



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO. 55 OF 2019

TABU LAZARO NZUYA

TILPHONIA JOHN ALFA (Suing as the administrators of the Estate of

JOHN ALPHA BATAZAI).....PLAINTIFF

VERSUS

1. DAVID KINISU SIFUNA

2. HUSSEIN SHARIF ALWY

3. HASSAN SHARIF ALWY

4. BEACH VILLAS LIMITED

5. SELINA BEGONJA

6. MUKUTANO CHOME

7. OMAR DADU

8. LYDIA KAMANDI

9. THE COMMISSIONER OF LANDS

10. THE REGISTRAR OF TITLES MOMBASA.....DEFENDANTS

RULING

1. Before me for consideration are two Notice of Preliminary Objections, one dated 20th June 2019 by the 9th defendant and another one dated 25th November 2019 by the 1st defendant.

9TH DEFENDANT NOTICE OF PRELIMINARY OBJECTION

2. The 9th defendant's filed his objection to the suit on 26th March 2019 on the following grounds:

- a) The suit as drawn and filed is incompetent as against the purported 9th defendant and cannot be sustained in law.
- b) The suit has abated against the purported 9th defendant who passed away on 3rd June 2012 and should be struck out as against him.
- c) The suit is fatally and incurably defective, bad in law and lacks merit.
- d) The suit as a whole is an abuse of the process of the Honourable court as drawn and filed against the purported 9th

defendant.

3. The 9th defendant filed documents in support of the preliminary objection on 25th October 2019. They include; the 9th defendant's death certificate dated 19th June 2012, Grant of Letters of Administration to the Estate of Mohamed Kinango Kitonyo (deceased) issued on 2nd March 2018 and rectified on 16th July, 2018, certificate of confirmation of a grant to the Estate of Mohamed Kinango Kitonyo (deceased) dated 7th June 2019 and the National Identification Cards of the administrators of the estate of the 9th defendant.

1ST DEFENDANT NOTICE OF PRELIMINARY OBJECTION

4. The 1st defendant's objection to the suit was filed on 26th March 2019 and seeks the suit to be struck out/dismissed for reasons that:

a) The application and the entire suit is fatally defective, incurable and cannot stand in law.

b) The suit is in complete contravention of mandatory provisions of Order 4 Rule 4, Order 9 Rule 1 and 2 (a) of the Civil Procedure Rules.

c) The plaintiff is not a recognized agent within the meaning of Order 9 Rule 2 (a).

d) This court does not have jurisdiction to entertain this suit by virtue of the mandatory provisions of Article 162(2) as read together with 165 of the Constitution.

e) The plaintiff violates mandatory provisions of the law as to the jurisdiction of the Court to issue prayer (a) and (c) for reasons that this Honorable court lacks legal capacity to set aside a decision of a High Court.

f) The suit is bad in law as the parties do not have locus standi.

g) In light to the foregoing, it is clear that the entire suit and the application is wholly incompetent, scandalous, frivolous, vexatious, gross abuse of the process of court and in any case has been filed without jurisdiction and for this reason alone, the suit should be dismissed with costs.

5. The Court directed both preliminary objections be canvassed by way of written submissions.

SUBMISSIONS

6. The 9th defendant submitted in support of the two preliminary objections on 3rd February 2020. In reference to his objection, counsel for the 9th defendant submitted that it is trite law that a suit filed against the 9th defendant, almost eight years after his death is a nullity from inception, incurably defective and must be struck out with costs. Counsel relied on the case of **Viktar Maina Ngunjiri & 4 others V Attorney General & 6 others (2018)EKL**R where it was held that: *"the estate of a deceased person cannot take over proceedings against him when the deceased died before the suit was filed and the representative of the estate has not been identified, and that even if the representative were identified it is not possible to take over a nullity."*

7. On the 1st defendant preliminary objection, counsel for the 9th defendant supported the fact that the plaintiffs lack locus to bring the suit against the defendants. Counsel submitted that though the plaintiffs have presented letters of administration to the estate of John Alpha Batazal, there was no document of ownership presented over the suit property. Counsel concluded by asking court to allow both objections and dismiss the suit.

8. The 5th, 6th, 7th and 8th defendants filed their submissions on 4th February 2020 in support of the 1st defendant's objection dated 25th November 2019. Counsel for the 5th, 6th, 7th and 8th defendants submitted that this court lacks jurisdiction to entertain this matter and urged the court to strike out the suit for lack of jurisdiction. Counsel submitted that this court lacks the jurisdiction to set aside orders in High Court of HCCC No. 297 of 2010 as prayed by the plaintiff in this suit. Counsel submitted that the plaintiffs can only have the orders set aside by the court that granted them. Counsel further submitted that the letters of administration to the estate of the deceased only grants powers to the administrators over the properties of the deceased and does not extend to the suit property which is neither registered nor held by the estate of the deceased.

