



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

**CIVIL CASE NO. 3727 OF 1995**

**ROBERTA MACCLENDON FONVILLE.....PLAINTIFF**

**VERSUS**

**JAMES OTIS KELLY III**

**JOHN JAMES KLEIN**

**EATI DEVI MASCARENHAS**

**JOHN RUGGIERI.....DEFENDANT**

**RULING**

This is a preliminary objection to the suit. Counsels for the respective parties have agreed that:-

1. If the defendants objection on points of law on jurisdiction and/or locus standi are upheld or either is upheld the suit be dismissed with costs and
2. If they are not upheld and the plaintiffs points of law on the requirements of the Land Control Act consent – cap 301 is upheld, then judgment be entered for the plaintiff with costs.

The Original plaint was filed on 27.12.95 naming only two defendants – James Otis Kelly III (first defendant) and John James Klein both shown as Attorneys practicing law in the United States of America (USA). Upon filing the suit, plaintiff also filed an application for injunction to restrain defendants from transferring the shares for FONVILLE ENTERPRISES INCORPORATED; SEGERA RANCH LIMITED and MUKENYA RANCH LIMITED to John Ruggieri until the final determination of the suit. The application was heard exparte by Hayanga J. who on 27.12.95 granted an exparte temporary injunction until 9.1.96. In the meantime, plaintiff on 8.1.96 filed an application for leave to serve notice of summons on the defendants out of Kenya. That application was made under Order V Rules 21, 21A, 23, 24, 34 of Civil Procedure Rules. That application was heard exparte by Hayanga J. and allowed on 23.1.96. It was ordered that service on the defendants be effected by process of DHL. On 6.2.96, plaintiff obtained an order on application to add EATDEVI MASCARENHAS and JOHN RUGGIERI as third and fourth defendants respectively. An amended plaint was subsequently filed. By the amended plaint, the third defendant is a certified public accountant in Nairobi and Secretary of Segera Ranch ltd and Mukenya Ranch ltd while the John Ruggieri, the fourth defendant is a citizen of the U.S.A. State of Florida and domiciled there. The record does not show that plaintiff applied for and obtained an order for leave to serve notice of summons on Mr. John Ruggieri, out of jurisdiction. But the firm of Kaplan and Stratron Advocates filed a notice of Appointment under protest for John Ruggieri.

Plaintiff avers in paragraph 7 of the amended plaint that, she and her sisters Elizabeth Kilby Fonville and

Marion Kenley Fonville are the beneficial owners of 100 shares of FONVILLE ENTERPRISES INCORPORATED (F.E.I) incorporated in Texas State of U.S.A which 100 shares represent the 50% of the issued share capital while her mother Roberta Montomeru Fonville owns 100 shares also representing 50% of the issued share capital.

She avers further in paragraph 8 of the Amended plaint that, she, her sisters , her mother and FEI donated a Power of Attorney to the first and second defendants in respect of shares and other matters generally. And in paragraph 9 of the plaint, she avers, inter alia, that, FEI was incorporated for the sole intention of acquiring immoveable assets in Kenya and it owns through its subsidiary companies – Segera Ranch limited and Mukenya Ranch limited, six pieces of land with a total acreage of 49,000 which are agricultural land. In paragraph 11 of the plaints, she avers that the first and second defendants in breach of the terms of provisions and stipulations set out or implied in the power of Attorney have done certain acts including selling all the issued shares of FEI and consequently the shares in the subsidiary companies to John Ruggieri at an under value namely USD 2 million.

The reliefs sought in the plaint include:

- (i) An order of injunction to restrain John Ruggieri from entering into the two Ranches owned by the two subsidiary companies alienating or taking possession of the ranches and moveable assets in the two ranches
- (ii) An order revoking, annulling or setting aside the sale or transfer of the share of the subsidiary companies to John Ruggieri
- (iii) General damages resultant upon the breaches and actions of the defendants jointly and severally.

