



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 18 OF 2020**

1. HANOS (K) LTD.....1<sup>ST</sup> PLAINTIFF/RESPONDENT

2. GUNHILD GERLINDE OSER.....2<sup>ND</sup> PLAINTIFF/RESPONDENT

**VERSUS**

1. MOHANLAL NEMCHAND SHAH

2. LAXMIBEN MOHANGAL NEMCHAND SHAH.....2<sup>ND</sup> DEFENDANT

3. DHIREN MOHANLAL SHAH.....3<sup>RD</sup> DEFENDANT/APPLICANT

**AND**

C.B. GOR & GOR & ADVOCATES.....INTERESTED PARTY

**RULING**

1. Before the Honorable Court is the Notice of Motion application dated 24<sup>th</sup> October, 2019 and filed in court the said date by the Advocates for the 3<sup>rd</sup> Defendant/Applicant – the law firm of Messrs. Mutuku Mbithi & Butoyi Advocates. It is brought under the provisions of Order 9 rule 9 and other enabling provisions of law of the Civil Procedure Rules 2010.

It seeks to be granted the following orders:-

*(a) That leave to be granted to the Defendant/Applicant to change the firm of Advocates representing him in this matter from the law firm of Messrs. C.B. Gor & Gor & Advocates to the firm of Messrs. Mutuku, Mbithi & Butoyi Advocates.*

*(b) That upon the afore said leave being granted the firm of Messrs. Mutuku, Mbithi & Butoyi Advocates be deemed to be on record on behalf of the Defendant/Applicant on this matter.*

*(c) That the Notice of Change attached hereto be admitted as duly filed upon payment of the requisite court fees.*

*(d) That the party Bill of Costs attached hereto be deemed as duly filed upon payment of the requisite court filing fees.*

*(e) That Costs of this application to be provided for.*

2. The afore said application is founded and supported by the 18 Paragraphed Supporting affidavit of DHIREN MOHANLAL SHAH, the 3<sup>rd</sup> Defendant/Applicant herein and the annexures attached thereof sworn and dated on the 24<sup>th</sup> October, 2019. He deposed that the originating summons suit was instituted before the High Court, Mombasa by the Plaintiff/Respondent in the month of June 2003 where he had by then retained the Law firm of Messrs C.B. Gor & Gor & Advocates since the year 2003. He held that on 14<sup>th</sup> October, 2009 the Plaintiffs/Respondents applied to withdraw the suit and court granted the orders where the suit was marked as withdrawn.

3. Additionally, he deposed that on the same material day the court further ordered that the Plaintiffs/Respondents herein pays the costs for the suit to the 3<sup>rd</sup> Defendant/Applicant upon taxation. He attached the said court order. He deposed that the Respondents immediately filed yet another suit against the 3<sup>rd</sup> Defendant/Applicant herein being HCC Misc. Appl. No. 667/2009 (Later on it became ELC No. 52/2016).

On 18<sup>th</sup> October, 2018, the later suit was determined in favour of the Plaintiffs/Respondents. He informed court that the said judgment of the superior court had since been appealed against at the court of appeal being Court of Appeal (Mbsa) Civil case No. 81 of 2020 – **“Dhiren Mohanlal Shah – Vs – Hanos (K) Limited”**

4. He stated that taking into consideration that the issues at the High Court were fully canvassed, it was fair that the 3<sup>rd</sup> Defendant/ Applicant filed his Bill of Costs arising from the withdrawn case as ordered by court afore mentioned. He deposed that his then Advocates never filed a Bill of Costs for taxation as they had hoped on doing so upon the finalization of the entire dispute.

5. He deposed that, in the given circumstances, it had been necessary to appoint a separate Advocate being Mutuku, Mbithi & Butonyi Advocates in place of Messrs. Ndegwa Muthama Katsiya Associates to represent him on matters pertaining to the taxation of the Bill of Costs. In so doing, no party would suffer any prejudice should the prayers sought got granted.

