



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

ELC CASE NO. 21 OF 2021

(FORMERLY MOMBASA ELC 124 OF 2021)

REBECA MWIKALI.....PLAINTIFF

VERSUS

GUY ANDRE DE VOS.....1ST DEFENDANT

MYRIAM RENEE G. JEHAE.....2ND DEFENDANT

LAND REGISTRAR KWALE.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

BACKGROUND.

1. The Plaintiff commenced this suit by way of Plaint dated 1st July 2021 against her husband the 1st Defendant who allegedly secretly transferred the subject of this suit Kwale/Diani/Beach Block/1127 to the 2nd Defendant without spousal consent. She also claims a beneficial interest in the property by virtue of marriage and financial contribution to the developments thereon. The 1st and 2nd Defendants are Germany Residents. The 3rd and 4th are alleged to have acted in collusion with the 1st and 2nd Defendants for registering the transfer despite knowing that they were not Kenyan nationals and were not eligible to own land individually. The plaintiff seeks for judgement against Defendants for an order for cancellation of the transfer to the 2nd Defendant and a declaration that Kwale/Diani/Beach Block/1127 is jointly owned by the Plaintiff and the 1st Defendant as their matrimonial property.

2. Together with the Plaintiff, the Plaintiff filed a Notice of Motion application dated 1st July 2021 under certificate of urgency. The application sought for an order of temporary injunction prohibiting the 3rd Respondent from registering any transfer of the suit property pending the hearing and determination of the application. Orders for a permanent injunction are also sought prohibiting the 3rd Respondent from registering any transfer of the suit property pending the hearing and determination of this suit. This court granted the interim orders on 4th July 2021. The application was fixed for inter parties hearing on 29/07/2021. The orders were extended on 29th July 2021 by this court to enable the other parties respond to the application.

3. Initially the Plaintiff was represented by the firm of Mwaniki Waguthi & Company Advocates and changed lawyers to the firm of Muthoni Nguire Advocates.

4. The 1st and 2nd Defendants filed a Defence and Notice of Motion application dated 15th September 2021 the subject of this ruling. It seeks that the Plaintiffs suit be struck out for lack of jurisdiction and the ex parte orders be vacated for having been issued without jurisdiction. The application is based on the supporting affidavit of the Plaintiff and the following grounds; -

1. Both the 1st and 2nd Defendants are Belgium citizens, residing in Belgium with no residence permits for Kenya. Their entry into Kenya is by virtue of tourist visa.

2. Service on the Defendants was effected via email in violation of the provisions of Order 5 Rules 21,25 and 28 of the Civil Procedure Rules. Consequently, leave having not been sought and granted, the ELC court lacked jurisdiction to entertain the suit against the 1st and 2nd Defendants or issue any orders that affects their interests in the suit property.

3. Assuming that the ex parte orders were lawful, service having been affected on 23rd July 2021, the same orders lapsed on 8th July 2021. There were no orders to extend on the said 29th July 2021 by dint of Order 40 Rule 4(3) of Civil Procedure Rules 2010.

4. The suit against the 1st and 2nd Defendants being foreigners is incompetent for having been instituted without leave.

5. There is no independent cause of action against the 3rd and 4th Defendants who were added to the suit to ensure that any orders against the 1st and 2nd Defendants are effected. Once the suit against the 1st and 2nd Defendants is struck out, the entire suit has to be struck out.

