



Brandlise & 4 others v Rahil International Limited & 13 others
(Commercial Case 99 of 2016 & Civil Case 28 of 2017 (Consolidated))
[2023] KEHC 24764 (KLR) (Commercial and Tax) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24764 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 99 OF 2016 & CIVIL CASE 28 OF 2017 (CONSOLIDATED)
MN MWANGI, J
OCTOBER 13, 2023

BETWEEN

MARCOS BRANDLISE 1ST PLAINTIFF
DHANJI MANJI RAVJI 2ND PLAINTIFF
TORSTEIN FREDRICK KOCH 3RD PLAINTIFF
ACCELER GLOBAL LOGISTICS 4TH PLAINTIFF
ERICK KOCH 5TH PLAINTIFF

AND

RAHIL INTERNATIONAL LIMITED 1ST DEFENDANT
COULSON HARNEY LLP 2ND DEFENDANT
BENJAMIN TARUS KIPKORIR 3RD DEFENDANT
DAVID MUIRURI RITHO 4TH DEFENDANT
JAMES MBUGA NJOROGE 5TH DEFENDANT
DUNCAN DEEVER ACHAR 6TH DEFENDANT
JACKLINE CHELEGANGAT 7TH DEFENDANT
ERNETS KIPNGENO SIGEI 8TH DEFENDANT
JOSEPH OKOTH 9TH DEFENDANT
BENSON NGUGI 10TH DEFENDANT
POLYCARP A. ODHIAMBO 11TH DEFENDANT



CHIEF LAND REGISTRAR 12TH DEFENDANT
ATTORNEY GENERAL 13TH DEFENDANT
REGISTRAR OF COMPANIES 14TH DEFENDANT

RULING

1. By a Notice of Motion application dated 15th March, 2023, the 1st & 3rd defendants/applicants seek the following orders –
 - i. Spent;
 - ii. That this Honourable Court be pleased to order the NCBA Bank Kenya to forthwith transfer the sum of Kshs.81,100,000/= plus accrued interest thereon held in her account No. 1003532058 to the 1st defendant’s account No. 03801500251210 held in I&M Bank Limited Kenya pending the hearing and determination of this application;
 - iii. That the Directors of the 1st defendant be allowed unfettered access to the money held in the 1st defendant’s account No. 03801500251210 held in I&M Bank Limited Kenya;
 - iv. That this Court do make a declaration that the sale transaction for sale of land L.R. No. 20751 IR No. 68428 was completed and concluded legally; and
 - v. Costs of this application be provided for.
2. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn on 15th March, 2023 and 23rd May, 2023 by Benjamin Tarus Kipkorir, a Director of the 1st defendant company. In opposition thereto, the 1st plaintiff filed a replying affidavit sworn on 24th March, 2023 by Vincent Mwaniki, the Chief Finance Officer of the 1st plaintiff. The 2nd, 3rd, 4th & 5th plaintiffs filed a replying affidavit sworn on 27th March, 2023, by Dhanji Manji Ravji a Director of the 1st defendant company (applicant) and the 2nd defendant filed a replying affidavit sworn on 3rd May, 2023 by Paras Shah, the Managing Partner of the 2nd defendant herein.
3. The application was canvassed by way of written submissions which were highlighted on 3rd July, 2023. The 1st and 3rd defendants’ submissions were filed by the law firm of Prof. Tom Ojienda & Associates on 24th May, 2023 and the 1st plaintiff’s submissions were filed on 29th June, 2023 by the law firm of Mohammed Muigai LLP MM Chambers. The 2nd, 3rd, 4th & 5th plaintiffs’ submissions were filed by the law firm of Oraro & Company Advocates on 30th May, 2023 and the 2nd defendant’s submissions were filed on 30th May, 2023 by the law firm of TripleOK Law LLP Advocates. On 2nd May, 2023, when this matter came up for mention for directions, Mr. Odhiambo, learned Counsel for the 10th defendant indicated that the said defendant would neither file a response nor written submissions to the instant application as it has nothing to do with him.
4. Mr. Okore, learned Counsel for the 1st and 3rd defendants relied on the decision in *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* [2015] eKLR, where the Court of Appeal laid down the basis for setting aside a consent judgment or order. He also relied on the case of *Esther Targok Ayabei & another v Kibenjo Njuguna & another* [2019] eKLR and submitted that this Court should set aside the consent orders made on 8th April, 2016, based on non-fulfilment of the conditions set in the consent order. He contended that depositing of Kshs.81,100,000/= into the joint interest earning account was on condition that the applications dated 30th March, 2016 and 4th April, 2016 by the 1st plaintiff would



