



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 499 OF 2015

ELENA MEDICARE HOME LIMITED.....PLAINTIFF

-VERSUS-

CHARLES LUTTA KASAMANI t/a KASAMANI &

COMPANY ADVOCATES.....1ST DEFENDANT

DAVID OCHIENG OSODO.....2ND DEFENDANT

PHANUEL OKWENGU SILVANO.....3RD DEFENDANT

MARY AKINYI OYUGI.....4TH DEFENDANT

BENJAMIN NYAKIRA.....5TH DEFENDANT

AUMA ABUORO.....6TH DEFENDANT

KENNEDY ODERA MASIME.....7TH DEFENDANT

RUTH ONGACHI ANGWA.....8TH DEFENDANT

JOSHUA OJWANG LUSI.....9TH DEFENDANT

EDCOM SYSTEMS LIMITED.....10TH DEFENDANT

DICK ORANJA.....11TH DEFENDANT

PHILIDIA AMOLO OTHIENO.....12TH DEFENDANT

WINEM DEVELOPERS LIMITED.....13TH DEFENDANT

RULING

Elena Medicare Home Ltd filed an originating summon against Charles Luta Kasamani T/a Kasamani & Co. Advocates asking orders that:

1. The Defendant do deliver up to the Plaintiff or its Advocates on record the original Titles for the following properties:-
 - a) Kisumu Municipality/Block 10/787
 - b) Kisumu Municipality/Block 10/788
 - c) Kisumu Municipality/Block 10/789
 - d) Kisumu Municipality/Block 10/790

- e) Kisumu Municipality/Block 10/791
- f) Kisumu Municipality/Block 10/792
- g) Kisumu Municipality/Block 10/793
- h) Kisumu Municipality/Block 10/794
- i) Kisumu Municipality/Block 10/795
- j) Kisumu Municipality/Block 10/796
- k) Kisumu Municipality/Block 10/797
- l) Kisumu Municipality/Block 10/798

2. The Defendant do deliver up the Plaintiff or its Advocates on record all documents, correspondence and papers in the custody or control of the Defendant and held by the Defendant on behalf of the Plaintiff relating to the sub-division of the land known as Title No. Kisumu Municipality/Block 10/563 in which the Defendant has acted as Advocate for the Plaintiff.

3. The Defendant do deliver up to the Plaintiff or its Advocates on record a detailed cash account of money handled by the Defendant in relation to all transactions relating to the Sub-division of the land known as Title No. Kisumu Municipality/Block 10/563 together with all transactions relating to the sale/purchase of any of the plaintiff's plots resulting from the said sub-division.

4. The Defendant do pay to the Plaintiff all money received by the Defendant on behalf of the plaintiff in relation to all transactions relating to the sale/purchase of the Plaintiff's plot in respect of the sub-division of the land known as Title No. Kisumu Municipality/Block 10/563.

5. A decree do issue for all money due and payable by the Defendant to the plaintiff.

6. Time be fixed within which the Defendant must comply with the orders of the court failing which execution to issue.

7. The Defendant do pay the Plaintiff's costs of this summons and all consequential proceedings.

Mr. Jason Wellington Oluga swore the supporting affidavit claiming to be a shareholder and director of the plaintiff.

The Defendant raised a preliminary objection on the basis that:

- 1. Plaintiff's Advocates are irregularly on record as they have not been appointed as required by law.
- 2. This suit has been grounded on the affidavit of one Jason Oluga who is not a Director of the Plaintiff's Company.
- 3. The Plaintiff Company is incapable of filing suit as the same is not properly constituted for its failure to comply with the Companies Act, by failing to file returns, etc.
- 4. In the circumstances, the suit is bad in law, incompetent and an abuse of the court and the same should be struck out with costs.

Mr. Kasamani for the Defendant argues that a limited liability company can only commence Civil Proceedings by a resolution of the plaintiff authority the filing of the suit, a company can only sue in its name with the sanction of its board of directors or by a resolution in general or a special meeting.

Secondly, the plaintiff did not annex the minutes or a formal resolution appointing the firm of advocates of Rachuonyo and Rachuonyo to come on record or authority to change of advocates filed by Alionga on 10/10/2014.

Moreover that Jason Olunga is not a director of the Plaintiff's company.

Lastly, the defendant argues that this is not a matter to be entertained by the ELC as the court lacks jurisdiction.

The plaintiff on his part argues that the 1st Defendant has no evidence that Jason Wellington Olunga was not a director of the Plaintiff and that it is not possible for the court to determine the issues in dispute on a preliminary objection as raised by the 1st Defendant as there is need for production of rival evidence.

The Plaintiff further argues that the court should determine the dispute on merit and that the authority issued by the Plaintiff's board to file suit has been produced vide an affidavit. She contends that the dispute is over titles to the suit property and therefore the court has Jurisdiction.

It is trite law that a preliminary objection can only be properly canvassed and allowed if it revolves purely on a point of law but not where there is need to infer evidence.

In the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distribution Ltd 1969 E.A. It was held.

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained on if what is sought is the exercise of judicial discretion".

In this case it will require evidential value to determine whether Jason Wellington Oluga was a director of the Plaintiff or not.

On the issue of a resolution of the Board of the Company for the suit to be instituted, it is not clear how the defendant became aware that there was no resolution of the board. It is not clear who has informed the defendant that the plaintiff has not been filing returns. The 1st Defendant can't approach the court by way of preliminary objection for the determination of the above issue.

However, on the issue of Jurisdiction I do agree with the 1st Defendant that the suit is brought under order 52 rules 4 of the Civil Procedure Rules that provides:

"4. (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for— (a) the delivery by the advocate of a cash account; (b) the payment or delivery up by the advocate of money or securities; (c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant; (d) the payment into or lodging in court of any such money or securities; (e) the delivery up of papers and documents to which the client is entitled. (2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate. (3) If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate's lien, if any, as the court deems fit."

The originating summons herein is premised on the provisions of order 52 rule 4 of the civil procedure rules and the advocates act Cap 16 laws of Kenya.

The Plaintiff in the originating summons alleges that the 1st Defendant was engaged as an advocate of the High Court of Kenya to in connection with the subdivision of the plaintiff's property being title number Kisumu Municipality /Block 10/563 into 12 plots with the intention of selling the resultant plots.

The defendant was to find suitable buyers at not less than Ksh 900000/=. The consideration payable to the defendant was 15% of the purchase price.

The plaintiff donated a power of Attorney to the defendant to enable him execute the mandate effectively.

The defendant has been unable to execute the mandate as agreed and that two titles out of the twelve titles are not out and that the defendant has become difficult and has refused to divulge details of subdivision of the land. It is being alleged that the defendant has sold one of the parcels of land contents being parcel number Kisumu/Municipality/Block 10/789. He has refused to tender the proceeds of the sale or to account.

This court finds that the dispute between the Plaintiff and the Defendants is purely commercial as it revolves on breach of agreement between the plaintiff and defendant and that the same does not revolve on title, ownership or use of land. The plaintiff is claiming proceeds of sale of land by an agent. The upshot of the above is that this court lacks the jurisdiction to hear and determine the commercial dispute herein and therefore the matter is sent back to the High Court of Kenya at Kisumu for determination

DATED AT KISUMU THIS 18TH DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE