



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

CASE NO. 1222 OF 2007

UNION OF KENYA CIVIL SERVANT.....PLAINTIFF/APPLICANT

-VERSUS-

JOHN SILAS NYAMATO.....1ST DEFENDANT/RESPONDENT

DONALD KANURU KIBERA.....2ND DEFENDANT/RESPONDENT

JOSEPH BONNIE MUNYONKI.....3RD DEFENDANT/RESPONDENT

AND

ISAAC GATHUNGU WANJOHI.....PROPOSED 4TH INTERESTED PARTY

ISABELLA NYAGUTHI WANJOHI.....PROPOSED 5TH INTERESTED PARTY

IGAINYA LIMITED.....PROPOSED 6TH INTERESTED PARTY

RULING

INTRODUCTION

1. The Ruling herein relates to two [2] Application, one filed by the and/or on behalf of the Plaintiff and the other filed on behalf of the 2nd Defendant.
2. Vide the Application dated the 8th of July 2020, the Plaintiffs/Applicants herein have sought for the following Reliefs;
 - i. *This Honorable Court be pleased to grant leave to the Plaintiff to effect service of this application by way of newspaper advertisement in addition to and/or as substitute for personal service.*
 - ii. *The honourable court be pleased to order substitution of the 1st Defendant, namely John Silas Nyamato, now deceased with the name of the administratrix to his estate being Catherine Mora Nyamato.*
 - iii. *The honourable court be pleased to order joinder of Isaac Gathungu Wanjoi, Isabella Nyaguthi Wanjohi and Igainya Limited in the capacity of 4th, 5th & 6th Defendant respectively.*
 - iv. *Subsequent to the joinder, leave be granted to the plaintiff to amend the Plaint dated 22nd August 2007 filed herein on the 28th August 2007, as per the annexed draft amended Plaint hereto attached.*
 - v. *The court be pleased to fix time for filing of pleadings, affidavits and documents by the Defendants as appropriate.*
 - vi. *The court be pleased to issue further and/or other orders as befits the circumstances.*

vii. Cost of this application be provided for.

3. Upon being served with the aforesaid Application, the 4th proposed Defendant, namely Isaac Gathungu Wanjoi filed a Replying Affidavit on his behalf and on behalf of the 5th and 6th proposed Defendants, which Replying Affidavit was sworn on 4th November 2020, and to which the deponent has annexed two documents, including a consent order entered into in respect Nairobi HCC NO. 4799 of 1987 between **the Trustees of the Union of Kenya Civil Servants v Kenya Civil Servants Welfare Association & 2 Others.**

4. The second Application is the one dated the 4th November 2020, filed by the 2nd Defendant and in respect of which the following Reliefs are sought;

a. *The Complaint dated 22nd August 2007, and filed in court on the 28th August 2007, be struck out as the same is;*

I. It discloses no reasonable course of action

II. It is scandalous, frivolous and vexatious

III. It may prejudice, embarrass or delay the fair trial of the action

IV. It is otherwise an abuse of the court process

b. *Cost of the application be provided for*

5. The subject Application is premised on the various grounds enumerated at the foot thereof and same is further supported by the affidavit of the 2nd Defendant sworn on the 4th November 2020.

6. Upon being served with the 2nd Defendant's Application, the Plaintiff herein responded and/or reacted to same by filing Grounds of Opposition dated the 8th February 2021, in respect of which the Plaintiff contended that the Application by the 2nd Defendant, was misconceived and/or otherwise legally untenable.

DEPOSITION BY THE PARTIES:

PLAINTIFF'S CASE

7. The Plaintiff's Application dated the 8th July 2020, is supported by the affidavit of one Jerry S. Olekina who has averred that same is the Deputy Secretary General of the Plaintiff Union and by virtue of his said position same is therefore conversant with the facts of the subject matter.

8. The deponent has further averred that subsequent to the filing of this suit, the 1st Defendant herein passed on and/or died on the 27th January 2015, and that following the death of the 1st defendant, there is therefore need to substitute the 1st Defendant with the duly appointed and/or constituted legal administrator thereof.

9. Besides, the deponent has further averred that the estate of the 1st Defendant, has since been succeeded by one Catherine Nyamato and in this regard, the deponent has annexed a copy of the gazette notice published on the 8th December 2015.

10. On the other hand, the deponent has further averred that the Plaintiff conducted an official search on 19th November 2019, as pertains to the property known as LR No 201/674, namely Nature house, situate along Tom Mboya street, Nairobi, and that the outcome of the search revealed that the property was transferred to and is registered in the name of 4th, 5th & 6th proposed Defendants.