- be heard and determined. That despite the fact that the 1st defendant deposited the monies as directed by the Court, the said applications have never been heard and determined six (6) years down the line due to the 1st plaintiff's reluctance.
5. Counsel cited the case of *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others* [2018] eKLR, where the Supreme Court in interrogating the concept of privity of contracts affirmed the decision of the Court of Appeal in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR. He submitted that the concept of privity of contracts which is a fundamental concept of contract law, precludes any other party from having any locus in regard to the contract of the sale of all that property known as L.R. No. 20751 IR 68428, save for the actual parties to the said contract which in this instance, it is the 1st plaintiff and the 1st defendant herein.
 6. Mr. Okore stated that since the application herein relates to monies which are part of the consideration in the impugned contract of sale between the 1st plaintiff and the 1st defendant, the 2nd to 5th plaintiffs and the 2nd defendant are precluded from bringing any claim in relation to the impugned contract of sale and consent order, thus extinguishing any ground of opposition they have raised. He stated that depositing of Kshs.81,100,000/= into a joint interest earning account in the name of Counsel for the 1st plaintiff and the 1st defendant was as a result of a consent judgment entered between the 1st plaintiff and the 1st defendant. He contended that the concept of parole evidence rule precludes the introduction of extrinsic evidence into the consent orders which introducing the consolidated suit would amount to.
 7. Counsel for the 1st and 3rd defendants referred to the case of *Salomon v Salomon & Co. Ltd* [1895-99] ALL ER 33, where the Court laid down the concept of a company being a separate legal entity and submitted that the 1st defendant is a company formed and registered under the *Companies Act*, 2015 with a separate legal personality. He stated that the 2nd defendant who acted as the Advocates for the 1st plaintiff, the buyers in the impugned contract of sale confirmed the validity of the title to the suit property held by the 1st defendant by inter alia conducting a search at the Registrar of Companies to ascertain the legitimacy of the Directors of the 1st defendant as at the time of getting into the contract for sale of the suit property, and the issue of directorship of the 1st defendant was not in contention at the time.
 8. He submitted that the impugned contract of sale between the 1st plaintiff and the 1st defendant was completed and the said defendant passed good title to the 1st plaintiff, and as such, the issue of the 1st defendant's directorship which is the bone of contention in the consolidated suit No. 99 of 2016 does not affect valid transactions done by the 1st defendant as a distinct legal personality in any way. He was of the view that the the outcome of the consolidated suit does not affect the 1st defendant's rights to the sum of Kshs.81,100,000/= which emanated from a valid contract of sale. Mr. Okore contended that the orders sought in the application herein do not affect the subject matter of the consolidated suit which is to decide the proper set of Directors of the 1st defendant by operation of the concept of legal personality, and that since the 1st defendant is a separate entity from its Directors, it is well within its powers to demand monies owed to it.
 9. Ms. Wanjiku Ngigi, learned Counsel for the 1st plaintiff submitted that consent orders are perceived as contracts between parties, and that they enter into them of free will, thereby depriving the Courts of the burden and responsibility of exercising judicial authority to determine an issue one way or the other. She urged this Court to uphold the contract between the parties and stated that the only window for intervention is similar to what would vitiate a contract. To this end, Counsel relied on the case of *Purcell v FC Trigell Ltd* [1970] 2 All ER 671 quoted by the Court of Appeal in the case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR. She submitted that the grounds for setting aside consent



orders are fraud, coercion, mistake or misrepresentation but none of these grounds have been pleaded or relied on by the 1st defendant in support of the application herein.