5. The application is opposed by the Plaintiffs through the Plaintiffs Replying Affidavit sworn on 18th October 2021.

SUBMISSIONS

The 1st and 2nd Defendants Submissions

6. The application was disposed of by way of written submissions. The Defendants identified two issues for determination whether 1) The Court has assumed jurisdiction over the 1st and 2nd Defendants and 2) in any event there were orders capable of being extended. It was submitted that the visit on tourist visa by the 1st and 2nd Defendant did not convert them to being residents of Kenya as argued by the Plaintiffs. Counsel relying on the court of appeal decision in **Misnak International (UK) Limited Vs. 4MB Mining Ltd C/O Ministry of Mining, Juba Republic of Southern Sudan & 3 Others (2019) eKLR** submitted that jurisdiction over foreigners is assumed when the Plaintiff seeks leave of the court to serve summons outside jurisdiction to determine if there was a case to warrant service of summons outside jurisdiction; thereafter upon leave service. It was only upon service that a court assumes jurisdiction over a foreign defendant. Other cases relied upon were **Roberta Macclendon Fonville Vs. James Otis Kelly III & 3 others (2002) Eklr** which emphasized that the question of leave and service of the notice of summons goes to the root of the courts jurisdiction over defendants who are not citizens and not domiciled in Kenya. Further that failure to serve notice of summons in accordance with the official procedure set out in the rules was a fundamental omission and not merely an irregularity which divests the court of jurisdiction.

7. It was also urged on the basis of **Misnak International (UK) Limited Vs. 4MB Mining Ltd C/O Ministry of Mining, Juba Republic of Southern Sudan & 3 Others** supra that the learned judge in granting the ex parte orders ought to have first assumed jurisdiction however urgent the application was. The domicile of the suit property in Kenya was also not a valid ground for assuming jurisdiction without leave.

8. Counsel further contended that Order 40 Rule 4(3) bestowed a duty to serve all pleadings on the opposite party within 3 days of issue and default the injunction shall lapse. From the Affidavit of service sworn herein it was deposed that the pleadings were served via email on 23rd July 2021, 18 days after issuance of the order. Counsel emphasizing that the law must be applied as is relied on **Emfil Limited Vs. Attorney General & 424 others (2015) eKLR** where under similar circumstances the court found that the orders had by operation of law. Further that delay was not a procedural technicality but offended the overriding objective of the Civil Procedure Act and Rules as seen in **Immaculate Wambia Mungai Vs. Fredrick Mwai Mwhia (2017) eKLR**.

9. This court was invited by the 1st and 2nd Defendants that the Notice of Motions is allowed with costs.

The 3rd and 4th Defendants Case.

10. The 3rd and 4th Defendants raised grounds of opposition pointing that that the application was defective, an abuse of the courts process and a nullity in law and equity. The crux of the matter was illegal transfer of matrimonial property and whether the suit was matrimonial property yet the applicant had not moved the court under a specific provision of the law. Consequently, the court lacked jurisdiction to determine the pertinent issues of law emerging from that statute. Counsel relied on **Hermanus Phillipus Steyn Vs. Giovanni Gnechi-Ruscone, Supreme Court Application No. 4 of 2012 and affirmed in Michael Mungai Vs. Housing Finance Co(K) Ltd & 5 Others (2017)eKLR** and **County Executive of Kisumu Vs. County Government of Kisumu & 8 Others (2017) eKLR**.

11. Further that the affidavit in support of the application should be struck out for lack any marked or commissioned documents. Further that in the absence of the said documents the burden of proof as required under Section 107- 109 of the Evidence Act Chapter 80 of the laws of Kenya had not been discharged. No prima facie case has been established as held in **Mrao Ltd Vs. First American Bank Ltd & 2 others (2003)eKLR 125** as no material was presented to enable the court establish the existence of any right infringed upon by the other party. Further reliance was placed on the case of **Nguruman Limited Vs. Jan Bonde Nielsen & 2 Others (2014) eKLR**.

12. It was further contended that the 3rd Respondent discharged their duties and exercised their powers under Section 14 of the Land Registration Act 2012 in good faith and the claim is defeated in law under Section 52 of the Societies Act Cap 108 of the laws of Kenya.

13. Counsel reiterated that the Court lacked jurisdiction to hear and determine the matter.

The Plaintiffs case.

14. Counsel for the Plaintiffs submitted that the suit was initially filed under another advocate until November 2021 when the present counsel was retained to salvage the suit. It was admitted that the 1st and 2nd Defendants had raised meritorious issues of law and fact surrounding jurisdiction. Citing the case of **Patriotic Guards Ltd Vs. James Kipchirchir Sambu (2018) eKLR** where the court of Appeal cited the decision of **Tana & Athi Rivers Development Authority Vs. Jeremiah Kirigo Mwakio & 3 Others (2015) eKLR**. Counsel implored that the mistake of the previous advocate in failing to obtain leave should not be visited upon the Plaintiff. He urged that the Plaintiffs were now

more aware of the consequences of the mistakes herein and were ready to vindicate the same for the suit to proceed to its logical conclusion.