9. The 1st defendant filed his submissions on 15th September 2020 in support of his preliminary objection dated 25th November 2019. Counsel submitted that the plaintiffs do not have locus to institute the suit herein and cannot and should not be heard. Besides that, it was submitted that this court does not have jurisdiction to set aside the judgment of the High Court.

10. Counsel submitted that this court pursuant to Article 162 (2) of the Constitution of Kenya, has equal status with the High Court. Consequently, this court has no jurisdiction to superintend, supervise, direct or review the decisions of the High Court. Counsel relied on the Supreme Court's decision in **Republic V Karisa Chengo & 2 others (2017)EKL**R, where the Supreme Court held inter alia that both the specialized courts are of equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived of the other. Counsel submitted that the plaintiffs claim was heard and determined by the High Court in HCCC 297 of 2010 and for that reason, this court cannot purport to set aside the judgment issued by the High Court. Counsel further submitted that the only recourse available to the plaintiff would be to appeal against the decision of the High Court. Counsel submitted that if the consent order was fraudulently obtained, the only remedy available is for the plaintiff to appeal against it or review it before the same court and not this court.

11. Counsel urged that this court cannot set aside the decision made by the High Court as the same would amount to this court sitting as an appeal court on an order or matter heard and determined by a court of coordinate jurisdiction. Counsel relied on the case of **Witt & Busch Ltd V Dale Power Systems, PLC (2007) 17 NWLR (pt 1062)** where court held that **“in the absence of statutory authority except where the judgment or order is a nullity, one judge has no power to set aside or vary the order of another judge of concurrent and coordinate jurisdiction,”** to make an argument that this court should find that it has no jurisdiction to issue prayer (a) and (c) of the plaint and dismiss the suit in its entirety.

12. On locus to bring this suit, counsel submitted that the plaintiffs lack legal capacity to institute the suit for the reason that the deceased did not own the suit property and that the registered owner Mr. Jimmy Verjee, who donated power of attorney to Mr. John Alfa Batalaza is also dead. Counsel submitted that the power of attorney created an agency relationship between Mr. Verjee and Mr. Batalaza. He further submitted that the death of either party extinguished the said relationship and cannot be taken up by the estate of either party. Counsel submitted inter alia that the death of the principal terminates the agency by operation of law, since it was not given for valuable consideration. The reason is that an agent can only perform such duties as may be effected by his principal and is precluded from effecting duties for which is merely a substitute. Counsel urged that when the principal dies, the substitute dies by operation of the fact of death and the law.

13. Counsel submitted that even if the power of attorney created a resulting trust, the plaintiffs failed to demonstrate to this court that Mr. Batalaza advanced any monies to Mr. Verjee prior to their demise. Counsel submitted that the court never presumes a trust and the party relying on the existence of a trust has to do so via evidence. Counsel argued that the plaintiffs’ claim of resulting trust is misled since Mr. John Alpha Batalaza did not advance money to Mr. Verjee for purchase of the property. Counsel relied on the Court of Appeal decision in **Charles K. Kandie V Mary Kimoi (2017) eKLR** where it was stated that **“it is trite law that there is a resulting trust in favour of the person who pays for the purchase price of land though registered in the name of another.”** Counsel concluded by asking court to uphold his preliminary objection dated 26th August 2019 and dismiss the suit.

14. The 1st and 2nd plaintiffs filed their submissions opposing both the 1st and 9th defendants’ preliminary objections on 28th January 2020. On the 9th defendant’s objection, counsel for the plaintiffs submitted that the death of the 9th defendant was unknown to the plaintiffs. That the same could be cured by an application for substitution of parties since the 9th defendant’s estate had legal representatives.

15. On the 1st defendant objection, counsel for the plaintiffs refuted the assertion made by the 1st defendant that this court lacks legal capacity to set aside a decision of the High Court. Counsel stated that the plaintiffs were not parties to the suit where the consent order was obtained. Counsel further submitted that the consent order did not bind the plaintiffs who were neither parties to suit nor consent to the order. That the consent referred to was obtained illegally and fraudulently counsel submitted that the consent order ought to be set aside as it’s contrary to the policy of court and at the time it was made, material facts were ignored. Counsel further submitted that it would be unjust for the court to dismiss the suit on the ground that it has no jurisdiction to issue two out of the five prayers sought. He referred to the overriding objective of court to plead with court to hear the plaintiffs on merit. Counsel also submitted that the plaintiffs brought the suit as the legal representatives with grant of letters of administration and thus cannot be agents as alleged by the 1st defendant. Counsel concluded by asking the court to dismiss the two objections with costs and set the matter down for hearing.