On 2<sup>nd</sup> June, 2021, after obtaining leave, the 3<sup>rd</sup> Defendant/ Applicant prepared and filed a 10 Paragraphed further affidavit dated 26<sup>th</sup> May, 2021, sworn by one PETER MUTUKU MBITHI. He deposed being an Advocate of High Court of Kenya practicing from the firm of Messrs. Mutuku, Mbithi & Butonyi Advocates and having the conduct of this proceedings. Hence, he was competent to swear the said affidavit.

6. According to the Learned Counsel, although the said application dated 24<sup>th</sup> October, 2019 was allocated a hearing date on 2<sup>nd</sup> December, 2019, but in between On 28<sup>th</sup> November, 2019, the Plaintiffs/Respondents filed their grounds of oppositions. On 2<sup>nd</sup> December, 2019, while appearing before Lady Justice D. Chepkwony of the then High Court, Mombasa, the Learned Counsel for the Plaintiffs/ Respondents submitted that the entire suit ought to be transferred to this Court where according to him was the correct place with the proper jurisdiction to hear land related matters. Subsequently and by consent, the matter was transferred to this court. He informed court that he had since filed its party to party Bill of Costs which had been pending before this court. He contended that this court had jurisdiction to give directions on all the issues related to the case at hand including the taxation of the said Bill of Costs pending before court. On 16<sup>th</sup> March, 2021, he swore and filed a further affidavit in response to the issues raised from the preliminary objection filed by the Plaintiffs/ Respondents.

## **II. THE PLAINTIFFS/RESPONDENTS CASE**

7. The said Notice of Motion application was vehemently opposed by the Plaintiffs/Respondents. As indicated above, on 28<sup>th</sup> November, 2019 the law firm of Messers Anjarwalla & Khanna Advocates filed grounds of opposition dated the same date Under the provisions of Order 57 Rule 14 (d) (e) of the Civil Procedure Rules. From the said grounds, they argued that the said application was wholly misconceived, an abuse of the process of court and that the Prayers numbers 4 and 5 of the said application could no longer be sought or implemented having arisen from an order issued on 3<sup>rd</sup> December, 2009 which lapsed, and time barred by limitation. They argued that this court had no jurisdiction to grant any directions or orders onto such prayers.

8. On 29<sup>th</sup> January, 2020, the Advocates for the Plaintiffs/ Respondents filed a Notice of Preliminary objection dated 29<sup>th</sup> January 2020 raising a few issues of law as:-

***(a) That the Notice of Motion application dated 24.10.2019 and filed on the same date was still pending hearing and determination of prayers 4 & 5 thereof.***

***(b) That the said application was opposed by the 1<sup>st</sup> Plaintiff/ Respondent through the statement of grounds of opposition dated 28<sup>th</sup> November, 2019 and filed on the same date.***

***(c) That the consent order issued on 3<sup>rd</sup> December 2009 for costs to be taxed was time barred and was not enforceable in law.***

***(d) That there had been no subsequent order of costs issued herein.***

***(e) That this Hon. Court has no jurisdiction to proceed to tax the said party and party Bill of Costs and hence prayed for the same to be set aside.***

***(f) That the Bill of Costs was in event defective as the 1<sup>st</sup>, 2<sup>nd</sup> Defendants were deceased sought to claim costs against the 2<sup>nd</sup> Plaintiff who was also deceased.***

## **III. THE SUBMISSIONS**

9. On 1<sup>st</sup> March, 2021, in the presence of all the parties the Honorable Court directed that the said application dated 24<sup>th</sup> October, 2019, the further affidavits dated 16<sup>th</sup> March, 2021, 26<sup>th</sup> May, 2021 by the 3<sup>rd</sup> Defendants/Applicants, the grounds of opposition dated 2<sup>nd</sup> November, 2019 and the preliminary objection by the Plaintiff/Respondent dated 29<sup>th</sup> January, 2020 be disposed off by way of written submissions. Both the Learned Counsels Senior Counsel Mr. Ushwin Khanna for the Plaintiffs/Respondents and Mr. Peter Mutuku Mbithi for the 3<sup>rd</sup> Defendant/Applicant were accorded brief moment each to orally highlight their submissions and which mandate they executed so diligently, devotedly and dedicatedly, I must admit with great admiration and humility.