10. It was stated by Counsel that the amount of money held in the joint interest earning account in the name of Counsel for the 1st plaintiff and the 1st defendant were deposited as a compromise between the said parties since the sale transaction had run into headwinds and wound up in these Court proceedings. She indicated that the said amount was not deposited to await successful completion of the transaction as pleaded in the instant application or as security pending the determination of the applications. She further indicated that there was no condition imposed on the 1st plaintiff in the consent order, as the funds are to be held until determination of the applications filed by the 1st plaintiff to preserve the balance of the purchase price which has not yet been done.
11. Ms. Wanjiku Ngigi contended that the said applications have not been heard since the parties herein decided to expedite the final determination of the issues in dispute by filing substantive pleadings and commencing trial. She submitted that the decisions relied on by the 1st defendant on the limb of setting aside a consent order on account of a condition to be fulfilled are distinguishable from the circumstances of this case, as in the said decisions, the consent orders were in respect of a conditional stay and whether Advocates have authority to enter into a consent on behalf of their clients. Counsel stated that the 1st defendant has not met the threshold for setting aside a consent order.
12. In submitting that at the *ex parte* stage of proceedings the party that brings an application is expected to be candid and as open with the facts as possible, Ms. Wanjiku Ngigi referred to the decisions in *Republic v Kenya Medical Training College & another Ex parte Kenya Universities and Colleges Central Placement Service* [2015] eKLR and *Kenya Electricity Transmission company Limited v Kibotu Limited* [2019] eKLR. Counsel stated that *ex parte* orders are ordinarily made without hearing the other party to offer their alternative facts for the Court's consideration, but in this case, the 1st defendant did not disclose that it had made a similar application in Misc. Application No. E934 of 2020 where the Court directed it to place the said application before this Court for consideration, which has not been done to date.
13. She further stated that the 1st defendant did not discharge its obligation to this Court and if this Court makes a finding that there was deliberate non-disclosure of material facts its duty is to strike out the application herein as the 1st defendant effectively attempted to steal a march in the process of the Court. Ms. Wanjiku Ngigi asserted that the instant application will determine the entire dispute because the validity and legality of the sale transaction of the suit property which is being challenged will have been determined and the 1st plaintiff's monies will have been dissipated before determination of the dispute of rescission of the sale transaction and ownership of the 1st defendant company. She relied on the Court of Appeal case of *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others* [2016] eKLR and submitted that there are no special circumstances or facts that have been presented to warrant the grant of such final orders at this stage.
14. Ms. Lubano, learned Counsel for the 2nd, 3rd, 4th & 5th plaintiffs submitted that the 1st plaintiff's applications that led to the deposit of Kshs.81,100,000/= in a joint interest earning account in the names of the Counsel for the 1st plaintiff and the 1st defendant came up for hearing on two occasions, that is on 19th April, 2016 and 28th April, 2016 but they were adjourned at the 1st & 3rd defendants' instance. She stated that the law firm of Oraro & Company Advocates is opposed to the release of the said funds on behalf of the company while the dispute between the parties herein is still pending, as it pre-empted the case in the consolidated suit. She relied on the case of *Flora N. Wasike v Destimo Wamboko* (*supra*) and the Court of Appeal case in the *Board of Trustees National Social Security Fund*



- v Michael Mwalo* [2015] eKLR. She submitted that the 1st defendant has not met the test for setting aside a consent order.
15. Counsel contended that a decision to release the funds would pre-determine the issue of whether the 1st plaintiff was entitled to rescind the contract of sale between it and the 1st defendant and thereby recover the purchase price which is part of the sum now being sought to be released, and who the Directors and Shareholders of the 1st defendant company are, thus establishing whether the sale of the suit property was valid. She cited the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR and stated that the 1st & 3rd defendants are seeking final orders in an interlocutory application which should not be allowed since all the parties in the consolidated suit are yet to be heard.
 16. Ms. Lubano referred to the decisions made in *Kenya Power & Lighting Co. Ltd v Samwel Mandere Ogeto* [2017] eKLR and *Kenya Breweries Ltd & another v Washington O. Okeya* [2002] eKLR and contended that the orders sought in the instant application are akin to mandatory injunction orders, yet no special circumstances have been shown to warrant the same. She stated that no evidence has been tendered to demonstrate that the 1st defendant is at the risk of running insolvent should the application herein be disallowed. She submitted that by virtue of the 1st & 3rd defendants asserting that they are the Directors and Shareholders of the 1st defendant company while evoking the doctrine of privity of contract, and that a company is a separate legal entity, the 2nd to 5th plaintiffs' contention is that the 3rd to 9th defendants had no right, authority or capacity to sell the suit property to the 1st plaintiff and as such, the alleged contract was void ab initio.
 17. She relied on the case of *Yusuf Abdi Adan & another v Hussein Ahmed Farah & 3 others* [2017] eKLR and emphasized that the issue of privity of contract does not arise since the 1st defendant company can only act under the direction and control of the 2nd to 5th plaintiffs who are its lawful Directors and Shareholders. She stated that as long as the 3rd to 9th defendants are still held to be Directors of the 1st defendant company at the Companies' Registry and claim to have authority to act on its behalf, the 2nd to 5th plaintiffs are apprehensive that once the funds are released to the 1st defendant's company bank account at 1&M Bank Kenya Limited, the 3rd to 9th defendants may access the said funds before the consolidated suit is determined. She submitted that should the 3rd to 9th defendants be found not to be the lawful Directors of the 1st defendant company, release of the said funds would be prejudicial to the interest of the other parties to the consolidated suit.
 18. Mr. Kivindy, learned Counsel for the 2nd defendant relied on the Court of Appeal case of *SMN v ZMS & 3 others* [2017] eKLR and submitted that the test for setting aside a consent order has not been met by the 1st and 3rd defendants. He further relied on the Court of Appeal case of *Kenya Commercial Bank Limited v Benjob Amalgamated Limited & another* [1998] eKLR and stated that the 1st defendant has neither demonstrated the grounds provided for setting aside a consent order nor demonstrated that the 1st defendant's Advocate did not have authority to compromise and settle. He pointed out that the parties herein appeared before Lady Justice Nzioka on 19th November, 2019 and agreed to keep all the applications in abeyance. He submitted that the authenticity of the sale of the suit property to the 1st plaintiff by the 1st defendant is to be ascertained by the 12th and 13th defendants.
 19. He further submitted that the issues for determination in the consolidated suit are who the actual owners of the 1st defendant company are, whether the 1st defendant had proper authority to give the green light for transfer of the suit property to the 1st plaintiff, and whether the 1st plaintiff was entitled to rescind the contract of sale between itself and the 1st defendant. He urged this Court to refrain from granting any of the orders sought in the application herein as doing so would pre-determine the issues



