REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 134 of 2007

STEPHEN BLANCHET ……..
PLAINTIFF

VERSUS

AKACH ADHIAMBO LANGI ……..……
DEFENDANT

****

RULING

Before court is the Chamber Summons dated 29th September 2008 by which the Applicant seeks the following orders:-

"(1) That the Plaintiff's Plaint filed herein against the Defendant be struck out and the Plaintiffs suit against the Defendant be dismissed with costs.

(2) The costs of this application and the suit be borne by the Plaintiff in any event."

The application is supported by the grounds adduced on the face of it as well as by the supporting affidavit of **AKACH ADHIAMBO LANGI** the Defendant herein. The Plaintiff/Respondent **STEPHEN BLANCHET** filed his Replying Affidavit dated 12th October 2009 in court on 17th June 2009. For the purposes of this present application Mr. Njoroge Advocate appeared for the Plaintiff/Applicant whilst Mr. Osino appeared for the Defendant/Respondent. On 8th July 2009 it was agreed by consent that both advocates file their written submissions in the matter. This was done with the Applicant filing their written submissions on 29th July 2009 whilst the Respondent filed their own written submissions in court on 16th September 2009.

A brief background on the case is as follows. On or about May 1992 the Plaintiff then a High School student in the United Kingdom met the Defendant and the two commenced a relationship. From December 1992 the couple began to cohabit and as a result of this cohabitation they bore four children. From October 2001 the couple relocated together with their four children to Kenya thereby bringing themselves under the jurisdiction of this court. The Plaintiff and Defendant jointly own a house in London which house is situated on **16 Pembroke Road, Muswell Hill, London N10 2HR** (hereinafter referred to as "***the London House").*** Additionally the parties are directors and shareholders of Creek Marketing and Development Limited (hereinafter referred to as "***the company"),*** which company is the

registered proprietor of a parcel of land known as **KILIFI/MTWAPA 403** measuring 2.83 hectares situated in Mtwapa (hereinafter referred to as the "***Mtwapa property")***. This Mtwapa house is the only asset of the company. After relocating to Kenya the couple fell out and became estranged as a result of which cohabitation between them ceased from July 2004. In his Plaint dated 28th May 2007 the Plaintiff alleges that the parties agreed that the two properties be sold and the proceeds thereof be shared out equally between them. This did not happen. The Plaintiff further alleges in his Plaint that despite each party having obtained independent valuations for the two properties the Defendant has adamantly refused to give her consent to the sale and disposal of the two properties. This the Plaintiff avers is causing him to suffer loss and damage especially since the Defendant remains in exclusive occupation of the Mtwapa property. The Plaintiff therefore filed his Plaint seeking orders from the court for the sale of the two properties and the remittance to himself of a one half share of the two properties upon the sale thereof. This therefore is the suit which the Defendant/Applicant is asking this court to strike out and dismiss.

I have carefully perused and considered the written submissions filed in court by both counsel as well as the authorities cited and annextures thereto. From these written submissions it is clear that this application for dismissal is based on two main grounds:

(1) That since the London property is immovable property situated in a foreign country this court does not have jurisdiction to make any orders with respect to the same.

(2) That the Mtwapa property does not belong to either the Plaintiff nor the Defendant as individuals but rather belongs to the company which is a totally separate and distinct legal entity. No consent has been obtained and/or given by the company for the disposal of its only asset by way of sale or indeed in any other way

I propose now to deal with each of the grounds raised individually.

The fact that the London property is located in a foreign

country is not in any doubt at all. The description alone **16 PEMBROKE ROAD, MUSWELL HILL, LONDON N102HR** makes this manifestly clear. The property is clearly situate in England. This is a fact readily conceded to by both parties. In his plaint dated 28th May 2007 prayer (a) therein seeks:

(a) An order that the two properties known as KILIFI/MTWAPA/403 and house on 16 Pembroke Road, Muswell Hill, London N102HR be sold by public auction or private treaty and the proceeds thereof be shared equally between the Plaintiff and the Defendant."

It is evident that the Plaintiff is asking this court to order that this London property be sold either by private treaty or by public auction. This raises the very pertinent question of whether a Kenyan court is vested with sufficient jurisdiction to make orders with respect to immovable property situate in the United Kingdom. The High Court of Kenya is created by and derives its authority from the Constitution of Kenya. S. 60 of the Constitution provides as follows:-

"***60(1) There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law."***

The Constitution thereby vests in the High Court of Kenya "***unlimited original jurisdiction in civil and criminal matters."*** This section does not however clarify whether this unlimited jurisdiction would extend to immovable property in a foreign country. The Plaintiff's suit can be described as a suit brought to court for the determination of his right and/or interest in immovable property in the terms of S. 12 of the Civil Procedure Act Cap 21 Laws of Kenya. The marginal notes for S.12 provides that "***suit to be instituted where subject matter situate."*** The relevant provisions of S.12 go on to provide as follows:-

"***12. Subject to the pecuniary or other limitations***

prescribed in any law, suits –

(a) for the recovery of immovable property, with or without rent or profits,

……

(d) for the determination of any other right to or interest in immovable property;

(e) ……

Where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate."