### **A. THE SUBMISSIONS BY THE 3<sup>RD</sup> DEFENDANT/APPLICANT**

10. On 11<sup>th</sup> June, 2021, the Advocates for the 3<sup>rd</sup> Defendant/ Applicant the law firm of Messrs. Mutuku, Mbithi & Butonyi Advocates

prepared and filed their written submissions dated 2<sup>nd</sup> June, 2021. The Learned Counsel, Mr. Mbithi submitted that on 14<sup>th</sup> October, 2009 Justice Anzangalala then of High Court Mombasa delivered a judgment in this case and awarded the 3<sup>rd</sup> Defendant/Applicant costs. He submitted that this application was filed under the provision of Order 9 Rule 9 of the Civil Procedure Rules taking that it was after the delivery of judgment. He reiterated that on 2<sup>nd</sup> December, 2019 when the application came up for hearing before Lady Justice D. Chepkwony of the High Court Mombasa, the outgoing and incoming Advocates entered into a consent on the change of representation of the Applicant and how the interested party would be compensated with regard to the outstanding the costs of the suit upon taxation of the bills before the said court. He held that this was done in the presence of the Plaintiffs/ Respondents. He stated that it was from that understanding that the Applicant filed his Bill of Costs on 16<sup>th</sup> December, 2019.

11. On 3<sup>rd</sup> February, 2020 he informed court that it was when the suit came up for mention for directions, that the Plaintiffs/ Respondents raised a preliminary objection on the jurisdiction of the High Court to give direction on the case. He sought to have the suit transferred to this Court as the court with the proper Jurisdiction to deal with the matter. Pursuant to that, the High Court agreed with the Plaintiffs/ Respondents. Eventually, the case was transferred to this Court, Mombasa settling down the issue of the proper court to handle the subject matter. Therefore, it was the Advocates' submission that it was unfair for the Plaintiffs/ Respondents to be seen once again to be challenging the jurisdiction of this Court. He contended that the said court was now clothed with the necessary and proper jurisdiction to give directions in the case.

12. On the issue raised the Party to Party Bill of Costs being time barred, the Learned Advocate for the 3<sup>rd</sup> Defendant contended and relied that on provision of Section 4 (4) of the Limitation of Actions Cap 22 of Laws of Kenya as the relevant one for the of limitation time on the enforcement of Judgment it provided a time limit of 12 years from when the judgment was delivered. The Learned Counsel submitted that the purpose for filing the application herein and the Party to Party Bill of Costs on 16<sup>th</sup> December, 2019, the Defendant/Applicant intended to enforce the decree of Court delivered on 14<sup>th</sup> October, 2009. He argued that it was properly filed within the twelve (12) years stipulated statutory period. To them therefore, this Court has original and unlimited jurisdiction to issue direction herein. On the contrary, and all said and done they held the view, it was the Plaintiffs/ Respondents who had erroneously relied on the provisions of Section 4 (1) ( e ) of the Act which instead provided for equitable reliefs and on contracts. It is affirmed that consent orders are not contracts. He argued that the proper section of the Act was Section 4(4) of the Act and that the Party to Party Bill of Costs filed on 16<sup>th</sup> December, 2019 was within the acceptable time limits. To buttress on this point, they relied on the decision of *“Koinange Investments & Development Company Limited – VS- Ian Kahiu Ngethe & 3 Others [2015] eKLR* where the Court of Appeal *“Court of Appeal was emphatic that the provision of Section 4 (4) of the Limitation of Actions Act governs execution of Judgment and decree”*

In the final analysis, he urged this Honorable Court to order that it has the jurisdiction to order that the Bill of Costs be listed before a Taxation officer of the court for Taxation.