in the consolidated suit, thus condemning the other parties herein unheard against the spirit and letter of Article 50(2) of the *Constitution* of Kenya, 2010. In submitting that the 1st and 3rd defendants will suffer no prejudice if the orders sought are not granted Mr. Kivindyo cited the case of Abdirahman Abdi also known as *Abdirahman Mohamed Abdi v Safi Petroleum Products Ltd & 6 others* [2011] eKLR.

20. In a rejoinder, Mr. Okore submitted that when the consent of 8th April, 2016 was being entered into, the 2nd to 5th plaintiffs were not parties to this suit thus the doctrine of privity to contract works against them. He further submitted that the directorship of the 1st defendant company has been changed during the pendency of this suit. He asserted that in the instant application, the 1st and 3rd defendants are seeking to enforce a contractual right.

Analysis and Determination.

21. I have considered the application filed herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavits filed by the plaintiffs and the 2nd defendant as well as the written submissions by Counsel for the parties. The issues that arise for determination are –
- i. Whether the consent order issued by Hon. Justice Erick Ogola on 8th April, 2016 should be set aside thus allowing prayer No. 2 of the application herein;
 - ii. Whether the Directors of the 1st defendant should be allowed unfettered access to the money held in its account No. 03801500251210 held in I&M Bank Limited Kenya; and
 - iii. Whether this Court should make a declaration that the sale transaction for sale of land L.R. No. 20751 IR No. 68428 was completed and concluded legally.
22. In the affidavit filed by the 1st and 3rd defendants sworn by Benjamin Tarus Kipkorir, they deposed that the 1st defendant was the registered owner of L.R. No 20751 IR 68428 situated along Mombasa Road which it agreed to sell to the 1st plaintiff for Kshs.168,000,000/=. The 2nd defendant acted for the 1st plaintiff in the said transaction, whereas Chaudhri & Associates acted for the 1st defendant.
23. Mr. Kipkorir averred that the 1st plaintiff and the 1st defendant entered into an agreement for sale dated 17th October, 2014, which inter alia provided that the 1st plaintiff's Advocate would issue a professional undertaking to pay the balance of the purchase price upon successful transfer and registration of the suit property to the 1st plaintiff and that the suit property would be sold with vacant possession.
24. He further averred that prior to execution of the said agreement for sale, the 1st plaintiff's Advocate physically inspected the suit property and carried out an official search of the said property at the Land's Registry which confirmed that the said property was duly registered in the name of the 1st defendant.
25. It was stated by the 1st defendant that all the terms of the sale agreement dated 17th October, 2014 were duly complied with and on 14th January, 2015, the suit property was duly transferred and registered in the name of the 1st plaintiff. That seven (7) days later, the 1st defendant's Advocates requested the 2nd defendant to honour their professional undertaking dated 24th November, 2014, but the 2nd defendant declined to do so alleging that a post-registration search at the Land's Registry indicated apparent material discrepancies between pre and post searches on the title of the suit property.
26. It was averred that by letters dated 13th February, 2015 and 11th November, 2015, the Chief Lands Registrar confirmed that the 1st defendant's title presented for transfer and registration was genuine. That the same was also confirmed by the Department of Criminal Investigations in its letter dated 20th



