**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL SUIT NO. 1 OF 2015**

**(FORMERLY CIVILSUIT NO. 4270 OF 1991**

J N M ……..……..PLAINTIFF/APPLICANT

-VERSUS-

J N M…….....…DEFENDANT/RESPONDENT

**R U L I N G**

1. The Plaintiff Applicant filed a Notice of Motion dated 3rd December, 2014 and Amended on 24th February, 2015. It was filed under Order 12 **Rules 1 & 7** and **Order 51** of the **Civil Procedure Rules (2010) Section 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya** and any other any enabling laws. The Applicant seeks orders setting aside the Order issued on 2nd December, 1992 together with all the Consequential Orders thereto.

2. To that application the Defendant/Respondent has raised a Preliminary Objection dated 19th January, 2015, seeing the striking out of the said application on the following grounds:-

1. **That the application is bad in law as it seeks to review a Court Order not in existence, since no Court Order was made on 2nd December, 1992.**

2. **That the application is bad in law as it should have been brought under Order 45 of the Civil Procedure Rules, 2010 instead of Order 12 Rules 1&7.**

3. **That the application is bad in law as it seeks orders that will unilaterally violate the rights of persons not party to these proceedings, that is, the Respondent's and Applicant's Children (Five Adults), under Article 40 of the Constitution, over Land Reference Number *[particulars withheld]* Woodley and Title Number Nairobi/Block *[particulars withheld]*.**

4. **That the Applicant is guilty of laches/inordinate delay as she has filed her application more than Twenty (20) years after the Order adopted by the Court on 15th December, 1992.**

5. **That the Applicant is guilty of Approbating and Reprobating, since she is challenging a Court Order that she willingly participated in its making and which she has enjoyed Benefits of, for a period of more than Twenty(20) years before filing her Application.**

6. **That the Applicant's claims are statute barred under Section 4(1)(a) of the Limitation of actions Act, as they are being made more than six(6) years after Memorandum of Final Settlement had been executed by both parties as a contract and adopted by the Court vide its Order dated 15th December, 1992.**

7. **That the application is bad in law because the Applicant seeks to enforce that which she waived in 1992 of her own free will and volition.**

8. **That the Court is functus Officio, since the Applicant of her own free volition invoked the court's jurisdiction in having the matter marked as settled based on an agreement she was privy to.**

3. On 24th March, 2015 the Plaintiff/Applicant filed her Grounds of Opposition to the Preliminary Objection dated 19th December, 2015 and raised the following grounds:-

1. **That the order No. 1 & 4 was made on 15th December, 1992 and issued on 2nd July, 2012 as shown on paragraph 4 of the Preliminary Objection, she seeks leave to amend as per amended Notice of Motion filed and served on 24th February, 2015.**

2. **That Order 45 of the Civil Procedure Rules is correct as it stated under "any other enabling provision of the law'.**

3. **That she has notified all the interested parties.**

4. **That the Respondent drew or caused the order of 15th December, 1992 to be drawn 23 years later under suspicious circumstances without her approval.**

5. **That paragraph 5 of the Preliminary Objection is wrong as the Order of 15th December, 1992 could not be executed before it was issued on 2nd July, 2012 and the Advocate for the Defendant hid it for reasons known to him. However, the transfer of assets were made on other dubious grounds namely:-**

a. **Before the order of 15th December, 1992 was issued the Defendant unilaterally transferred Runda property (LR No.*[particulars withheld]* under section 65(h) Registration of Title Act preventing her participation, and that if there was consent there was no need to do so.**

b. **Similarly, the transfer of (1) Jambo & Woodley property were done allegedly on the basis of love and affection (which love and affection never existed).**

6. **That with regard to ground no. 6 of the Respondent's Preliminary Objection, she states that 1 or 2 pages are missing by the act of the Respondent's Advocate, and that the Memorandum is not her document.**

7. **That she is not caught up by limitation period, if there is, 12 years starting from 2nd July, 2012 when the order was issued.**

8. **That she has no power to waive fraud as the Memorandum of settlement was a sham.**

9. **That with regard to the court being functus officio, the court has power to change the order up to 2nd July, 2012, when it was issued.**
10. **That the draft order of 15th December, 1992 if any, issued on 2nd July, was never approved by her.**
11. **That there are triable issues involving fraud and concealment.**