## **B. THE SUBMISSION BY THE 1<sup>ST</sup> PLAINTIFF/RESPONDENT**

13. On 15<sup>th</sup> March, 2021, the Advocates for the 1<sup>st</sup> Plaintiff/ Respondent the law firm of Messrs. Anjarwalla & Khanna Advocates filed their written submissions dated 11<sup>th</sup> March, 2021. Mr. Khanna, the Senior Learned Counsel, raised the issues with regard to prayers numbers 4 and 5 of the said application. He submitted that this Court had no jurisdiction to give direction or orders as urged for in prayers numbers 4 and 5 of the said application. He argued that the consent order referred to by the 3<sup>rd</sup> Defendant/Applicant entered on 3<sup>rd</sup> December, 2009 which was over 11 years ago. Therefore, according to them, any legal action taken by the Applicant to tax their Party to Party Bill of Costs was time barred. As far as the Learned Counsel was concerned, an action to tax a Party to Party Bill of Costs ought to have been made within a period of six (6) years from the date of the consent order of 3<sup>rd</sup> December, 2009. To buttress on this point, the Learned Counsel relied on the Provisions of Section 4(1) (e) of “The Limitation of Actions Act, Cap. 22”. Hence, he submitted that likewise any action taken to file a Party to Party Bill of Costs or to tax the same under the Advocates (Remuneration Order) also was time barred under the provisions of – Section 4(1) (e) of the Act. Further, he stressed that this Court had no jurisdiction to give directions and prayers sought under prayer Nos. 4 and 5 of the application. Indeed, the fact that on 16<sup>th</sup> December, 2019 the Applicant had already filed their Party to Party Bill of Costs dated 5<sup>th</sup> December, 2019 was an abuse of the due process. The Learned Counsel argued that the Applicant did this neither hold leave of court nor attained any direction by court to that effect. They emphasized that neither had the said application been heard nor the prayer Nos. 4 and 5 allowed on 2<sup>nd</sup> December, 2019 as alleged.

14. The Learned Counsel submitted that this court had jurisdiction to only hear Environment and Land Court related Cases. Furthermore, he averred that the 1<sup>st</sup> Plaintiff/ Respondent was never a party to the Consent entered with the Defendants and the interested party. He submitted that the limitation period for a consent order was Six (6) years and not twelve (12) years as alleged. In this case the consent order read, *inter alia:-*

***“That the Plaintiffs/Applicants do pay to the Defendants/Respondents their costs of this suit to be taxed and certified by the Taxing Officer of this Court”***

15. Therefore, he submitted that the said orders sought by the 3<sup>rd</sup> Defendant/Applicant were unattainable. The costs were first required to be taxed and certified. Such taxation would only be carried out by way of an action upon filing and taxing the Bill of Costs. Such an action would only be done within a period of six (6) years of the date of the said order dated 3<sup>rd</sup> December 2009.

Further, he urged court to consider that from the time the consent order was issued on 3<sup>rd</sup> December, 2009, which was over ten (10) years the matter had been lying dormant without any steps taken. The Learned Counsel asserted that, reviving a matter which the court on its own motion ought to have dismissed for want of prosecution, in itself was an abuse of the court process. He urged court to find that it was contrary to the overriding objectives of this court having regard to the ever increasing issue of backlog of cases which court is under pressure in reducing.

The upshot of it all, the 1<sup>st</sup> Plaintiff/Respondent urged the Honorable Court to allow the Preliminary Objection and to dismiss prayers 4 and 5 of the said application dated 24<sup>th</sup> October, 2019 with costs to the 1<sup>st</sup> Plaintiff/Respondent. He also urged court to set aside the party to Party Bill of Costs dated 5<sup>th</sup> December, 2019 and filed on 16<sup>th</sup> December, without prior leave of court.