The London house cannot be any stretch of imagination be said to be located within the local jurisdictional limits of a Kenyan court. The wording of this provision of the law is very clear and specific. The property with respect to which a suit is instituted under the Civil Procedure Act must be situate in Kenya. This position is reinforced by case law. In the case of **PAPCO INDUSTRIES LIMITED –VS- THE EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK (THE PTA BANK) HCCC 528 OF 2006**, a case which involved recovery of the suit property a security located in Uganda and registered under Ugandan law. The Defendant in that case raised a Preliminary Objection seeking to have the suit struck out on the basis that the Plaintiff lacked locus and that the High Court of Kenya lacked requisite jurisdiction to hear the suit. In her ruling in which she allowed the Preliminary Objection and struck out the suit **Hon. Lady Justice Mary Kasango** held at page 4 thereof:-

"***It is also pertinent to note that under paragraph 8 of the loan agreement the securities stated therein are to be found in Uganda. That is the land is in Jinja Uganda and the assets in respect of the debenture are also to be found in Uganda. The law that would be applicable to this properties is clearly the Ugandan law. This court would be misplaced to grant any orders in relation to those securities which are not under the jurisdiction of this court. I do therefore, find that this court does not have jurisdiction to hear the matter presented before this court."***

I am persuaded by this authority and I find no valid reason to deviate from the reasoning therein. Likewise as pointed out by counsel for the Applicant in his written submissions courts, various other commonwealth jurisdictions have held the same view as that in the **PAPCO** case. In the cited English case of **BRITISH SOUTH AFRICA COMPANY –VS- COMPANHIA DE MOZAMBIQUE AND OTHERS [1891] ALL ER REP 640** it was held by Lord Herschell, L.C. that:-

"***No nation can execute its judgements, whether against persons, or movables, or real property, in the country of another."***

In the Canadian case of **DUKE –VS- ANDLER 1932 (SCR) 734** the

Honourable Justice Smith of the Supreme Court of Canada held at page 738 that:-

"***The general rule that the courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country is not in dispute."***

These are authorities which though not binding on this court are of very great persuasive value. Indeed to my mind a court ought only to make orders that it is able to follow up to ensure compliance with and which it would be able to act upon in the event of a breach thereof. How will the High Court of Kenya ensure compliance with its orders if made with respect to immovable property in a foreign land? Courts ought not to make orders in vain. I am convinced and I do hold the view that since the London house is situate in England this court has no authority or jurisdiction to make orders with respect to the sale or

otherwise of that house. To do so would amount to a futile attempt to encroach upon the jurisdiction of the British courts which alone have the requisite jurisdiction to make such orders.

Counsel for the Respondent argues that his proposed amendment to the Plaint as per the proposed amended Plaint dated 12th June 2009 wherein the Plaintiff states that he and the Plaintiff were married under common law would save the suit by bringing into play S 17 of the Married Women Property Act [1887]. Counsel further refers this court to S. 74 of the Enforcement of Judgement in Different Jurisdictions of the Civil Procedure [Volume 1] 2003 of the Laws of England. S. 74.2 of that Act provides that any judgement, decree, order, decision or writ of execution given by a foreign court or tribunal is enforceable in England or Wales. S. 74.11.2 of the same Act includes Kenya as one of the commonwealth countries to which this Act is applicable. That may all be very well and good but I am convinced that the British court would enforce **only** such judgements as a foreign court including a court in Kenya had jurisdiction to make in the first place. The issue of jurisdiction goes to the heart of the matter and without it every act done thereafter becomes invalid, null and void. I do not accept for one minute that because of the existence of this British statute a court in Kenya may proceed to make orders with respect to a property situate in England. The British courts will only enforce **valid** court orders from a foreign court. If the foreign court in the first instance lacks requisite jurisdiction to make the order in question, ab initio then the provisions of this Enforcement of Judgement in Different Jurisdictions Act cannot and will not apply. The cases cited by learned counsel for the Respondent such as **Echaria –vs- Echaria Civil Appeal No. 75 of 2001, Neema Nungari Salim –vs- Salim Ali Molla HCCC 23 of 2001 and Florence Wairimu Kanyora –vs- Njoroge Kinyanjui HCCC No. 11 of 2002 (OS)** are all distinguishable from the present case in that all the three cited cases the property in dispute was situate in the Republic of Kenya and thereby subject to the jurisdiction of the High Court of Kenya. Jurisdiction is the key that validates any judgement, decree or order. An order made without jurisdiction is not enforceable either in Kenya or anywhere else for that matter. In the case of **BRITISH SOUTH AFRICA COMPANY –VS- COMPANHIA de MOZAMBIQUE 1893 A.C. 602** the Queen Bench Division developed the Mozambique Rule. This rule is described by Wikipedia, the free encyclopedia "***as a common law rule in private international law. The rule renders actions relating to title in foreign land, the right to possession of foreign land non-justiciable in common law jurisdictions."***