Two bundles of documents were produced by consent for purposes of the preliminary objection as agreed documents. Bundle A was produced by plaintiff while bundle B was produced by the defendant. Bundle B contains the STOCK PURCHASE AGREEMENTS made on 7.12.95 between the first and second defendants as Attorneys infact of FEI, the setter on one part and John Ruggieri, the purchaser, on the other part. By that agreement, the first and second defendants agreed to sell the 100 shares of Roberta Montgomery Fonville; and the 100 shares of the estate of William Fonville both in FEI to John Ruggieri at a price of U.S. D 2,100,000. That agreement was executed in Florida USA. The documents in Bundle B show that prior to the date of the making of the agreement, plaintiff and her two sisters had been appointed as independent co-executrices of the estate of William Marion Fonville; that the three sisters had become shareholders in FEI; that Roberta Montgomery Fonville had on 30.9.93 appointed John S. Klein (2nd defendant) as agent and Attorney in fact and that FEI had on 9.3.95 appointed John J. Klein and James O. Kelly III (first defendants) its Attorneys infact. The Power of Attorney given by FEI was executed by Roberta Montgomery Fonville as president; Marion Kenley Fonville as Secretary; Roberta Montgomery Fonville as Director and shareholder; Marrion Kenley Fonville as Director and shareholder, Roberta McClendon Fonville as shareholders and Elizabeth Kirby Fonville as a shareholder.

The stock Purchase Agreement shows that FEI was selling its stock in FEI and its stock in the subsidiaries companies in Kenya including the stock of Mukenya Ranch ltd and Segera Ranch ltd and that John Ruggieri was buying both the stock of FEI and the stock of subsidiary companies in Kenya. The Agreement further shows that Mukenya Ranch ltd and Segera Ranch ltd owned collectively a ranch containing approximately 50,000 acres.

Mr. Joseph Musyoki – a senior search clerk in the firm of M/S Kaplan and Straton Advocates did a search of the two subsidiary companies in the companies Registry. He found, among other things, that, FEI owns 9994 shares in Mukenya Ranch out of the 10,000 shares issued and that by a special resolution dated 7.1.70 Mukenya Ranch was converted from a private company to a public company. In the case of Segera Ranch ltd he found, inter alia, that FEI owns 94 shares out of the 100 shares already issued.

The defendants filed a Defence to the Amended plaint under protest in which:

(i) They deny that proper or lawful service of the summons and other process was effected on the defendants or any of them.

(ii) They contend that, considering the subject matter of the suit, the fact that FEI is a foreign corporation and that first second and 4th defendants are resident in the U.S.A, this court has no jurisdiction to entertain or hear and determine the plaintiffs claim

(iii) Plaintiff has no locus standi in respect of sale and transfer of the 100 shares owned by Roberta Montgomery Fonville; in the sale and transfer of the remaining shares owned by the estate of William Marion Fonville and in the sale of shares of Mukenya Ranch ltd and Serega Ranch ltd in which she had no beneficial interest.

Those issues were raised as preliminary objection to the suit. 1. JURISDICTION - ISSUE AND SERVICE OF NOTICE OF SUMMONS Mr. Alibhai for the defendant at first submitted that no application for leave to serve first, second, and 4th defendant out of jurisdiction was made and no leave was granted as provided by order Rule 21 Civil procedure Rules. But when it was brought to his attention that application was indeed made and that Hayanga J granted leave, he contended that such leave was granted without proper consideration of the relevant principles and that in any case the Notice of Summons was not served in accordance with the procedure set out in order V Rule 27 Civil procedure Rules.

He contended that Notice of Appointment of Advocates was made under protest; Defence filed under protest and application for the stay or striking out the suit was made and that defendant thereby challenged the jurisdiction of the court;

Mr. Nowrojee for the plaintiff, on the other hand, submitted that:

(i) Hayanga J. gave leave on 23.1.96 and other processes were served thereafter

(ii) The order of Hayanga J. was properly given and was not challenged by an application to set it aside and still stands

(iii) The order is not challenged by being traversed in the Defence and an application to set aside the order must be made as a first step to divest the High Court of the jurisdiction

(iv) Defendants submitted to the jurisdiction of the High Court by filing their appearances, Defences unconditionally and by challenging the plaintiffs application for injunction

(v) It is too late to raise issue of service as defendants have been part of the full hearing before, the court and asking for orders from the court independently of the issue of service.

It is a fact, supported by the record, that, plaintiff filed an application for leave to serve first and second defendant with notice of summons out of Kenya on 8.1.96 and that the application was allowed by Hayanga J on 23.11.96 and it was ordered that the service be effected by process of DHL

An affidavit of service sworn by Mr. Clement Muturi Kigano, Advocate then on record for plaintiff, was filed on 6.2.96. Mr. Kigano deposes in that affidavit that by cover of a letter dated 25.1.96 he caused to be dispatched to first and second defendants in USA by DHL World Wide Express, a chamber summons dated 27.12.95 and the affidavit in support of it; an order issued by court on 27/12/95 an order given by Court on 9.1.96 and issued on 10.1.96 and an order given by court on 23.1.96 and I issued on 24.1.96.