#### **IV ANALYSIS & DETERMINATION**

16. I have read and put into account all the pleadings – the written submissions by the 3<sup>rd</sup> Defendant/Applicant, the authorities, the grounds of opposition, dated 28<sup>th</sup> November, 2019 and the Preliminary objection dated and filed on 29<sup>th</sup> January, 2020 raised by the Plaintiffs/Respondents pertaining to the said application dated 25<sup>th</sup> October, 2019 by the 3<sup>rd</sup> Defendant/Applicant and considered the appropriate provisions of the law. In order to arrive at a fair, just and informed decision as urged by both the parties herein the court has relied on and framed the following salient issues. These are:-

***(a) Whether the filed preliminary objection by the Plaintiffs/Respondents meets the known and established threshold of a preliminary objection as set out by law and precedents.***

***(b) Whether the 3<sup>rd</sup> Defendant/Applicant is entitled to be granted the orders of Costs as ordered by court against the Plaintiff/Respondents, based on the recorded consent and upon the withdrawal of the entire suit by the Plaintiffs/Respondents against the Defendants.***

***(c) Who will bear the costs of the notice of the Preliminary Objection and the Notice of Motion application dated 25<sup>th</sup> October, 2019.***

**Issue No. 1 - Whether the filed preliminary objection by the Plaintiffs/Respondents meets the known and established threshold of a preliminary objection as set out by law and precedents.**

17. According to the Black Law Dictionary Preliminary Objection is defined as being:

***“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”***

The above legal preposition has been clearly elaborated in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696*. Where Lord *Charles Newbold P.* held that a proper preliminary objection constitutes a pure points of law. He held that:-

***“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”***

18. Additionally, I wish to refer on the decision of *Attorney General & Another –VS- Andrew Mwaura Githinji & another [2016] eKLR:-* which does in a very explicit way spell out the preposition as pertains Preliminary objections *inter alia:-*

***(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.***

***(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and***

***(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.***

19. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case, though it is convenient if is raised at the earliest opportunity of the case in order to pave way for the smooth management and determination of the main dispute in a matter. The 1<sup>st</sup> Plaintiff/Respondent raised the objection on 29<sup>th</sup> January, 2020 immediately the suit was transferred from High Court to this court. To me there was no inordinate delay in raising the objection. The issues raised are serious as they are based on pure matters of law and thus needed to be dealt with. To that front, the Preliminary objection by the Plaintiffs/ Respondents fully meets the legal threshold of a preliminary objection.

**ISSUE No. 2 - Whether the 3<sup>rd</sup> Defendant/Applicant is entitled to be granted the orders of Costs as ordered by court against the Plaintiff/Respondent based on the recorded consent and upon the withdrawal of the entire suit by the Plaintiffs/Respondents against the Defendants.**

20. In order to handle this sub - heading with the required finesse, I feel there is need to extrapolate on the facts of the case though briefly. This is rather protracted litigation of close to twenty (20) years pending before this court between the Plaintiffs/Respondents and the Defendants/Applicants herein. The case was initiated by the Plaintiffs/Respondents at High Court on 16<sup>th</sup> June, 2003, through an Originating

summons. The Plaintiffs/Respondents moved court seeking various prayers among them that they were entitled to adverse possession of the suit property known as Land Reference numbers Sub – division numbers 2108 and 2124, Bamburi which were both owned by the Defendant/Applicant. It will be noted that, by that time, there was still another suit initiated by the Plaintiffs/Respondents being HCCC No. 342 of 1996 between the same parties and the same properties.

21. The Plaintiff's case was that by a lease dated 1<sup>st</sup> August, 1986, the Defendant, his father Mohanlal Nemchand Shah and his late mother Laximiben Mohanlal Nemchand Shah leased the suit to the Plaintiff/Respondent for a period of three (3) years from the period of August, 1986 and that the said lease expired on 31<sup>st</sup> July, 1989. That since the effluxion of the lease, it had not been renewed or extended and the Plaintiff/Respondent continued to be in possession of the suit premises openly and without interruption for a period of over nineteen (19) years as at the date of filing of the said suit in 2009. Upon taking possession, the Plaintiff/Respondent had undertaken extensive development on the premises.