11. It is the deponent's further averment that as a result of the fact the suit property is now registered in the name of 4th, 5th & 6th proposed Defendants., it is imperative that the said 4th, 5th & 6th proposed Defendants be joined into the subject proceedings and by extension the Complaint dated the 22nd August 2007, be amended, to incorporate the proposed 4th, 5th & 6th Defendants.

12. Finally, the deponent has averred that the inclusion of and/ or joinder of the said 4th, 5th & 6th proposed Defendants, would enable the honourable court to fully and effectively determine the issues in dispute in the subject matter.

RESPONSE TO THE PLAINTIFF'S APPLICATION

13. The Plaintiff's application was responded to and/or opposed by the 4th, proposed Defendants, Replying affidavit sworn on 4th November 2020 and in respect of which the deponent has averred as follows.

14. Firstly, that the suit property was transferred to and in favor of the Defendants herein by virtue of a court order **vide Nairobi Hcc 4799 of 1987**, which was effectively a consent order entered into between the Trustees of the Union of Kenya Civil Servants, the precursor of the Plaintiff herein and the trustees of the Kenya Civil Servants Welfare Association.

15. Secondly, the deponent has further averred that pursuant to and upon the execution of the consent order between the Plaintiff predecessor and the Trustees of Kenya civil servant welfare association, the suit property ceased to be the property of the Plaintiff's predecessor, but became the property of Kenya civil servant welfare Association, the latter who was represented by the Defendants herein.

16. It is the Deponent's further averment that subsequently the suit property was sold to and transferred in favor of the 4th, 5th & 6th proposed Defendants, on the 21st September 2000.

17. It is the deponent's further averment that as the time of filing the suit, the Plaintiff herein was aware of the ownership status pertaining to and/or concerning the suit property and thus the Plaintiff ought not to have sued and/or impleaded them at the onset.

2ND DEFENDANTS APPLICATION

DEPOSITION BY PARTIES:

18. Vide the supporting affidavit sworn on the 4th November 2020, the 2nd Defendant herein has averred that the 1st & 3rd Defendants and himself were the registered trustee of Kenya Civil Servant Welfare Association and that by virtue of their official positions, they transacted for and on behalf of the said welfare association.

19. The Deponent has further averred that the suit property was initially registered in the name of the Union of Kenya Civil Servants, but latter on the union was banned and subsequently its registration was canceled by the Registrar of the Trade Union

20. As a result of the cancelation and the effective de-registration, the initial union of Kenya civil servant ceased to exist, as a Legal person.

21. On the other hand, the Deponent has also averred that the current union is separate and distinct from the Union of Kenya civil servants, which was de-registered and whose Legal existence was canceled.

22. In this regard the deponent has averred that the Plaintiff herein has no nexus to and/or affinity to or with her predecessor or at all.

23. On the other hand, the deponent has further averred that prior to the cancelation or de registration of the Union of Kenya civil Servants, a dispute arose between the now defunct Union Kenya civil Servants and Kenya Civil Servant Welfare Association, which culminated into the filing of a civil suit by the defunct union **vide Nairobi HCC No. 4799 of 1987**, which suit was thereafter resolved by way of consent, entered into and executed on the 28th October 1988.

24. Owing to the execution of the consent, the deponent has averred that all the properties that initially belonged to the defunct union, were transferred to and became registered in favor of the trustees of Kenya civil Servants Welfare Association.

25. In short, the Deponent herein contends that the plaintiff herein did not and has never owned the suit property and that in any event, the Relief sought in the instant suit are contrary to the terms of the Consent order entered into and/or endorsed on the 28th October 1988.

RESPONSE BY THE PLAINTIFF

26. Confronted with the 2nd Defendant's Application, the Plaintiff herein chose to and indeed filed Grounds of opposition, wherein the Plaintiff has contended that the 2nd Defendant's Application is fatally incompetent and legally misguided.

27. On the other hand, the Plaintiff has also averred that no consent exists which allowed the Defendants to legally acquire ownership of the suit property and that the transfer and registration of the suit property in the names of the Defendants was fraudulent.

28. Besides, the plaintiff has also contended that though the 1st Defendant died on the 27th January 2015, the court is still possessed of the power to substitute the deceased with the duly appointed and constituted legal administratrix thereof.

29. Further, the Plaintiff has also contended that the proposed Defendants herein did not acquire a valid title to the suit property and hence the transfer and registration of the suit property in their name was a result of fraud.