From that affidavit, first and second defendants were only served with the application for interlocutory injunction; order of limited interim injunction; order extending the limited interim injunction and order granting leave to serve out of jurisdiction. The record does not show that a notice of summons in the prescribed form or at all was issued by court and served on the first and second defendants.

In the case of the 4th defendant, no application for leave to serve him out of jurisdiction was made and no order for service outside jurisdiction was given. The record also shows that the first 2nd and fourth defendants did not enter appearance, conditional or otherwise.

The pleadings show that the first, second and fourth defendants are citizens of USA and are domiciled there. They would not therefore, prima facie, be amenable to the jurisdiction of the Kenya courts unless and until application for leave to Serve them out of jurisdiction was made, allowed and served in accordance with over V Rules 21 and Rule 27 Civil procedure Rules.

The question of leave and the question of service of the Notice of summons goes to the root of this courts jurisdiction over the first, 2nd and fourth defendants.

It is true that application for leave to serve first and second defendants out of jurisdiction was made and allowed by Hayanga J in his discretion. In the case of a Resident defendant, the primary documents which gives a defendant the notice of the institution of the suit and orders him to enter an appearance in the suit to avoid adverse consequences is the summons to enter appearance (Order III Rule 3(1) Civil Procedure Rules). Unless summons to enter appearance have been issued and defendant served with summons to enter appearance and defendant has failed to enter appearance all proceedings in the suit against him are a nullity.

In the case of foreign defendants, the Notice of summons is a substitute for the summons to enter appearance. The reasons why a notice of summons and not a summons is the correct document are explained by Sir Charles Newbold, the President of former Court of Appeal for Eastern Africa in Prabhudas (N) & Co. versus Standard Bank {1968}EA 869 at page 683 paragraphs B – E.

In this case, after Hayanga J. granted leave to serve notice of summons out of jurisdiction on the first and 2nd defendants, the notice of summons in the prescribed form was not issued by court and was not served on the first and second defendants. The notice of summons had to be served strictly in accordance with the mandatory procedure set out on Order V Rule 27.

If that procedure was followed, then, plaintiffs should have made a formal request to court in the prescribed form. The Chief Justice would then have forwarded the notice of summons to the Minister for Foreign Affairs in the prescribed form for transmission through diplomatic channel to the Government of USA requesting service. The Government of USA would then have communicated service or otherwise through diplomatic channel. In this case, Hayanga J. ordered service of Notice of summons through DHL – a private international couriercompany and plaintiffs counsel filed an affidavit of service verifying that first and second defendants were served, inter alia, with the court order through that medium.

Plaintiff did not obtain leave to serve the fourth defendant out of jurisdiction and so no Notice of summons was issued and served on him. The result is that this Court has not been called upon to exercise jurisdiction over him and he has not been given notice of the institution of the suit and asked to enter appearance. He is not therefore obliged to respond to this suit as he has not been made amenable to the jurisdiction of this court. As regards the first and second defendants; Notice of summons has not been issued against each and served in accordance with the mandatory procedure. In my view, failure to issue a Notice of summons for service on each of them and failure to serve a Notice of summons in accordance with the Official procedure set out in order 2 Rule 27 is a fundamental omission and not merely an irregularity which divests this court of any jurisdiction over them. The service of the court order which gave leave to serve out of jurisdiction through DHL and the service of the court order through DHL are themselves a nullity.

Notwithstanding the order for leave to serve out of jurisdiction, a foreign defendant who is served has a right to contest the jurisdiction of the court by entering a conditional appearance and thereafter making an application to set aside the order giving leave, or to set aside the service or to strike out the suit for want of jurisdiction

In Prabhudas (N & Co., versus Standard Bank (1968) E.A 679(supra) Charles Newbold P. said at page

684 in part:

“It is true that that there is no specific provisions in the rules for a conditional appearance but to the knowledge of the members of the court it has been the practice for at least the last twenty odd years where appropriate to enter a conditional appearance --- In my view where a defendant chooses to enter unconditional appearance in proceedings in court, he must be taken, save in exceptional circumstances such as where he contemporaneously files notice of motion to set aside the proceedings to which he has entered appearance, to have waived any irregularity in the process to which he enters an appearance and thus accepts the jurisdiction of the court”

The other members of the Court agreed with the views of the President .

