



Continental Homes Limited v Martova Limited & another (Civil Case E019 of 2021) [2023] KEHC 18877 (KLR) (13 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE E019 OF 2021
SM GITHINJI, J
JUNE 13, 2023**

BETWEEN

CONTINENTAL HOMES LIMITED PLAINTIFF

AND

MARTOVA LIMITED 1ST DEFENDANT

ANNA MARTIN 2ND DEFENDANT

RULING

1. Before this court for determination is the Defendant's notice of motion dated February 3, 2023 brought under sections 1A, 1B, 3A of the [Civil Procedure Act](#), order 40 rule 7 of the [Civil Procedure Rules, 2010](#) and rule 25 of [the Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The orders sought are as follows; -
 - i. Spent.
 - ii. The Registrar of Lands Mombasa, be and is hereby directed to register the discharge of charge dated 2/10/2022 in respect of the Title relating to the parcel of land known as subdivision number 368 section III Mainland North, registered as CR No. 10345 in the name of the Defendant.
 - iii. The Registrar of Lands Mombasa, be and is hereby directed to register the transfer of the Title relating to the parcel of land known as subdivision number 368 Section III Mainland North, registered as CR No. 10345 from Anna Martin to Mortova Limited(Defendant) for the purposes of completion of the change of user and registration of the issue (sic) individual leases over the units erected therein in the name of the respective purchasers, with the exception of Unit Number A-1, to be registered and held in the name of Martova Limited pending the determination of the main suit, further orders of the Court, or consent of the parties.



- iv. Subject to Order 1, and 2 above, the Defendant be restrained either by their servants or agents or otherwise howsoever from selling, transferring, or otherwise charging Unit A-1 erected on the parcel of land known as Subdivision Number 368 Section III Mainland North, registered as CR No. 10345 pending the hearing and determination of the main suit.
 - v. Costs be provided for.
2. The application is founded on the grounds set out on the face of it and on the facts deposed in the supporting affidavit and further affidavit of Anna Martin, the director of the Defendant Company dated 3rd February 2023 and 18th May 2023 respectively. She deposed that she is the registered owner of the parcel of land identified as Subdivision Number 368 Section III MN, CR No. 10345 where the villas subject of this suit are erected. That the said parcel of land is charged to SBM Bank Limited for a sum of Kshs. 46,137,000/-.
 3. She added that the Defendant's efforts to change the user and issue individual leases to third parties/ buyers of the villas have been frustrated since the land is still registered under her name. Further, Anna Martin deposed that the Defendant has since managed to obtain a purchaser for Villa No. A-2 and it stands to suffer great loss if the said villa is not transferred to the purchaser. According to her the orders sought if granted will not affect the substratum of the suit, in this case villa unit A-1.
 4. In response, the Plaintiff filed a replying affidavit sworn on 19th April 2023 by Balal Abdul Aziz Chaudhry, the Plaintiff's director, who deposed that there is no evidence of the alleged Charge to SBM Bank, sale agreement, or any application for change of user. According to him, the Defendant's application is substantially similar to another application previously filed by the Defendant dated 25th February 2022 and another oral application made on 20th April 2022. He added that the application was mischievous, made in bad faith and devoid of any probative value.
 5. Alongside the replying affidavit, the Plaintiff filed a notice of preliminary objection dated April 19, 2023 premised on the following grounds; -
 1. That the application is res judicata by dint of the Notice of Motion Application dated February 25, 2022.
 2. That the Application contravenes section 158 of the *Companies Act*, 2015.
 3. That the Application further offends the provisions embedded in order 9 rule 2 c of the *Civil Procedure Rules*, 2010.
 4. That the Defendant/applicant is time barred by dint of order 1 rule 15 of the *Civil Procedure Rules*, 2010.
 5. That there is no privity of contract between the Plaintiff/respondent and the Defendant/applicant on the issues raised in the notice of motion application dated 3rd February 2023.
 6. That the Application offends the principle of Salomon v Salomon.
 6. Following the court's direction, the notice of motion and preliminary objection were heard simultaneously by way of written submissions. Notably, as at the time of writing this opinion the Plaintiff had not filed its submissions. I therefore summarize the Defendant's written submissions dated May 24, 2023 as follows; -