16. On 24th October 2019 when the 9th defendant’s preliminary objection came for hearing, Mr. Nyabicha holding brief for Mr. Bwire counsel for the 1st defendant stated that they are not opposed to the preliminary objection. Mr. Obongo, Counsel for the 2nd, 3rd and 4th defendants stated that he is in support of the 1st and 9th defendants’ preliminary objection. Ms. Kiptum holding brief for Gikandi counsel for the 5th, 6th, 7th and 8th defendants stated that she has no objection to the preliminary objection.

17. I have considered both preliminary objection, submissions filed herein and the issues before me for determination are;

- a) **Whether this court has jurisdiction to hear this suit.**
- b) **Whether the plaintiffs have locus standi to bring this suit.**
- c) **Whether the suit against the 9th defendant is a nullity?**

18. When faced with the question of jurisdiction, whether raised by a party or by court on its own motion, it must be decided forthwith. I will proceed to make the earliest determination on the question of jurisdiction before I make one more step.

19. Vide a plaint dated 25th March 2019, the plaintiffs pray for judgment against the defendants for:

- a) **A declaration that the consent filed in HCCC 297 of 2010 in reference to Plot No. 411 were based on fraudulent and misrepresented facts and should be set aside to investigate validity of the provisional certificate that the 1st defendant had fraudulently obtained.**
- b) **Declaration that the provisional certificate in reference to Plot 415 transferred to the 2nd and 3rd defendant is null and void and should be cancelled.**
- c) **Declaration that the consent filed in ELC No. 11 of 2012 Beach Villas V Kelvin Tim Mogeni and David Kinisu Sifuna involving the 1st defendant herein be set aside to the extend where the 4th defendant is granted Plot No. MN/III/414 and further investigation be carried out on how they obtained the title deeds for Plot No. 414 and thereafter court make a finding on the validity of their ownership.**

d) Declaration that the 9th defendant fraudulently obtained ownership for Plot No. 413 which was subdivided into 8414 & 8413 which subdivision is illegal.

e) Permanent injunction do issue to restrain the defendants by themselves, their servant, workmen, agent, office or otherwise howsoever from dealing with by purporting to sell, transfer, charge, mortgage, subdivided any transaction whatsoever on Plot 411, 413 & 414 which transaction have been null and void and the property be returned into the name of the original owner who had authorized the plaintiff to take care of the said properties.

20. Counsel for the 1st defendant has contended that this court has no jurisdiction to hear and determine the suit herein and issue the prayers sought by virtue of Article 162(2) read together with Article 165 of the Constitution. In the case of **Owners of the Motor Vessel ‘Lilian S’ V Caltex Oil (Kenya) Ltd (1989)eKLR** it was held that:

“Once a question of jurisdiction is raised, court is obligated to determine on it right away. Jurisdiction is everything and without it court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means..... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

21. This court is a creation of Article 162 (2) (b) of the Constitution of Kenya which confers court with jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to land. The prayer (a) sought by the plaintiff, relates to a consent order issued in HCCC 297 of 2010. This court is of equal rank or status as the High Court. Thus, a decision of the High Court cannot be subject of appeal to this court.

22. In my view this court lack jurisdiction to re-open, review and re-consider the issue of validity of the consent orders issued by the High Court. The Supreme Court in **Republic V Karisa Chengo (2017) eKLR** settled the fundamental issue of jurisdiction of the High Court, this court (ELC) and ELRC. The Supreme Court held that:

“concurring with this view, learned judges of the Court of Appeal in the present matter observed that both the specialized courts are of equal rank and none has jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other. Thus a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these courts is subject to supervision or direction from another.

We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court and vice versa. The three are different and autonomous courts and exercise different and distinct jurisdiction. As Article 165 (5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

23. From the well founded thoughts of the Supreme Court, which bind this court, I am well guided to find that this court has no jurisdiction to set aside a consent order entered into by a High Court. As directed by the decision in **Owners of the Motor Vessel ‘Lilian S’ V Caltex Oil (Kenya) Ltd (supra)**, I find that I have no jurisdiction and I have no basis to continue with the proceedings in this matter and consider the evidence laid before me. I have to down my tools in the instant matter in respect to not only prayer (a) and (c) of the plaint but in relation to the whole suit. This court cannot purport to confer itself with jurisdiction to proceed to determine the remaining issues before it, as any decision made forthwith amounts to nothing.

24. Having said that, I dispense off the entire suit and find that the 1st defendant’s Notice of Preliminary Objection dated 25th November 2019 is merited and is hereby allowed. The plaint dated 25th March 2019 is struck out and the suit dismissed with costs to the defendants.

Ordered accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF JULY 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

YUMNA COURT ASSISTANT

MULIRO HOLDING BRIEF FOR BWIRE FOR THE 1ST DEFENDANT

ODUNDI FOR THE 9TH DEFENDANT

N/A FOR THE PLAINTIFF

N/A FOR THE OTHER DEFENDANTS

C.K. YANO

JUDGE