- March, 2015. It was stated that on being satisfied with the sanctity of the transaction, the 2nd defendant released the balance of the purchase price to the 1st defendant's Advocates, who in turn released it to the 1st defendant.
27. It was deposed that in light of the foregoing, any attempts by the 1st plaintiff to rescind the agreement for sale dated 17th October, 2014 is inconsistent with the law, untenable and in breach of customs and usage in sale of land transactions. He contended that at the time of the transaction to sell the suit property to the 1st plaintiff, the directorship of the 1st defendant was not contested.
 28. The 1st defendant deposed that vide an application dated 30th March, 2016, the 1st plaintiff sought orders to restrain the 2nd defendant from releasing the balance of the purchase price to the 1st defendant's Advocates, but since that had already been done, it filed another application dated 4th April, 2016 seeking to bar the 1st defendant from appropriating the money gained from the sale of the suit property.
 29. That vide an order dated 8th April, 2016, the aforementioned applications were adjourned on condition that the 1st defendant deposits the sum of Kshs.81,100,000/= into a joint interest earning account in the name of Counsel for the 1st plaintiff and the 1st defendant within three days, pending hearing and determination of the two applications. Mr. Kipkorir averred that the 1st defendant complied with the said order on 18th April. 2016.
 30. He further averred that the 1st plaintiff is enjoying quiet possession of the suit property upon successful transfer and registration of the same in its name hence it is unfair and against the business interest of the 1st defendant to hold the balance of the purchase price from the said defendant, as its operations are on the death bed as a result of financial inadequacies having been kept away from its money for six (6) years.
 31. The 1st plaintiff in its replying affidavit sworn by Vincent Mwaniki deposed that the it filed two applications dated 30th March, 2016 and 4th April, 2016 and interim orders were granted in respect to the two applications on 31st March, 2016 and 7th April, 2016. He averred that when the said applications came up for hearing on 8th April, 2016, the 1st plaintiff and the 1st defendant got into a consent for the 1st defendant to deposit Kshs.81,100,000/= into a joint interest earning account, which deposit would be maintained pending the hearing and determination of the 1st plaintiff's applications. He further averred that the two applications had been set down for hearing on 19th April, 2016 and 28th April, 2016 but the said hearings were adjourned at the 1st defendant's instance.
 32. It was stated by the 1st plaintiff that the aforementioned consent remains binding on the parties and can only be varied or set aside by the agreement of the parties to the said consent. He further stated that this matter is part-heard with the 4th plaintiff having given evidence on 29th March, 2022 and that the parties herein agreed to hold the said applications in abeyance for the expeditious disposal of the suit. The 1st plaintiff stated that there is a contest as to the true Directors of the 1st defendant and its proper representation before this Court. In addition, that from the various defences filed by the 1st defendant in the consolidated suit, it is evident that the 1st defendant has wildly contradictory positions in respect to the suit property.
 33. That the 1st defendant one hand it avers that it sold the suit property to the 1st plaintiff and on the other hand, it avers that it did not sell the suit property to the 1st plaintiff and that the property is not up for sale. The 1st plaintiff stated that for this reason, the 1st defendant is not in a position to give the 1st plaintiff vacant possession of the suit property. It was stated that the aforementioned issues are live