30. Finally, the Plaintiff has contended that there is need and/or necessity to amend the Plaint and thereby include the proposed Defendants and that the inclusion of the said Defendants, shall enable the honourable court to deal with the subject dispute and essentially resolve the issue of ownership of the suit property.

SUBMISSIONS BY THE PARTIES

31. The Application dated the 8th July 2020, came up for hearing on the 28th April 2021, on which date the honourable court issued directions pertaining to and/or concerning the hearing and disposal of same. For clarity, the honourable court directed that the application be canvassed and/or disposed of by way of written submissions, to be filed and exchanged by the parties.

32. Latter on the 20th September 2021, the subject matter came up for mention to confirm whether the parties have filed and exchanged the written submission as pertains to the Notice of Motion Application dated the 8th July 2020.

33. However, when the matter came up as aforesaid, it transpired that the 2nd Defendant had also filed an Application dated the 4th November 2020, and which Application was also pending hearing and determination.

34. In the premises, this honourable court directed that the two [2] Application be heard and/or be canvassed simultaneously and that same be disposed of by way of written submissions.

35. Pursuant to and in obedience to the courts order under reference, the parties herein filed their respective submissions with the plaintiff two sets of submissions being filed on the 19th July 2021, whilst the 2nd Defendant's submissions were filed on the 22nd October 2021.

36. For the avoidance of doubt, the submissions and the authorities relied on by the parties herein are part of the court record and thus same have been duly considered and where necessary, shall be applied towards the resolution of the issue in dispute.

ISSUES FOR DETERMINATION

37. Having appraised the Notice of Motion Application dated the 8th July 2020, filed by the Plaintiff herein, together with the supporting affidavit thereto, as well two set of the written submission dated the 19th July 2021, on one hand, and the 2nd Defendant's Application dated 4th November 2020, together with the written submissions thereto, the following issues arise for determination;

I. Whether the suit against the 1st Defendant has since abated and if so whether substitution can be ordered on the phase of abatement.

II. Whether the amendment sought by and/or on behalf of the Plaintiff meets and/or satisfy the requisite conditions and whether same can be granted

III. Whether the Plaintiff herein has the requisite locus standi to maintain the suit herein concerning and/or pertaining to the suit property

IV. Whether the Plaintiff suit discloses a reasonable course of action

ISSUE NUMBER 1:

38. It is conceded by the Plaintiff that the 1st Defendant herein died and/or passed on the 27th January 2015, and that the succession cause in respect of the estate of the deceased 1st defendant was published in the Kenya gazette on the 8th December 2015.

39. It is also important to note that the issue of death of the 1st Defendant herein was brought to the attention of the court and by extension the attention of the plaintiff herein vide the Application dated 14th July 2015, albeit filed on the 20th July 2015, whereby the firm of M/s E K Mutua & Company Advocates, sought leave of the court to cease acting on behalf of the Defendants based and/or premised on lack of instructions, following the death of the 1st Defendant.

40. Suffice it to say, that vide the said Application dated 14th July 2015, the Defendant's advocate attached and/or exhibited a copy of the obituary which appeared in the daily Nation newspaper of 4th February 2015.

41. Owing to the foregoing, it is my observation that the issue of death of the 1st Defendant was well within the knowledge of the Plaintiff and his counsel from as early as 4th February 2015, when the obituary was advertised.

42. At any rate, assuming that the Plaintiff did not read the obituary or better still, were not aware of same, the fact of the said death was brought to the attention of the Plaintiff on the 14th July 2015, when the Defendant's previous advocates filed the Application seeking to Cease acting for the Defendants, primarily on the issue of lack of instructions following the death of the 1st Defendant.

43. Notwithstanding the foregoing, it is also common ground that the Plaintiff herein has stated and thus conceded that the notice as pertains to the institution of the succession cause, in respect of the estate of the 1st defendant, was published on the 8th December 2015.

44. In the premises, it is obvious to conclude that the Plaintiff herein was well aware of and/or knowledgeable of the death of the 1st Defendant as well as the commencement of the succession cause, whose notice was published on the 8th December 2015 before the lapse of the statutory 12 months.

45. Owing to the fact that the succession cause was lodged and the notice thereof published on the 8th December 2015, it was thus possible for the Plaintiff herein to commence the process of substitution before the lapse of 12 months. For clarity, the 12 months period lapsed and/or terminated 26th January 2016.

