaro no long had instructions from the client and had not filed a replying affidavit and intended to cease acting. The purpose of the adjournment was to allow the advocate cease acting so that the defendants could be served directly. More than one year later that desire has not been realised. What has come to surface is that the advocate now has instructions to act and file an application to set aside. It cannot be lost sight of the fact that earlier on, in the transaction for sale, the Advocate for the defendant when pushed to confirm if the defendant would be ready to complete the sale, speedily and on the same day, responded to say they no longer had instructions. I take the view that those two happenings were not coincidental but were to me what JUDGE HARRIS IN SHAH -VS- MBOGO (supra) called 'designs to obstruct and delay the course of justice.' Such a person does not deserve the court's judicial discretion to set aside.

20. For the foregoing reasons this file deserve to be brought to its logical and just conclusion. To upset the proceedings so far taken on the facts disclosed would, to this court, not serve the ends of justice. The court takes the view that the application is not made with *bonafides* with purpose of justice in mind but to delay the course of justice. It deserves dismissal and I am left with no discretion but only one option; dismiss it with costs to the plaintiff.

**Dated, signed and delivered at Mombasa this 17<sup>th</sup> day of August 2016.**

Ruling delivered in the presence of Mr.Omolo for the Plaintiff/Decree holder/Respondent and in the absence of the Judgment debtor/applicant.

**P.J.O.OTIENO**

**JUDGE**

**15.8.2016**