- for determination by this Court as the 1st plaintiff has never been granted vacant possession of the suit property, as a result of which it rescinded the sale agreement between it and the 1st defendant.
34. Mr. Mwaniki deposed that in the event the consolidated suit is determined in favour of the 1st defendant, it will be entitled to the balance of the purchase price together with interest thereon thus it stands to suffer no loss. He averred that from the foregoing, the 1st plaintiff is apprehensive that in the event that it is successful in the consolidated suit, it will be unable to recover its funds from the 1st defendant. The 1st plaintiff averred that the 1st defendant has failed to disclose that it previously filed Misc. Appl. No. E934 of 2020 before Judge Majanja, in respect of the matters in dispute before this Court and the learned Judge directed that the said application be placed before this Court for directions, which the 1st defendant never did.
35. The 2nd to 5th plaintiffs in their replying affidavit sworn by Dhanji Manji Ravji deposed that the instant application seeks to determine issues raised in the consolidated suit which is currently part heard. He averred that the background of the consolidated suit is that the 1st defendant was incorporated on 18th September, 2006, with the 2nd to 5th plaintiffs as its Directors and Shareholders as can be seen from the 1st defendant's copy of CR-12 dated 21st August, 2020. He also averred that the 1st defendant was the registered owner of the suit property having purchased it from Stepping Stones Holdings in 2006 for the sum of Kshs.16,000,000/=.
36. He further averred that on or about 14th January, 2015, unknown to the 2nd to 5th plaintiffs, the 1st defendant company acting under the 3rd to 11th defendants' instructions, fraudulently, unlawfully and without any right transferred the suit property to the 1st plaintiff for a consideration of Kshs.168,000,000/= vide an agreement for sale dated 17th October, 2014.
37. That on discovery that the suit property had been sold unlawfully and fraudulently, the 1st plaintiff instituted HCCC No. 99 of 2016 seeking orders of a permanent injunction restraining the 2nd defendant from releasing the balance of the purchase price to the 1st defendant company, rescission of the sale agreement dated 17th October, 2014, and return of the deposit and all legal and attendant costs incurred by the 1st plaintiff on account of the sale transaction.
38. He deposed that the 2nd to 5th plaintiffs on the other hand filed HCCC No. 28 of 2017 once they learned of the sale of the suit property where they sought inter alia, a declaration that the 2nd to 5th plaintiffs are the true and lawful Directors and Shareholders of the 1st defendant, the alterations and changes made to the 1st defendant's shareholding and directorship in favour of the 3rd to 11th defendants are fraudulent, illegal, null and void ab initio and a declaration that the sale and transfer of the suit property to the 1st plaintiff was fraudulent, illegal, null and void ab initio.
39. It was stated by Mr. Ravji that the injunction order issued by Judge Erick Ogola was varied by way of a consent of the parties dated 17th August, 2020. He further stated that the consolidated suit was partly heard by Lady Justice Mshila on 24th March, 2022 and 29th March, 2022 when the 2nd to 5th witnesses testified. He stated that the 2nd to 5th plaintiffs' contention is that the orders being sought in the instant application are the very same issues that are the subject matter of the part-heard consolidated suit, which include the lawfulness or otherwise of the purported sale of the suit property and the related issues of entitlement to the amounts paid by the 1st plaintiff as consideration for the said sale. He contended that the orders sought in the application herein are final in nature and cannot be issued at an interlocutory stage.
40. The 2nd defendant in its replying affidavit sworn by Paras Shah, deposed that the 2nd defendant acted as Legal Counsel for the 1st plaintiff in relation to its purchase of the suit property from the 1st defendant.



He averred that they applied for a search on the suit property based on copies of the title deed to the suit property and certificate of incorporation respectively.

41. That the official search results from the Land's Registry in Nairobi confirmed that the suit property was registered in the name of the 1st defendant and the one from the Companies' Registry confirmed the existence of the 1st defendant and the identity of its Directors and Shareholders. That subsequently, the 1st plaintiff and the 1st defendant entered into an agreement for the sale of the suit property for Kshs.168,000,000/=
42. It was stated by the 2nd defendant that in compliance with the terms of the sale agreement, they released the 10% deposit of Kshs.16,800,000/= to the 1st defendant's Advocates on 17th November, 2015 and on 24th November, 2014, they issued them with a professional undertaking stating that they would pay the balance of the purchase price being Kshs.151,200,000/= within seven (7) days of them receiving the registered transfer of the suit property in favour of the 1st plaintiff.
43. That the said professional undertaking formed a distinct and separate contract between the 2nd defendant and the 1st defendant's then Advocates, and the 2nd defendant would be obligated to comply with the undertaking once the conditions specified in its terms had been fulfilled, as the undertaking was not to be contingent upon the terms of the agreement for sale.
44. The 2nd defendant deposed that sometime in January 2015 they received the registered transfer together with an original title to the suit property in the name of the 1st plaintiff, and thereafter, they carried out another search on the suit property to confirm that the records at the Land's Registry had been updated to reflect the transfer in favour of the 1st plaintiff. That on receipt of the results, they noticed subtle discrepancies between the said search and the pre-registration search.
45. Mr. Shah stated that on making inquiries from the Ministry of Lands on the said discrepancies, they were advised to report the matter to the Department of Criminal Investigations. That vide a letter dated 17th June, 2015, the Department of Criminal Investigations confirmed that the title to the suit property in the name of the 1st plaintiff was the original and genuine title, which was also confirmed by the Chief Land Registrar in a letter dated 11th June, 2015.
46. Mr. Shah averred that vide a letter dated 23rd December, 2015, they proceeded to advise the 1st plaintiff of the implications of the communication from the Department of Criminal Investigations and the Chief Land Registrar and further advised the 1st plaintiff to complete the transaction. Thereafter they were issued with the go-ahead to complete the transaction by the 1st plaintiff's Vincent Mwaniki by telephone. As a result, it was agreed between the 2nd defendant and Counsel for the 1st defendant that the transaction between the 1st plaintiff and the 1st defendant would be completed on 18th February, 2016.
47. However, by a letter dated 18th February, 2016, the 1st plaintiff informed the 2nd defendant that it had become aware of a person who had been arrested and arraigned in Court for allegedly claiming and selling the suit property to another person and for this reason, the validity of the title to the suit property was in question and directed for a cancellation of the transaction. That vide a letter dated 21st March, 2016, the 1st plaintiff instructed the 2nd defendant to terminate the agreement for sale, recover the deposits paid, re-convey the title to the suit property back to the 1st defendant's name and immediately refund the purchase price and demand for the deposits already paid to the 1st defendant.
48. The 2nd defendant asserted that since the 1st defendant had fulfilled all its obligations as required of it in the agreement for sale dated 17th October, 2014, the authenticity of title, with the issues raised by the 1st plaintiff having been settled by the relevant authorities conclusively, they could not comply with the