46. On the other hand, even if the application for substitution was not made within the 12 months period, it would still be possible that the requisite Application for the reinstatement of the abated suit, as well as substitution of the 1st defendant, could very well have been filed without undue and/or inordinate delay.

47. Nevertheless, despite the fact that the Plaintiff was well seized of all the requisite facts, no application for substitution of the deceased 1st Defendant and/or, better still the reinstatement of the abated suit, was filed, timeously and/or with due promptitude.

48. For the avoidance of doubt, it is worthy to note that no application has been filed for the reinstatement of the abated suit and what is pending Before the court as part of the Application dated the 8th July 2020, is the limb relating to substitution and not otherwise.

49. To the extent that the 1st Defendant passed on and/or died on the 27th January 2015, the suit against the said 1st Defendant, now deceased, abated by operation of the law upon the lapse of 12 months from the date of the death of the said 1st defendant. In this regard, the suit abated by the **26th January 2016.**

50. In view of the foregoing, it is appropriate to refer to and otherwise reproduce the provision of Order 24 Rule 3(2) of the Civil Procedure Rules 2010 which provides as hereunder;

(2) Where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

51. My reading of the aforesaid provision of the law drives me to the conclusion that the abatement of the suit is automatic and same accrues upon the lapse of one year [12 Months] from the date of death of the deceased. For clarity, the endorsement of an order for abatement, is not legally required, as a matter of law, though as a matter of practice such endorsement is necessary as a precursor to the request for cost by the adverse party.

52. In support of the foregoing observation, I find guidance in the decision in the case **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR**, where the honourable held as hereunder;

“There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.”

53. In respect of the subject matter, its sufficient to observe that suit the against the 1st Defendant abated more than four and a half years before the filing of the Application dated 8th July 2020.

54. Nevertheless, it is also important to note that despite the Plaintiff being aware of the abatement of the suit against the 1st defendant, by operation of the law, same has not found it fit to seek for the reinstatement and/or revival of the suit.

55. In the premises, it is my finding and holding that no substitution can arise and/or be allowed against and/or on behalf of the 1st Defendant either sought or at all. Consequently, the limb of the Application seeking for substitution must fail.

ISSUE NUMBER 2

56. The Plaintiff herein has also sought leave to join and/or incorporate the proposed 4th, 5th & 6th Defendants in the subject suit and thereby to amend the Plaint to facilitate the said incorporation.

57. It is the Plaintiff’s position that the intended amendment has become necessary as a result of an official search conducted on the 19th November 2019, which led the Plaintiff to discover that the suit property had been transferred to and registered in the names of 4th, 5th & 6th proposed Defendants. In this regard, the joinder and consequential amendment is thus said to be imperative.

58. If the plaintiff herein only came to know of the sale and transfer of the suit property in favor of 4th, 5th & 6th proposed Defendants on the 19th November 2019, one would have been disposed to look at the Plaintiff with a favorable eye, even though it further took the Plaintiff 8 more months, before filing the Application dated 8th July 2020.

59. However, the Plaintiff herein needs to be truthful and honest with the court and I say this deliberately, because on or about the 24th April 2012, the plaintiff filed list of witness and Bundle of Documents which contains the following documents;

I. The transfer instrument in respect of the suit property drawn by m/s Peter Gitau Ngige Advocate whereby the suit property was being transferred to and/or in favor of 4th, 5th & 6th Defendant. See page 58-61 of the bundle.

II. The Plaintiff has also filed a copy of the certificate of title in respect of the suit property which confirms that the same had

been transferred and registered in the names of 4th, 5th & 6th proposed Defendant. See page 65-71

III. The Plaintiff has also exhibited a letter dated 21st January 2003 whereby the Plaintiff general secretary indicates and/or confirms that the buyers of the suit property 4th, 5th & 6th Defendant. See pages 87 and 88 of the Plaintiff's bundle filed on the 24th April 2012.

60. In my humble view, the Plaintiff herein was aware of the sale and transfer of the suit property to the 4th, 5th & 6th proposed Defendant from as early as the year 2002/2003, before the filing of the subject suit.

61. In the premises, the Plaintiff herein were enjoined to implead every party to the subject suit, right from the onset and in the event of failure to do so, the Plaintiff would move with due diligence to seek for such amendment, but not to wait for 14 years and then wake up with conscious and deliberate falsehood meant to mislead the court.

62. In my humble view, the application for joinder and leave to amend the plaint has been made with unreasonable and inordinate delay, which has not been explained. Consequently, the Plaintiff is guilty of *laches*.