I am convinced by the logic of this Rule and I do agree with the same. The London house even if it be termed matrimonial property is situate in a foreign jurisdiction. It is subject to the laws of England and it is only the Courts of England that has jurisdiction to make valid and enforceable orders with respect to that London house. To purport to do so would be to encroach into the jurisdiction that rightfully belongs to the British Crown. I therefore dismiss the Respondent's submissions in this regard. I therefore find that this suit is incompetent and untenable in so far as it seeks orders with regard to property situate in England which orders the High Court of Kenya has no jurisdiction to make.

Secondly the Plaintiff in his Plaint seeks orders with respect to the Mtwapa property. In the same Plaint the Plaintiff concedes that this Mtwapa property which was the matrimonial home is in actual fact registered to **Creek Marketing and Development Limited**. In his Plaint dated 28th May 2007 at paragraph 3 the Plaintiff states that:-

"***3. The Plaintiff states that the parties herein are the directors and shareholders of Creek Marketing and Development Limited ("the company").***"

It is trite law that a company is a legal entity separate and distinct from its directors and/or shareholders. This principle was well enunciated in the well-known case of **SALMON –VS- SALMON & CO. LTD [1897] A.C. 22HL**. The law in Kenya has also enacted this principle by virtue of The Companies Act Cap 486 Laws of Kenya. S. 16(2) of Cap 486 provides that:-

"***From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising***

all the functions of an incorporated company with the power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act."

The fact that the Plaintiff and the Defendant are the only directors and shareholders of the company does not in any way deny it of its unique status a separate and individual entity in law. The Mtwapa belongs to the company. It does not belong to either the Plaintiff nor the Defendant in their individual capacities. Therefore in order for the Mtwapa land to be sold and/or divided there must be a company resolution to this effect. In the case of **AJ LIMITED & ANOTHER –VS- CATERING LEVY TRUSTEES & 3 OTHERS (NAIROBI) HCCC NO. 1488 of 2000** (unreported) it was held by Hon. Justice J.B. Ojwang at page 10 that :-

"***It is trite law, just as counsel for the 2nd Defendant has eloquently submitted, that the shareholders or directors of a company are, in their individual capacities not the company …." (my emphasis)***

The company is entitled to sue and be sued in its individual capacity and does not require either the Plaintiff or the Defendant to litigate on its behalf. The Plaintiff in his suit seeks orders from the court which lie directly against the property of the company yet he has not enjoined the company in the suit. There is no evidence of any company resolution to wind up the company or to sell its assets. The court must take into consideration factors such as any debts the company owes to third parties and tax liabilities the company may have before making the orders sought by the Plaintiff. It is precisely for this reason that the company must be party to the suit. The parties may be the directors and shareholders of the company but they **are not** the company and cannot come to court to seek sale of company assets. For these reasons I must again declare this present suit both incompetent and untenable.

The Plaintiff/Respondent did file an application dated 12th June 2009 to amend the Plaint to which he has attached the proposed amended Plaint. I have perused and have considered this proposed amended Plaint and in my view it would not save this suit. There is no amendment that would act to confer jurisdiction where none exists. Likewise no amendment would entitle a court to make orders with respect to property owned by a party not named in the suit. I am well aware that courts are reluctant to strike out a suit unless no life can be breathed into that suit at all. It is my opinion that this is one such suit. It cannot be saved by amending the Plaint. This suit in my view is not sustainable in law. The objections raised by the Applicant in this application go to the very root of the matter and are not mere technicalities. For the reasons given above I do hereby allow the Defendant's application and I order that the Plaintiff's suit be struck out. Each party to meet their own costs for this application.

Dated and Delivered at Mombasa this 22nd day of October 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Ms. Ngugi holding brief for Defendant/Applicant

Ms. Osimu for Plaintiff/Respondent

M. ODERO

JUDGE

22/10/2009