12. **That all the five children were minors at the time their father invited them to sign transfer of Jambo and Woodley property contrary to the provision of the Civil Procedure Act requiring the approval of judge and representation by next friend.**

4. For purposes of the Preliminary Objection proceedings the Plaintiff/Applicant shall be referred to as the Respondent/Applicant while the Defendant/Respondent shall be referred to as the Applicant/Respondent.This application was orally argued on 21st May, 2015. Mr. Mwicigi appeared for the Applicant/Respondent, while the Respondent/Applicant appeared in person.

5. The learned counsel submitted that the application is bad in law, and contended that the date of making an order and of issuing that order does not invalidate that order, and that there is a difference in the date for making an order and the date of extracting it.

6. It was Mr. Mwicigi's contention that the Applicant cannot rely on the issue of form to challenge the validity of the contents of the documents.

7. Further, the learned counsel submitted that the Applicant's Notice of Motion is brought under **orders 12 Rule (1) & (7)** which deals with ex-parte orders and yet the orders sought are for review. It was therefore counsel's submission that the application should be struck out because the court has no jurisdiction to deal with this application in the manner in which it has come. Further that the orders did not issue ex-parte, and the Applicant should therefore, seek to review that consent or go on appeal.

8. Mr. Mwicigi submitted that the two properties whose registration Applicant seeks to alter were registered in her name and that of her two children who are now adults, and thus her application seeks to interfere with the property rights of other persons who are not party to these proceedings, by setting aside orders that conferred title to five other persons without their involvement.

9. It was also submitted that the Applicant is guilty of laches, arguing that the consent order was made on 15th December, 1992, twenty three years ago, and the Applicant offers no explanation in her application why it took her twenty three years to challenge an order she was party to and to which she consented.

10. Counsel relied on the case of **Joram Ole Tome & Another v. Meshack Ole Tome & Another (2005) eKLR,** where the Court observed that an application brought nearly five years after the court order was recorded lacked bona fides as no reason was given for the delay. He further submitted that **Order 45 Rule 1** of the **Civil Procedure Rules** provides that an application for review must be made without undue delay and contended that 23 years is inordinate delay.

11. Lastly, counsel submitted that the Applicant is barred from approbating and reprobating on an issue of law, arguing that the agreement was signed by the Applicant in person and that she has not denounced her signature. He contended that the property has been in her name and that of her children for more than 20 years. That, she has been living in one and collecting rent from the other, and she cannot come to court today to reprobate that which she has all along approbated and benefited from.

12. On her part, the Applicant submitted that the said application is not bad in law, and that it is the Respondent who has come to court with bad laws because the memorandum signed in 1992 did not give her any matrimonial rights. She submitted that the document was prepared by the lawyer and she signed it, arguing that there was no order in the matter. It was also her case that the settlement was not correct or complete, and that these were tricks of the Respondent employed against her.

13. She contended that it was wrong to transfer her property into the names of her children who were under age and that the lawyer for the Respondent misled all of them, and made children to sign documents. She submitted that she was married and that her property was being wasted by a wealthy person.

14. She argued that she had made an application to enjoin her children, but that they are all far away in England and she cannot access them. Further that the said children have been instructed not to talk to her.

She contended that she did not give her property to the children, she did not raise them and she does not want them because they do not even know her. She asserted that she wanted her matrimonial rights not her rights to children. She urged that her children have lived an expensive life in the properties which she left for them, and that her only benefit was to collect rent of about Kshs. 10,000/- from one property.

15. On the issue of laches, she submitted that she took long to file this application because she had no money to engage lawyers who wanted Kshs. 500,000/- in fees. She stated that the Respondent would even call the lawyers and tell them not to represent her. She submitted that she approached FIDA Kenya who told her that they could not take up a matter that was already in court. She maintained that she was not late in coming to court since the Respondent did not extract the order since 1992 till 2012. She argued that if it was important the Respondent should have moved quickly.

16. It was further her contention that the consent itself is not a contract because it is full of fraud, as it favours only her husband and her children but not her.