63. On the other hand, I also find and hold that the intended claim as against 4th, 5th & 6th Defendant, has been caught up by the limitation of actions Act. In this regard, the Plaintiff's intended course of action is statute barred, by dint of **Section 7 of the limitation of actions Act, Chapter 22, Laws of Kenya.**

64. Whereas a court should be disposed to allow an application for amendment, particularly where the hearing of the suit has not commenced, however the court must still be enjoined to exercise its discretion judiciously as opposed to whimsically and/or arbitrarily.

65. As pertains to the principles applicable in exercise of discretion whether to allow an application for amendment or otherwise, it is imperative to take cognizance of the decision in the case of **Central Bank Kenya Ltd v trust Bank Kenya Ltd & 4 Others (2000) eKLR, where the honourable court of appeal observed as hereunder:**

The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

"that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

66. In respect of the subject matter, the Application for joinder and leave to amend has been brought after 14 years after the suit was filed, even though the facts informing the subject Application, were well within the knowledge of the Plaintiff, from as early 2002/2003, in terms of the Documentation filed by the Plaintiff herself.

67. On the other hand, it is also sufficient to note that 4th, 5th & 6th proposed Defendant, whom the Plaintiff has sought to be joined, have since accrued vested interest in the property, premised under limitation of action Act, Chapter 22 laws of Kenya.

68. In my humble view, the subject Application seeking for joinder and leave to amend, does not meet the established conditions and/ or threshold, to warrant an exercise discretion in favor of the amendment.

ISSUE NUMBER 3

69. It is common ground that there existed the union of Kenya civil servant, which was established under the Trade unions Act, Chapter 23 laws of Kenya, same having been established in the year 1959. **See paragraph 6 of the Plaintiff.**

70. However, the said Union of Kenya civil servants, which was a legal trade union and thus a body with perpetual succession, was however dissolved and thereafter deregistered on the 19th July 1980. For clarity, the order of cancelation was dated and signed on the 5th July 1983. See document at page 20 of the Plaintiff own bundle. ...

71. From the foregoing, it is my finding and holding that the initial union, which was in existence and which was the lawful proprietor of the suit property ceased to exist on or about the 5th July 1983 and thus same was/is separate from the Plaintiff herein.

72. First forward, on or about the year 1993, a committee chaired by Hon. Justice Saeed R. Cocker was appointed His Excellency the President to consider the need for the establishment of a trade union of Civil Servants and in this regard, a Report was prepared and thereafter handed over to His Excellency the president which authorized the establishment of the new union.

73. Based on the foregoing, the establishment of the new union thereafter came into operation on or about the 14th January 2002. See the Plaintiff's own documents title comprehensive statement on the plight of the property of the union of Kenya civil servant dated the 20th March 2012, contained at pages 1-14 of the bundle of documents dated the 24th April 2012.

74. Owing to the fact that the new union was established and gazetted on the 14th January 2002, in line with the Plaintiff own documents, it

cannot be said that the current union which has filed the subject suit is same as its predecessor, the latter which ceased to exist upon the cancellation of its registration on the 5th July 1983.

75. In any event, by the time the current Plaintiff was being established and/or imbued with legal capacity, the suit property did not belong to it or at all.

76. In the premises, it is my finding and holding that as pertains to the issues espoused and/or alluded to in the subject matter, the Plaintiff herein is devoid of the requisite locus standi, to commence and/or maintain the subject suit, either as against the existing Defendants or at all.

77. In support of the foregoing position, I take guidance from the decision in the case of **Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR**, where the honourable court held as hereunder;

It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit.

ISSUE NUMBER 4:

78. The Plaintiff herein has pleaded in her plaint that the properties which *hitherto* belonged to the Union of Kenya civil Servants, which was dissolved and/or deregistered were vested in favor of the Defendants in their capacity as official and trustees of Kenya civil servants welfare association. In this regard, the Defendant were obliged to protect the said properties. *See paragraph 10, 11 and 13 of the Plaint.*

79. It is apparent that the union of Kenya civil servant, whose certificate of registration was canceled on the 5th July 1983, was indeed separate and distinct from Kenya civil Servants welfare association. In this regard, it cannot be said that the Defendants were officials of the Plaintiff predecessor.

80. Nevertheless, that is not the central point. The critical point is however, is that the suit property was transferred to and in favor of the Defendants pursuant to a court order which was issued vide Nairobi HCC NO. 4799 of 1987. Consequently, it cannot be said that the transfer of the suit property to and in favor of the Defendants was fraudulent, yet the court order that facilitated the said transfer has never been challenged, impeached and/or otherwise rescinded.