22. From the records, it is indicated that on 14<sup>th</sup> October, 2009, being six (6) years down the line, when the case was slated for hearing the Plaintiffs/Respondents applied to withdraw the entire Originating Summons case and Justice Anzangalala allowed the application for the withdrawal of the case under Order 25 (1) of the Civil Procedure Rules as the case had not been set down for hearing, with an order that the Plaintiffs/Respondents do pay the Defendants/Applicants their costs of the suit to be taxed and certified by the Taxing Officer of high court. Immediately thereafter, the Plaintiffs/Respondents filed another suit being HCC (Misc.) (Mbsa) Appl. No. 667 of 2009 and which was later on registered as ELC No. 52 of 2016 between the same parties, the same properties and same cause of action and seeking the same prayers. On 18<sup>th</sup> October, 2018 having been heard, the suit by the Plaintiffs/Applicants was determined to their favour. The 3<sup>rd</sup> Defendant/Applicant filed an appeal being Court of appeal (Mbsa) Civil Appeal numbers 59 of 2019 which is still pending hearing and determination before the Court of Appeal Mombasa. Thus, I have deciphered that the main bone of contention here as twofold:- a). The issue of the order by the high court on the payment of the costs of this suit and b). Whether this Honorable Court would be the proper court to direct the costs to be taxed and certified by the Taxing officer on orders granted by High Court and vis – a vis the Consent order of 3<sup>rd</sup> December, 2009.

23. Moving forward towards making a fair and just decision, I wish to state the following. As pointed out above, the main substratum of this dispute is whether the Defendant/Applicant is entitled to the prayers No. 4 and 5 of the application and/or whether the consent order entered on 3<sup>rd</sup> December, 2009 by the parties herein was barred by Limitation of Actions under Section 4 (1) ( e ) of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya. Firstly, let us have an assessment of the concept of Costs. Under the provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 provides that:-

***“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction shall be no bar to the exercise of those powers; Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order”***

24. Secondly, from the above provision of law, there are two (2) principles in relation to costs. These are as found under a). Costs followed the event b). Costs are the court's discretion. In a nutshell, on awarding costs, the principles adhered with were ***“costs followed the event”*** simply which means the results of the entire litigation. The effect of it means the party who called forth the event by instituting a suit, would bear the costs if the suit falls. But if the said party showed that legitimate occasion, by the successful suit then the Defendant or Respondent would bear the costs. In making this decision, it is a discretionary one by court which would be exercising it judicially and not whimsically by considering the special circumstances of the case and being guided by the ends of justice. For instance, in awarding costs courts would consider such aspects of public interest, motivation and the conduct of the parties prior to the institution of the case. Further, they held that, the “Costs follow the events’ principles should not be used to penalize the losing party but rather to compensating the successful party for the trouble taken in prosecuting or defending the case. This court would even “Suo Moto” in the interest of justice make an order for costs in favour of any party whatsoever. In this case, the Plaintiffs/Respondents withdrew their case under the provisions of Order 25 Rule 1 of the Civil Procedure Rules.

In the decision of ***“HCCC (Nyeri) No. 17 of 2014 - Cecilia Karuru***

***Ngaya – Vs – Barclays Bank of Kenya & another eKLR (2016); cited by the 1<sup>st</sup> Defendant/Respondent with the following holdings:***

***“In determining the issue of Costs, the Courts is entitled to look at inter alia i) The Conduct of the parties ii). The subject of litigation iii). The circumstances which led to their institution of the proceeding iv). The events which eventually led to their termination v). the stage at which the proceedings were terminated vi). The manner in which they ever terminated viii). The relationship between the parties and viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) ( c ) of the Constitution. ....”***

25. Thirdly, I wish to point out that all court orders including consent orders as the one of 3<sup>rd</sup> December, 2009 emanate from Judgments, awards, orders or decrees and are enforceable in law in accordance with the Civil Procedure Rules and Section 14 of the Environment and Land Court Act unless they are set aside, reviewed or appealed against. The conduct by the parties in this matter is that on 3<sup>rd</sup> December, 2009 they entered into a Consent to have it adopted and enforced. From the records the aforesaid consent order has never been challenged to date.

However, according to the Plaintiffs/Respondents the said consent order was interpreted to mean a contract which is governed by the Laws of Contract and which its enforceability is limited by law for six(6) years. According to them, the Consent Order tantamounted to a contract hence it was governed by the provisions of Section 4(1) (e) of “The Limitation of Actions Act, Cap. 22 which held as follows:-

**“4 (1) “The following actions may not be brought after the end of six (6) years from the date on which the cause of action accrued:- 4 (1) (e) actions, including action claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written Law.**

26. In as far as the setting aside of consent orders was concerned the same was well articulated and determined in the court of appeal here my understanding is that this never termed nor equate consent orders to legal contract nay far from it. The superior Court only addressed the issue of setting aside consent orders.

