



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 56A OF 2013

[Formerly Eldoret H.C.C.C No. 130 of 2011]

SUNRISE ORTHOPAEDIC & TRAUMA

HOSPITAL LTD.....1ST PLAINTIFF

DAVID LANGAT.....2ND PLAINTIFF

VERSUS

DR. LECTARY KIBOR KEIYO LELEI.....1ST DEFENDANT

SUNRISE ORTHOPAEDIC & TRAUMA

HOSPITAL LTD.....2ND DEFENDANT

CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE NO. 224 OF 2012

(ORIGINAL NAIROBI HCCC NO. 468 OF 2012)

DAVID LANGAT.....PLAINTIFF

VERSUS

ST. LUKES ORTHOPAEDIC & TRAUMA

HOSPITAL LIMITED.....1ST DEFENDANT

DR. LECTARY KIBOR KEIYO LELEI.....2ND DEFENDANT

SUNRISE ORTHOPAEDIC &

TRAUMA HOSPITAL LIMITED.....3RD DEFENDANT

RULING

The 2nd defendant has filed the application dated 14.12.2018 praying that the further amended plaint dated 4.12.2018 be struck out for being an abuse of the process of the court and that in the attendance, the court be pleased to transfer the present suit to Eldoret High Court for direction and disposal. The application is based on the allegation that the fresh amendments to the plaint have changed the character of the suit from one dealing with land to one of a commercial nature hence this court lacks jurisdiction.

That this suit has mutated from a derivative suit to a direct claim which is vitiated by the Limitation of Actions Act, Cap. 22, Laws of Kenya. That the further amended plaint dated 4.12.2012 is an abuse of the process of the court. The application is based on the affidavit of Dr. Lectary Kibor Keiyo Lelei.

The 1st defendant filed a notice of preliminary objection stating that the new prayers in the further amended plaint have changed the character and substratum of the suit from a claim on land to a commercial dispute therefore this honourable court lacks jurisdiction to entertain the matter by dint of section 13 of the Environment & Land Court Act. That the new prayers in the further amended plaint are time barred under Section 4 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. Moreover, that the amendments have changed the claim from a derivative claim to a direct claim.

David Bett Langat filed a replying affidavit stating that the dispute arises from a contract between himself, Dr. Lelei and Sunrise Orthopaedic and Trauma Hospital Limited under which the Joint Venture Company was to acquire the title to Eldoret Municipality/Block 8/90 and construct a hospital on the land. The hospital was a commercial venture to be operated on a commercial basis.

Mr. Njuguna, learned counsel for the 1st defendant submits that the dispute before court is purely commercial and therefore, this court has no jurisdiction. He submits that there is no pleading on trust and therefore the issue of trust cannot be determined in this dispute as it is not pleaded.

Mr. Aseso, learned counsel for the 2nd defendant on his part argues that the court does not have jurisdiction to entertain the suit as crafted in the further amended plaint. According to Mr. Aseso, the claim is basically commercial dispute. The prayers seeking the 2nd defendant restrained from dealing with bank accounts remove the jurisdiction of this court, according to Mr. Aseso. Mr. Aseso raises the issue of Limitation of Actions Act; thus, if the claim is based on trust, it is brought beyond 3 years if it is contract, it is beyond 6 years.

Mr. Ndegwa, counsel for the plaintiff submits that this court should not consider the evidence on record but should look at the law because the parties herein have not adduced evidence and that the evidence has not been tested. He submits that the amendment does not depart from the original claim. He submits that the prayers in the suit have not been removed. They remain the same and that they are not new prayers. Moreover, he submits that the issue of title is raised and therefore, the Environment and Land Court has jurisdiction. The plaintiff has pleaded constructive trust. Breach of contract is pleaded and choses in action is pleaded. He argues that the issue of Limitation is res-judicata. The defendants should have appealed.

I have considered the application, preliminary objection, replying affidavit and rival submissions and do find that the first issue to determine is whether the court has jurisdiction to determine to hear this dispute in view of the amended plaint.

I have perused the amended plaint and do find that the cause of action is based on an alleged joint venture between the plaintiff and Dr. Lelei which is basically to construct and operate a hospital and incorporate a company and take up shareholding in equal footing, hold directorship and operate the hospital as a commercial entity.