1st plaintiff's instructions contained in their letter dated 21st March, 2016 as the same was inconsistent with the law and would be in breach of the 2nd defendant's legal and ethical duties as Officers of the High Court.

49. Thereafter, a consent was recorded in High Court Civil Case No. 55 of 2016 (OS) Mohammed Munir Chaudhri & Mohammed Ferhan Chaudhri t/a Chaudhri & Associates v Philip Jonathan Coulson & others t/s Coulson Harney Advocates, where the 1st defendant's Advocates sought an order compelling the 2nd defendant to comply with its professional undertaking dated 24th November, 2014, marking the suit as finally settled. As a result of the foregoing, the 2nd defendant released the balance of the purchase price in the sum of Kshs.151,200,000/= to the 1st defendant's Advocates on 22nd March, 2016. To recover the said funds, the 1st plaintiff filed two applications dated 30th March, 2016 and 4th April, 2016. Parties then got into a Consent Order dated 8th April, 2016 requiring the 1st defendant to deposit Kshs.81,100,000/= in a joint interest earning account, which order has never been varied, amended and/or set aside.
50. Mr. Shah asserted that the instant application is opposed as it sets to deal with the core issues for determination in the consolidated suit. The ability of the 1st defendant to pass a clean title in respect to the suit property and the confirmations issued by the relevant authorities in the process of authenticating the ownership of the 1st defendant as well as the suit property is in question. In addition, the 1st defendant's ownership is in contention as can be seen by the fact that it has two sets of Directors both of whom are parties to this suit and represented by two sets of law firms.
51. The 1st & 3rd defendants in their further affidavit sworn by Benjamin Tarus Kipkorir deposed that none of the prayers sought in the instant application have been sought in the consolidated suit thus the application herein does not seek to pre-determine any issues raised in the consolidated suit.
52. He averred that the suit property is now registered in the name of the 1st plaintiff who enjoys unfettered right of ownership having been handed over vacant possession pursuant to the sale transaction as can be seen from the 2nd defendant's witness statement by Counsel Kamami Christine Michira dated 25th February, 2020.
53. It was stated by Mr. Kipkorir that Judge Majanja transferred HCCOMM NO. E934 of 2020 to be dealt with by the same Court presiding over the consolidated suit for convenience and since it has a historical background with the consolidated suit and that the learned Judge did not determine the issues raised therein with finality.
54. Mr. Kipkorir further stated that pursuant to the provisions of Order 40 Rule 4(2) & (6) of the *Civil Procedure Rules, 2010*, *ex parte* orders are only valid for fourteen (14) days and that the respondents have not attempted to have the *ex parte* injunctive order granted in the application dated 4th April, 2016 extended. For this reason, the said orders elapsed approximately seven (7) years ago, consequently, the money the 1st defendant seeks to have released is not burdened by any orders of the Court.

Whether prayer No. 2 of the application herein should be allowed consequently setting aside the consent order issued by Hon. Justice Erick Ogola on 8th April, 2016.

55. On perusal of the instant application, it is evident that prayer No. 2 of the said application is seeking this Court to order NCBA Bank Kenya to forthwith transfer the sum of Kshs.81,100,000/= plus accrued interest thereon held in account No. 1003532058 to the 1st defendant's account No. 03801500251210 held in I&M Bank Limited Kenya "pending the hearing and determination of this application". In view of the fact that the said order is sought pending the hearing and determination of the application herein, it cannot be granted as the application is already spent. In arriving at this conclusion, I am



guided by the holding in the case of *Catherine Njeri Macharia v Macharia Kagiob & Another* [2013] eKLR, where when the Court was faced with a similar question stated as follows -

“I accept and approve the holding by Hon. Justice Lesiit in HCCC No. 329 of 2003 *Ano Shariff Mohammed v. Abdulkadir Shariff Abdirahim* and Hon. Justice Fred Ochieng in HCCC No. 2047 of 2000 *Wilfred O. Musingo v. Habo Agencies Ltd* where my colleague judges were faced with applications seeking prayers similar in wording as in the instant application by the plaintiff. Justice Lesiit rendered herself as follows in the case referred to:

“The prayer seeks a stay of execution of decree pending the hearing and determination of this application. The issue is that once the application is heard and determined then what. I do not think the prayer is worded correctly as the stay of execution should be prayed pending something other than the application itself. Considering this prayer and the manner it is worded, it is my view that the entire application is spent and that there remains nothing for me to stay”.