**Court of Appeal (Kisumu) Civil case No. 81 of 1984 of “Flora N. Wasike – Vs – Destimo Wamboko” court held thus:-**

**“It is now settled law that a consent judgement or order has contractual effect - and can only be set aside on grounds which would justify settling a contract aside, by mistake, omission or misrepresentation of facts or fraudulent means or if certain conditions remain to be fulfilled, which are not carried out..... courts cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between parties” .**

On the other hand, the Defendant/Applicant has argued that even the consent order was a Court order which should be enforceable based on a twelve (12) years’ time limitation as provided for under Section 4 (4) of the Limitation of Actions Act Cap. 22 which provides:-

**“4 (4) “An action may not be brought upon a Judgement after the end of twelve (12) years from the date on which the Judgement was delivered, or (where the Judgement or a subsequent order directs any payment of money or the delivery of any property is made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a Judgement debt may be recovered after the expiration of six years from the date on which the interest became due.**

27. Certainly, on 14<sup>th</sup> October, 2009 while appearing before the then Justice Azanglala at High Court Mombasa the Plaintiffs/Respondents withdrew their case and an order to the effect that costs be paid by the Plaintiff/Respondent to the 3<sup>rd</sup> Defendant/ Applicant. I take this to have happened close to ten (10) from the time this order was made. To me, the 3<sup>rd</sup> Defendants/Applicants was still within the statutory limitation period to have filed the said application. By and large, a consent order is an court order of court like any other order and is not a contract as was erroneously argued by the Plaintiff/Respondent. The enforcement is governed by the limitation sanction of 12 years by law.

Fourthly, all said and done, based on the provisions of the Sections 1, 1A 3 and 3A of the Civil Procedure Rules 2010, Section 3 of the Environment & Land Act, No. 19 of 2012 and Article 159 of the Constitution of Kenya, what are termed as overriding objectives. These provisions of law do donate to court a greater latitude when dealing with land matters to overcome any undue technicalities which would hinder the attainment and application of the said overriding objectives and its principles to ensure and facilitate fast expeditious, proportionate and accessible resolution of dispute before it.

28. Finally, the upshot of this is that the application by the 3<sup>rd</sup> Defendant/Applicant dated 24<sup>th</sup> October, 2019 falls within the ambit of Section 4 (4) of the Limitation Action Act Cap 22 and therefore he is entitled to the prayers numbers 4 and 5 of the said notice of motion application as sought. In view of the forgoing, and avoidance of doubt, I therefore order:-

**a) THAT the Prayers numbers 4 and 5 of the Notice of the Motion application dated 24<sup>th</sup> October, 2019 by the Defendant/Applicant is hereby allowed.**

**b) THAT as ordered by the High Court in HCCC (Mombasa) in Miscellaneous Civil Application No. 409 (OS) of 2003 by the then Justice Azangalala on 14<sup>th</sup> October, 2009, the estate of the Plaintiffs/Respondents do pay to the Defendant/Applicant their costs of the suit to be taxed and Certified by a Taxing Officer of the Environment and Land Court.**

**c) THAT the Grounds of opposition dated 28<sup>th</sup> November, 2019 and the Preliminary Objection dated 29<sup>th</sup> January, 2020 by the Plaintiffs/Respondents is hereby dismissed.**

**d) That each party to their own costs.**

**IT IS SO ORDERED.**

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 16TH DAY OF NOVEMBER 2021.**

**HON. JUSTICE L.L. NAIKUNI**

**JUDGE**

**(ELC- MOMBASA)**

**In the presence of:-**

**M/s. Yumna – the Court Assistant**

*Mr. Khanna Advocate for the Plaintiffs/Respondents.*

*Mr. Mutuku Advocate for the Defendant/Applicant.*