15. Regarding striking out the suit against the 3rd and 4th Defendants the plaintiffs were of the view that this prayer was meant to divert attention from the main issue of transfer of the suit property illegally and fraudulently. This was done under the watchful eyes of the 3rd and 4th Defendant who should not walk away scot free. The Courts attention was drawn to the provisions of article 45(3) of the Constitution of Kenya 2010 as to equal rights of parties in a marriage. Further reference was made to Section 28 of the Land Registration Act making spousal consent an overriding objective buttressed by the case of **MWK Vs SKK& 5 others (2018) eKLR**. Counsel submitted that accordingly the Plaintiffs suit raised triable issues and the claim against the 3rd and 4th Defendant must survive.

16. This court was further urged to invoke the principle of natural justice and grant the Plaintiff an opportunity to put her house in order as applied in **Patriotic Guards Ltd Vs. James Kipchirchir Sambu supra**. Further that the Plaintiff had been kicked out of the suit property 2 months after filing this suit with nowhere to go and deserved to be heard.

ANALYSIS AND DETERMINATION

17. I have considered the application, the grounds on the face of the application the supporting affidavit, the rival response and submissions filed by all the parties and case law cited. The issue for determination are 1) whether the Court has assumed jurisdiction over the 1st and 2nd Defendants 2) Whether the orders capable of being extended and whether the suit against the 3rd and 4th Defendant survive the striking out of the suit against the 1st and 2nd Defendants.

18. The law as to jurisdiction was well captured in the **Owners of Motor Vessel 'Lillian Vs. Caltex Oil (Kenya) Ltd (1989) eKLR**, where the court pointed that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue right away on the material before it, I will proceed to do so. I'm aware that according to this decision, without jurisdiction the court cannot move one more step.

Whether the Court has assumed jurisdiction over the 1st and 2nd Defendants

19. It is not in dispute that the 1st and 2nd Defendants are of Belgium Nationality and are resident in Belgium and only visit Kenya on tourist visa. The entire of Order 5 of the Civil Procedure Rules 2010 deals with issue and service of summons. The procedure for service of summons on foreigners or outside jurisdiction is provided under Order 5 Rule 25 which provides as follows;

‘Every application for leave to serve such summons or notice on a defendant out of Kenya shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is not resident in Kenya or not, and the grounds on which the application is made; and no such leave shall be granted unless it is made sufficiently to appear to the court that the case is a proper one for service out of Kenya under this Order.’

20. Clearly the procedure is that an application for leave must be first had and obtained before service of summons can be effected outside jurisdiction. Moreover, the leave is not automatic there should be evidence placed before the court that the case before it is proper for service outside jurisdiction. Counsel for the Plaintiff has indeed admitted that this procedure was not followed by previous Advocate for the Plaintiffs who had not offered any explanation for the same. Further that it was a mistake and counsel's mistake should not be visited upon his client. Moreover I have looked at the Affidavit of Service sworn by Felix Omondi Owino on 26th July 2021 and filed on 26th July 2021 which states at paragraph 4 that ‘...that the following day on 23rd July 2021, ‘I served the remaining defendants, Guy Andre /de Vos and Myriam Renee G. Jehaes through their known email address ...’ The addresses were stated therein. In my view the requirement for leave was mandatory by dint of the use of the word ‘shall’ under the rule. There is no option not to seek leave. And I agree with the authorities cited by Counsel for the 1st and 2nd Defendant. I'm further guided by the case of **Law Society of Kenya Vs. Martin Day , Leigh Day & 2 Others (2015)eKLR** where the court stated;-