81. For the avoidance of doubt, the fact that the transfer of the suit property to and in favor of the Defendants was pursuant to a court order is well delineated in the documents filed by the Plaintiff and in this case the certificate of title which is at pages 65-74 of the Plaintiff's bundle.

82. Other than the evidence that the transfer of the suit property was premised and/or predicated on a court order issued vide Nairobi HCC NO. 4799 of 1987, the Defendants herein have since annexed a copy of the said consent order, which authenticates the terms of the consent which were entered into between the Plaintiff's predecessor and Kenya civil servant welfare association, containing the terms of the consent.

83. On the other hand, lest it be forgotten, the Plaintiff herself has also tendered a copy of the said order as part of her bundle of document and same is contained at pages 31-32 of the bundled filed on the 24th April 2012. For clarity, the order filed by the Plaintiff, corresponds and is on all Fours with the one exhibited by the proposed 4th Defendant as annexure to the Replying affidavit.

84. It is evident that there was a consent between the Plaintiff's predecessor and the Kenya civil servants welfare association, whose officials included the Defendants herein and it is the said consent, that was responsible for the transfer of the *inter – alia* the suit property in favor of the Defendants.

85. Despite being aware of the said consent, which has never been quashed and/or set aside, the Plaintiff is before this honourable court and is seeking that the court be pleased to declare that the transfer of the suit property in favor of the Defendants and consequential transactions in respect of same, were fraudulent.

86. In my humble view a transaction which was founded and/or anchored on the basis of a valid court order, which has never been set aside and/or varied, cannot be held to be fraudulent by another court of coordinate jurisdiction.

87. Be that as it may, the Plaintiff herein is keen to influence and/ or persuade the court to make such a declaration, yet same are afraid to proceed and challenge the consent order which anchor the various transactions which are complained against.

88. In my humble view, the claim that is propagated by the Plaintiff herein, which is tantamount to challenging the consent order, which was issued vide Nairobi HCC NO. 4799 of 1987, is clearly devoid of a reasonable course of action.

89. Nonetheless, I also wish to point out that if the Plaintiff herein were/are offended by the execution and/or enforcement of the consent order which was issued Nairobi HCC NO. 4799 of 1987, then the issue becomes one of the execution and a new suit cannot be filed.

90. In support of the foregoing observation, I rely in the provision of Section 34 of the Civil Procedure Act, which are reproduced as hereunder;

“34. Questions to be determined by court executing decree

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court. Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.”

91. In support of the foregoing position, I further subscribe to the decision in the case of **Virnekas Mwanaharusi Nihazi v Bonifase Kahindi Katana & 2 Others (2019) eKLR, where the honourable court held as hereunder:**

The forum for attacking a judgment is not through the filing of a second suit. If a person is aggrieved by a judgment, that person ought to file an appeal or an application within that case to quash the judgment. I agree with the dictum in the case of Wilson vs The Queen (1983) 2 S.C.R 594, referred to me by Mr. Okere, where it was stated as follows :-

“...It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exists. Without attempting to a complete list, such grounds would include fraud or the discovery of new evidence.”

92. Based on the foregoing propositions, I am constrained to find and hold that the subject suit forms and/or constitutes a collateral attack on the proceedings and the consent order which emanated from Nairobi HCC NO. 4799 of 1987, and in this regard, the subject suit amounts to an abuse of the due process of the court.

FINAL DISPOSITION:

93. Having addressed and/or dealt with the various issues that were enumerated herein before, it is now appropriate to breakdown and/ or Summarize the relevant orders arising from the Discourse.

94. In a nutshell, I make the following orders;

I. The Plaintiff's Application dated the 8th July 2021 be and is hereby Dismissed.

II. The 2nd Defendant's Application dated the 4th November 2020 be and is hereby allowed.

95. Consequently, the Plaintiff's suit vide Plaint dated the 22nd August 2007, albeit filed on the 28th August 2007, be and is hereby struck out.

96. The 2nd Defendant shall have costs of the suit, as well as the two [2] Applications dated the 8th July 2020 and 4th November 2020, respectively and which shall be Borne by the Plaintiff.

97. As concerns the 4th, 5th & 6th Proposed Defendants, same had not been joined and/or admitted into the subject proceedings and hence same cannot benefit from an order of Costs.

98. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI.

In the Presence of;

June Nafula Court Assistant

Mr. Wakwaya for the Plaintiff

Mr. Mindo for the 2ND Defendant and the 4th, 5th and 6th Proposed Defendants.