7. The issues raised were whether the Defendant is entitled to the prayers sought; whether the preliminary objection is merited; and who should bear the costs of the application.
8. Regarding the first issue, counsel for the Defendant submitted that the prayers sought stand to benefit both parties and most particularly they were in the best interest of the Plaintiff. This, counsel argued, was because a company being a separate legal entity from its directors as it was held in *Arun C. Sharma v Ashana Raikundalia and 5 Others* [2015] eKLR, it was necessary that the subject land be registered in the Defendant's name.
9. On whether the preliminary objection is merited, counsel submitted that the issue raised in the present application was not determined in the former application referred to by the Plaintiff, hence the objection fails the test under section 7 of the *Civil Procedure Act*, and as established in the case of *IEBC v Maina Kiai and 5 others* [2017] eKLR.

Counsel further argued that the Plaintiff should be condemned to bear the costs.

Issues, Analysis and Determination

- i. Whether the preliminary objection is merited.
- ii. Whether the registrar of lands should be directed to register the discharge of charge and transfer of title in favour of the Defendant.

Whether the preliminary objection is merited

10. It is well settled that a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. See *Mukisa Biscuits Manufacturing Company Limited -v- West End Distributors* (1969) EA 696. In *Oraro v Mbaja* [2005] eKLR the court stated that: -

“A Preliminary Objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence.”

11. I will proceed to interrogate the objections raised vis-à-vis the above stated rules on preliminary objection. The Plaintiff's contention is that the application contravenes section 158 of the *Companies Act* and order 9 Rule 2c of the *Civil Procedure Rules*, 2010 for failure to attach a company resolution authorizing the director to act on behalf of the company. While this objection does not meet the threshold of a preliminary objection, it must be noted that the Defendant produced the requisite authority in the further affidavit.
12. The Plaintiff further contested that the application was time barred by dint of order 1 rule 15 of the *Civil Procedure Rules*, 2010 which provides;

“Notice to third and subsequent parties [Order 1, rule 15.]

1. Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
 - a. that he is entitled to contribution or indemnity; or



- b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
- (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
 - (3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed and served within fourteen days of leave, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.
 - (4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions “third party notice” and “third party” shall respectively apply to and include every notice so issued and every person served with such notice.
 - (5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.”
13. The above rule provides for a time frame within which a party may seek leave to issue third party notice. The present application as filed is not an application for such leave. In the circumstances, I see no basis in this objection.
14. Regarding objection 5 and 6, it is not clear which rules have been contravened. In any case, I am not satisfied that the same qualify as pure points of law. I say so because to determine whether or not there is privity of contract as pleaded, this court must interrogate some sort of evidence. In the foregoing, those grounds equally fail.



15. It is further the Plaintiff's contention that the present application is res judicata given a previous similar application dated 25th February 2022[former application]. The issue of res judicata goes into the jurisdiction of this court. section 7 of the Civil Procedure Act provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.....”

16. In the present case, orders sought in the former application were inter alia that the court set aside its order dated 18th November 2021 and be pleased to remove the caution placed on the suit land. The basis of that application was that the suit land is registered in the name of the director Anna Martin; and that the said director had secured a buyer for unit A-2.

17. To put matters into perspective, the order dated 18th November 2021 placed an interim injunction on the entire suit property pending the determination of an application for injunction dated 17th November 2021. On 21st April 2022 when the former application and that dated 17th November 2021 came up for directions, and upon parties advancing respective oral arguments, the court varied the order dated 18th November 2021 to the effect that caution be placed only against one of the villa units within the suit land.

18. Going back to the prayers sought in the present application, it is clear to me that the issues directly and substantially in issue are similar to those raised in the former application. Therefore, that former application having been determined by this court, I am inclined to find that the present application is res judicata the former application.

19. In any event, the present application seeks to compel the registrar of lands Mombasa to perform his duties. The outcome of such orders would affect the said registrar who is not a party to this suit. I am afraid this is a fatal misstep that goes to the core of the application and the orders sought cannot issue.

20. The outcome is that the application dated 3rd February 2023 lacks merit and is hereby dismissed. Costs be in the cause.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 13TH DAY OF JUNE, 2023.

.....

S.M. GITHINJI

JUDGE

In the Presence of: -

Mr Murgor for Defendant/Applicant with Mr Munyoro and George Ouma.