‘On the question of service of summons to enter appearance outside the jurisdiction of this court on a defendant who is residing outside Kenya, Order 5 Rule 25 of the Civil Procedure Rules provides that where leave to serve a summons or notice of summons out of Kenya has to be granted under rule 21, and the defendant is a Commonwealth citizen as defined in sub sections (1) and (2) of section 95 of the(former) Constitution or resides in any of the countries for the time being mentioned in sub section (3) of that section, the summons shall be served in such manner as the court may direct.” . The rider that exists is that leave may not be necessary if it is shown that the foreign company or foreigner is also either trading or domiciled in Kenya. In the circumstances of this case, the plaint at paragraphs 2 and 3 thereof is clear that the 1st and 2nd defendants reside in London. It was not shown that the 1st and 2nd defendants reside in Kenya or that they trade or have a law firm registered in Kenya. The plaint is clear that the two defendants aforesaid are legal practitioners in London, United Kingdom. It was therefore mandatory for leave and directions of the court to be sought and obtained before summons are served considering that the 1st and 2nd Defendants were domiciled in London only’ (emphasis is mine)

21. The Court in the above case also cited the case in **Raytheon Aircraft Credit Corporation & Another vs Air Al- Faraj Limited [2005] 2 KLR 47** the Court of Appeal stated as follows:- “...The High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by a plaintiff to serve summons or notice of summons, as the case may be, outside the country under Order V Rules 23 and after such summons are served in accordance with the machinery stipulated therein... The record does not show nor is it contended that the respondent moved the High Court for leave to serve the first appellant outside the jurisdiction and that such leave was given... Thus, there cannot be any question that Raytheon was not amenable to the jurisdiction of the High Court and the objection to jurisdiction should have been allowed on this ground alone.”(emphasis added).

22. In addition, it is confessed by Counsel on behalf of the Plaintiff that the Plaintiff was ignorant of the consequences of failure to obtain leave, it is trite that ignorance of the law is not an excuse. This is further compounded by the fact that the Plaintiff was not acting in person. Moreover, this is not a mere procedural matter it goes to the root of jurisdiction and even if I were to try and salvage it under the provisions of article 159 (2)(d) of the Constitution I would be wrong. I'm further guided in this regard by the case **Law Society of Kenya Vs. Martin Day , Leigh Day & 2 Others** supra - See paragraph 38 – 41. Based on the clear procedure given and the authorities cited my hands are tied and I find that the objection is merited.

The exparte orders

23. It is contended that the exparte orders granted by the court on 5th July 2021 had lapsed automatically by operation of the law. I have looked at the affidavit of service herein by the process server has clearly given the timelines as to when he served the summons. The summons was served by email on 23rd July 2021. I have seen the order of this court dated 5th July 2021 and issued on 7th July 2021. My computation of time taken to serve the same was beyond the three days stipulated under Order 40. I agree with the authorities cited and I need not belabor the point. The Order lapsed automatically by operation of the Law. In any event they were issued without jurisdiction and were of no consequence.

24. I will also consider whether the suit against the 3rd and 4th Defendants can survive or stand on its own in the absence of the suit against the 1st and 2nd Defendants. It has been submitted by the Applicants that it cannot survive. From the pleadings the substratum of the suit is anchored on the relationship between the 1st Defendant and the Plaintiffs. The 1st Defendant is the key player or of the transaction that led to the alleged fraudulent transfer of the property to be registered by the 3rd Defendants. Without the 1st and 2nd Defendant there would be no link to the 3rd and 4th Defendant herein. It cannot survive.

25. The upshot of the foregoing is that the Notice of Motion application dated 1st July 2021 is merited and the following orders shall issue to dispose of the same; -

1. The Plaintiffs suit is hereby struck out against all the defendants.
2. The orders granted exparte on 5th July 2021 and extended on 29th July 2021 are hereby vacated.
3. Each party shall bear its own costs.

DELIVERED AND DATED AT KWALE THIS 8TH DAY OF FEBRUARY, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

.....for the Plaintiff Respondent

.....for the 2nd Defendant Applicant

.....for the 1st Defendant Respondent

Mr. Denis Mwakina- Court Assistant.