In this case, failure by plaintiff to serve a Notice of summons on the first, 2nd and fourth defendants denied them an opportunity to enter conditional appearance. The first, 2nd and 4th defendants took the first available opportunity to file a Defence under protest wherein they raised the issue of jurisdiction. They then proceeded to file an application on 29/10/98 praying that the suit be stayed or alternatively be struck out on the grounds that leave to serve them out of jurisdiction was not given; that Notice of summons have not been served in conformity with order V Rule 27 CP Rules and that court had no jurisdiction over the subject matter of the suit. That application was not prosecuted. Instead the present preliminary objection was raised.

In my view, as the first; second and fourth defendants were denied an opportunity to enter conditional appearance, the subsequent action of the defendants of filing a defence under protest, filing an application to stay or strike out the suit and the raising of the preliminary objection before trial of the suit are lawful means of challenging the jurisdiction of the court and defendants cannot be said to have submitted to the jurisdiction of the court and waived the irregularities complained of.

Moreover the failure to obtain leave to serve the 4th defendant out of jurisdiction and the failure to issue and serve a notice on summons on the first and second defendants are not mere procedural irregularities which can be waived by the conduct of the defendants. They render the suit a nullity for want of jurisdiction over the defendants.

## **2. JURISDICTION – SUBJECT MATTER**

Regarding whether or not court has jurisdiction over the subject matter of the dispute this is what Newbold Ag. V P said in Karachi Gas Co. Ltd versus Isaaq (1965) EA 42 at page 53 H-1

“The two main issues which arise in this appeal are first, whether the supreme court had jurisdiction and secondly, whether the contract was frustrated. As regards the first of these issues, the defendant was out of the jurisdiction and was neither domiciled nor ordinarily resident in Kenya.

In such a case the courts of Kenya will not assume jurisdiction in relation to any matter arising out of contract unless the circumstances fall within the provisions of O. V Rule 21 of Civil Procedure (revised) Rule 1948 K. This rule details the circumstances in which service of the summons or a notice of summons may be allowed out of the jurisdiction in order to give effect to a jurisdiction which the courts have assumed. In the case of the contract the courts of Kenya will assume jurisdiction, inter alia, if the contract is made in Kenya or if the proper law of the contract is Kenya law or if a breach is committed within Kenya.

While it is not perfectly clear where this contract was made, I shall assume that it was made in Pakistan If, therefore the Kenya courts are to have jurisdiction in this case, either the proper law of the contract must be Kenya law or a breach of the contract must have been committed in Kenya. The various factors in this case, as is often the position, point in different ways for the purpose of determining what is the proper law of contract. The test to be applied is in my view, the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection”

By granting an order to serve first and second defendants out of jurisdiction, the High Court assumed jurisdiction over the suit and over the first and second defendants.

But that assumption of jurisdiction is provisional because a defendant served with a notice of summons has a right, as stated before, to contest the jurisdiction of the court. In the peculiar circumstances of this case and considering that defendants have not taken any action beneficial to them inconsistent with the objection to jurisdiction, the court can properly entertain an objection to jurisdiction at the trial in spite of the order granting leave to serve first and second defendants out of jurisdiction.

Although the Amended plaintiff does not specifically refer to the Stock Purchase Agreement dated 7.12.95, it is clear from the body of the plaintiff and particularly paragraph 11 and 11(a), that the subject matter of the suit is the breach of the terms of the power of Attorney by, inter alia, selling shares through the stock purchase Agreement. The 200 shares of FEI. Mr. Nowrojee, for the plaintiff referred extensively to the Stock Purchase Agreement to establish certain facts including the fact that the land in Kenya held by the subsidiary companies is part of the Stock Purchase agreement and that the principal assets of FEI is the 49,000 acres of Ranch held by the subsidiaries in Kenya. Clause 12 of the Stock Purchase agreement states:

“Choice of law: This agreement has been signed sealed and delivered in the state of Florida and shall be construed in accordance with the law thereof; venue of any proceedings hereunder shall be in Orange County Florida”

The position in law is that where parties have expressly stipulated that a contract is to be governed by a particular law that law is the proper law of contract.

In this case, the intention of the parties regarding proceedings relating the Stock Purchase Agreement was that the proper law of contract was the law of State of Florida, USA and that any proceedings should be instituted in the Orange County, Florida. Clause 12 of the stock purchase Agreement therefore settles the matter. It ousts the jurisdiction of the Kenya court regarding any disputes arising from the Agreement.