The hospital was to be constructed upon the suit property. It is alleged that Dr. Lelei would as part of his equity transfer the property to the incorporated company once it was discharged and freed from an encumbrance namely a charge registered over the property to secure a debt owed to Savings & Loans Kenya Ltd. The plaintiff was to inject capital into the joint venture to be incorporated by way of cash, actual building materials and also assist in the obtaining of loan facilities from eco bank Ltd for purposes of settling the loan owed to Savings and Loans Kenya Ltd and Kenya Commercial Bank Ltd and to fund construction and procuring the equipment for the proposed hospital.

It is alleged in paragraph 9 of the amended plaint that the plaintiff and Dr. Lelei proceeded to implement the agreements and sunrise was duly incorporated as a limited liability company on the 15th of March 2010 with the plaintiff and the 1st defendant as equal shareholders. A project financial proposal was prepared in respect of the suit property by the 2nd plaintiff. The 1st plaintiff through the 2nd plaintiff applied for a loan of Kshs. 30,000,000 and part of the money was paid to Dr. Lelei as the purchase price of the suit property and was used to settle the bank loans and construction of the hospital and purchase of the hospital equipment. Sunrise Orthopaedic and Trauma Hospital Limited further applied for, and was offered a loan of kshs. 15,000,000, and kshs. 7,500, 000 was disbursed by Eco bank Ltd. It is claimed that the plaintiff injected his own funds into the project by supply of materials payment of the architect's professional and the contractor's fees. The construction materials were delivered to the suit property. The plaintiff states that the defendant breached the agreement by failing to transfer the suit property into the name of Sunrise. The plaintiff claims that the defendant is guilty of misrepresentation, deceit, fraud and unjust enrichment. Moreover, breach of implied or constructive trust.

From the foregoing, it is clear that the court's jurisdiction is being questioned and without doubt, jurisdiction is everything, without which the court can do nothing else and must down its tools as have stated in the *locus classicus* case of **Owners of the Motor Vessel M.V Lillian S. v. Caltex Oil (K) Limited [1989] KLR 1.**

To begin with, the Constitution of Kenya 2010 gave parliament the power to establish the Environment and land court under Article 162(2) b.

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

a) ...

b) The environment and the use and occupation of, and title to, land.

And that

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

Pursuant to the aforesaid Article, parliament passed the ELC Act which establishes the ELC. Section 13 of the Environment & Land Court

provides for the jurisdiction of the court thus: -

2. In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes-

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; ... (Emphasis is mine)

This court finds that the joint venture is a contract revolving on land and therefore this court has jurisdiction to try the viability of the joint venture between the plaintiff and the defendants.

Moreover, the plaintiffs claim is based on ***Chose in action***. A *chose in action* is a comprehensive term used to describe a property right or the right to possession of something that can only be obtained or enforced through legal action. It is used in contradistinction to *chose in possession*, which refers to cases where title to money or property is in one person but possession is held by another. It is A right to personal things of which the owner has not the possession, but merely a right of action for their possession

Black's law dictionary defines chose in action as a proprietary right in personam such as a debt owed by another person, a share in a joint stock company, or a claim for damages in tort. Secondly, it is the right to bring an action to recover a debt, money or thing. Thirdly, personal property that one person owns but another person possesses the owner being able to recover through suit.

This claim is also based on constructive trust and therefore this court has jurisdiction to determine whether the action of the plaintiff and defendants created a constructive trust and whether therefore, the plaintiff was entitled to the suit land by virtue of constructive or implied trust.

On the issue of the prayers in the amended plaint being time barred, this court finds that the issue of limitation was dealt with in the ruling of this court delivered on 3.12.2018 and therefore, cannot be revisited now as revisiting the same would go against the principle of res-judicata as clearly provided for section 7 of the Civil Procedure Act Cap 21 Laws of Kenya thus;

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

The upshot of the above is that the application dated 14.12.2018 is disallowed. The preliminary objection dated 14.12.2018 is also disallowed. Costs to the plaintiff.

Dated and delivered at Eldoret this 1st day of February, 2019.

A. OMBWAYO

JUDGE