For his part Hon. Justice Ochieng rendered himself thus: -

“Now I revert to the orders sought by the Defendant. First it seeks an order of stay of execution pending the hearing and determination of this application. In other words, the very moment the court will have heard and determined the application dated 27th September, 2005 there would be no orders for stay of execution. Therefore, even if I were to grant prayer 2 as prayed, it would lapse as soon as I finish reading this ruling. As on 28th October, 2005, I had already given an order staying execution until today.

I hold that there is no need for the court to grant another order whose purport and effect would be the same as that which has already been given”.

56. Determining and/or granting prayer No. 2 of the instant application will not only be superfluous and it will also serve no purpose as by the time it is issued, the application herein will have been heard and determined. For this reason, this Court finds that the application herein is spent and I will not belabor on the same.

Whether the Directors of the 1st defendant should be allowed unfettered access to the money held in its account No. 03801500251210 held in I&M Bank Limited Kenya.

57. From the pleadings before this Court, it is evident that the 1st defendant has two sets of Directors. The first set is the 2nd to 5th plaintiffs who are represented by the law firm of Oraro & Company Advocates, whereas the 2nd set is the 3rd, 4th, 6th, 9th & 11th defendants represented by the law firm of Prof. Tom Ojienda & Associates. In addition, the issue and/or question of who the rightful Directors of the 1st defendant company are, is yet to be determined by this Court in the consolidated suit.
58. In light of the foregoing, this Court finds that it cannot make an order, let alone determine this issue as it is not clear which set of Directors will be granted unfettered access to the said monies. This is an issue best dealt with at the hearing of the consolidated suit so that the two sets of Directors can be given an opportunity ventilate their cases in support of their positions. the circumstances, it is not only proper and in the interest of justice but also in the best interest of the 1st defendant to first await this Court’s determination on who the Directors of the 1st defendant company are, before making a determination allowing the 1st defendant’s Directors unfettered access to the monies held in the 1st defendant’s account at 1&M Bank Kenya Limited.



Whether this Court should make a declaration that the sale transaction of land L.R. No. 20751 IR No. 68428 was completed and concluded legally.

59. The 1st plaintiff filed HCCC No. 99 of 2016 vide a plaint dated 30th March, 2016. On perusal of the said plaint, it is evident that the 1st plaintiff is seeking *inter alia* a declaration that the 1st plaintiff was entitled to rescind the sale agreement dated 17th October, 2014, Kshs.16,800,000/= being the deposit paid by it further to the sale agreement dated 17th October, 2014, and the sum of Kshs.151,200,000/= being the balance of the purchase price.
60. From the above, it is clear that the validity of the sale agreement for the sale of all that parcel of land known as L.R. No. 20751 IR No. 68428 dated 17th October, 2014 is an issue to be determined at the consolidated suit. In the main suit, the 1st plaintiff seeks to rescind the said sale agreement and in this application, the 1st defendant seeks a declaration that the sale transaction for the sale of land L.R. No. 20751 IR No. 68428 was completed and concluded legally. It is my finding that if I determine this issue at an interlocutory stage, it will amount to determining some of the issues raised in the consolidated suit with finality, without giving the parties herein an opportunity to adduce evidence in support of their cases. This would be contrary to the provisions of Article 50(1) of the Constitution of Kenya, 2010, which provides for the right to a fair hearing.
61. This Court will therefore not delve into the merits and demerits of this issue but will instead leave it for determination once it has taken the evidence of all the parties to this suit and given them an opportunity to adduce evidence in support of their cases and/or positions.
62. The upshot is that the application dated 15th March, 2023 is bereft of merit and it is hereby dismissed with costs to the plaintiffs and the 2nd defendant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 13TH DAY OF OCTOBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Biko Angwenyi h/b for Mr. Wanjiru Ngigi for the 1st plaintiff

Mr. Okore h/b for Prof. Tom Ojenda SC for the 1st, 3rd, 4th, 6th, 9th and 11th defendants

Mr. Okiring for the 2nd defendant

Ms Mengich h/b for Ms Lubano for the 1st to 5th plaintiffs and the 1st defendant

Ms B. Wokabi – Court Assistant.