But, if I am wrong in so finding, then, I have to consider the next test – that is, the system of the law with which the transaction has the closest and most real connection, some times referred to as “Non forum inconvenience”

Again, Mr. Nowrojee has addressed court at length on this point with a view to show that, in the physical sense and in terms of the law applicable including the land control Act (Kenya), this transaction has the real and substantial connection with Kenya.

The Stock Purchase Agreement incorporates both the sale of the 200 shares of FEI and the share of the subsidiaries in Kenya. The sale of the 200 shares in FEI was completed in U.S.A. by execution of the necessary stock transfer documents in accordance with the law of Texas. Clause 4(f) and 9 of the Stock Purchase Agreement shows that, the shares of the subsidiaries had to be conveyed at the date of the completion.

From the search done by Mr. Joseph Musyoki, it is not wholly correct that Mukenya Ranch ltd and Segera Ranch ltd were wholly owned by FEI. The correct position is that FEI owned the majority shares in both Mukenya Ranch ltd and Segera Ranch ltd. When the stock purchase Agreement refers to the shares of the subsidiaries it must be referring to the shares owned by FEI in the subsidiary companies. The subsidiary companies, have their own Memo and Articles of Association and are subject to the laws of Kenya. They have other shareholders other than FEI The subsidiary companies are Separate legal entities possessed of their distinct rights and liabilities from those of FEI, (USA).

The stock purchase Agreement would not have resulted in direct transmission of the shares of FEI in the subsidiaries without more being done in Kenya. More specifically, the shares of FEI in the subsidiaries would have been transferred to the purchaser in accordance with the memo and Articles of Association of the respective subsidiary Companies and in accordance with the laws of Kenya.

It is FEI (USA) which sold its shares in USA and its shares in the subsidiaries in Kenya. FEI is not a party to this suit. The issue is not whether FEI is amenable to the jurisdiction of this court or not. If that was the issue, then, the court would have embarked into the investigation of the complex issue whether or not it is present within the jurisdiction applying the law expounded in Adams versus Cape Industries PLC (1991) 1 ALL ER 929.

The first and 2nd defendants are sued because they allegedly breached the terms of Power of Attorney given and executed in America by entering into a sale agreement in America as Attorneys – in fact of FEI. The first and second defendants are distinct from FEI. The breaches they are accused of were committed in America.

The Power of Attorney was between American citizens The sale of the share was done in America. The purchase price was paid in America The first and second defendant are being brought to this court for what they did in America. In my view, the breaches of contract alleged against first, second and fourth defendant have the real and close - connection with the laws of America and this court has no jurisdiction over them.

For avoidance of doubt, I should point out that had this action been brought against FEI as a share holder in both Mukenya Ranch ltd and Segera Ranch ltd to stop transfer of its shares in Kenya in both companies to John Ruggieri, this court would have had jurisdiction to deal with the dispute.

On the issue of locus standi of the plaintiff to bring this suit, plaintiff and her two sisters are independent Co-executrices of the estate of William Fonville and hold the 100 shares as such. Her two sisters are not coplaintiffs.

The persons holding the office of an executor are like a legal entity capable of suing and being sued. If there are several executrices they are required to act jointly and all have to be made parties to suit against one or more of them. (see order XXX Rule 2 CP Rules). Similarly, they have all to be made co-plaintiffs in a suit brought on behalf of the estate.

The other 100 shares in FEI belong to Roberta Montgomery Fonville in her own right. Plaintiff has not shown any authority to sue on her behalf such a Power of Attorney. The plaintiff has no locus standi to sue on her own behalf in respect of the 100 shares of Roberta Montgomery Fonville. For the foregoing reasons, I uphold the 1st, 2nd and 4th defendant's preliminary objection with costs. The suit against 3rd defendant cannot stand without 1st 2nd and 4th defendants.

Consequently I dismiss the suit against defendants with costs.

E. M. Githinji  
Judge  
2.8.02

Mr. Shah holding brief for Albhai presen

t Mr. Kinyanjui for plaintiff present

E. M. Githinji  
Judge

Mr. Kinyanjui

I apply for leave to appeal against the Ruling. Secondly, I seek a stay of execution of the Ruling pending filing Notice of Appeal. By Order 41 Civil Procedure Rules you have jurisdiction to stay execution pending formal application

E. M. Githinji  
Judge

Mr. Shah

No objection

E. M. Githinji  
Judge

Order: 1. Leave to appeal if required is granted

2. As I have not granted a positive remedy to defendants stay of execution is refused.

E. M. Githinji

JUDGE

2.8.2002