17. Having considered the application, the affidavits for and against as well as the oral arguments by the respective parties, I find that the main issue for consideration is whether the Preliminary Objection herein is merited.

18. I have observed that the parties herein made elaborate arguments that would essentially go to the merit of the Amended Notice of Motion. Be that as it may, it should be noted that the court's duty at this point in time is to determine the Preliminary Objection first.

19. It is trite law that preliminary objection should be based on pure points of law. **Law JA** in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** rendered himself thus:

> **"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.** ***Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

Similarly **Sir Charles Newbold** in the above mentioned case of **Mukisa Biscuit** had this to say:

> **"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 demurrer. 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 is 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. This improper practice should stop."**

In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows:

> **"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to 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 demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is 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 issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."**

20. The Applicant/Respondent contends that the Applicant's claims are Statute barred under **Section 4(1) (a) of the Limitation of Actions Act**, which provides:-

> **(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued -**
>
> **(a) actions founded on contract;**

21. It should be noted forthwith, that a consent judgment or order has the effect of a contract hence the invoking of the above cited provision of the law by the Respondent herein.

22. In the case of **Flora Wasike vs. Destimo Wamboko** [1988] 1 KAR 625, Hancox, J.A. (as he then was) said in his judgment at page 629 –

> **"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out".**

23. Further, the Court Appeal in **Michael Mubea Kamau v. Robert Wanyika Machina & Beatrice Njeri Machina - Civil Appeal No.305 of 2002 ( Omolo, Waki & Visram JJA),** quoting the above case, at paragraph 47 had this to say on consent orders:

> "The law concerning the status of consent orders has been stated in several cases among them ***Flora Wasike v Destino Wamboko*** **(supra)** where the Court of Appeal stated as follows, ***'It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried ..... In Purcell vs. FC Trigal Ltd (1970) 3 All ER 671, Winn LJ said at 676: "It seems to me that if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."***

48. This general principle is so well established in our legal system and this court cannot by a judicial side wind disregard it. See the case of ***Hirani v Kassam*** **[1952] 19 EACA 131**, ***Brooke Bond Liebig Ltd v Mallya*** **[1975] EA 266**, ***Diamond Trust Bank of Kenya Limited v Ply and Panel Limited & Another*** **[2004] EA 31** amongst others".

Indeed, ***Black's Law Dictionary (8th Edition)*** *defines* consent judgment as:

> ***"A judgment, the provisions and terms of which are settled and agreed by the parties to the action."***

24. The said dictionary defines “Agreed judgment” which is analogous to “consent judgment” as:

> ***“A judgment entered on agreement of the parties, which receives the sanction of the court; and it constitutes a contract between the parties to the agreement, operates as adjudication between them and when court gives the agreement its sanction, becomes a judgment of the court.”***

25. In the circumstance of this case, the said consent order was entered into in 1992 and was adopted by the court on 15th December, 1992 nearly 23 years ago. Therefore, this Court is of the considered view that the Applicant/Respondent herein has raised a pure point of law and it is not blurred with factual details and therefore not liable to be contested and proved through the processes of evidence. Indeed, the points argued by the Applicant/Respondent are those that would measure up to the standards envisaged by **Law J.A.** in **MUKISA’S CASE,** as to what constitutes points of law which may dispose of a suit.

26. Further, it was the Applicant/Respondent’s case that the court is functus officio, since the Respondent/Applicant of her own free volition invoked the Court’s jurisdiction in having the matter marked as settled based on an agreement she was privy to.

27. In **Jersey Evening Post Ltd v. Ai Thani (2002) JLR 542 at 550,** it was held thus:

> **“A Court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available”.**

28. What then is the fate of the said Amended Notice of Motion application? The court is satisfied that a proper Preliminary Objection has been raised or argued before it as would, if upheld, lead to the disposal of the suit. The Court finds that the Applicant/Respondent’s Preliminary Objection is sustainable.

29. For the foregoing reasons, this court finds and holds that the Amended Notice of Motion herein dated 24th February, 2015 is bad in law and is incompetent. It is hereby dismissed with costs to the Defendant/Respondent.

**DATED, SIGNED and DELIVERED at NAIROBI this 9th DAY OF July 2015.**

**L. ACHODE**

**JUDGE**