



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 213 OF 2018**

**KHADIJA FAMAU YUSUF.....PLAINTIFF**

**VERSUS**

**MOHAMED HAFIDH MOHAMED & ANOR.....DEFENDANTS**

**RULING**

1. The plaintiff brought this claim against the defendant vide her plaint dated 24<sup>th</sup> September 2018. Together with the plaint, she also filed a notice of motion application of even date.

2. The 1<sup>st</sup> defendant in reply filed a preliminary objection dated 15<sup>th</sup> February 2019. The preliminary objection raised the following objections;

**(a) That this Honourable Court lacks jurisdiction to entertain the plaintiff's suit as the subject matter of this suit (Agreement dated 28<sup>th</sup> April 2003) was declared void in Judicial Review No. 79 of 2011.**

**(b) That the suit herein is an abuse of this Honourable Court process as it seeks to reintroduce a matter already determined.**

3. In response to the preliminary objection, the plaintiff filed grounds of objection dated 28<sup>th</sup> March 2019. She pleaded as follows;

**(a) That the Honourable Court has jurisdiction to entertain the plaintiff's suit as Section 8(1) of the Land Control Act allows the High Court on application to extend the period of six months allowed for any party to apply for consent in respect of a controlled transaction.**

**(b) That the plaintiff's suit is primarily seeking for an extension of the time under Section 8(1) of the Land Control Act therefore clearly within the preview of statute.**

**(c) That the High Court is mandated in law to consider such an application for extension of time and determine whether there are sufficient reasons to warrant extension of that time or not.**

**(d) That the 1<sup>st</sup> defendant's preliminary Objection is therefore incompetent and ought to be dismissed.**

4. Parties agreed that the objection be heard first since it touched on the jurisdiction of the court to entertain the matter. Ms. Ahmed learned counsel appearing for the 1<sup>st</sup> defendant submitted that this suit is res judicata High Court Judicial Review case No. 79 of 2011. She submitted that Murithi J in the former suit had declared the sale agreement dated 28<sup>th</sup> April 2003 null and void hence the plaintiff cannot bring a new cause of action premised on the same agreement. The 1<sup>st</sup> defendant produced the judgement in the said Judicial Review case No. 79 of 2011. She also relied on the finding of the Court of Appeal in the case of **Owners of Motor Vessel Lilian "S" –versus- Caltex Oil (Kenya) Ltd (1989) eKLR**.

5. Mr Mgupu advocate appearing for the plaintiff on his part submitted that the voidability of the impugned agreement was only made as a passing statement by the Judge. That the issue in dispute in the Judicial Review case was clearly spelt out at page 3 of the judgment. Mr Mgupu agreed that the Kadhi's court did not have jurisdiction to make the orders it made thus those orders were null and void. Once the Judge quashed those orders, parties went back to the positions they were in before the filing of suit before Kadhis Court. Consequently they are within the law to bring this suit seeking extension of time under Section 8(1) of the Land Control Act. He urged the court to dismiss the preliminary objection anchoring his argument on the following decisions;

**(a) Caroline Cheronno –versus- Liner Cheronno (2018) eKLR ;**

**(b) Willy Kimute –versus- Micheal Kibet (2018) eKLR.**

6. I have read page 3 of the judgment in the former suit where the trial Judge set out what was the ex-parte applicant's case. Five (5) grounds were listed and of relevant to the determination of this preliminary objection is ground nos 4 & 5;

**“The order is a nullity as the Kadhi's Court did not have jurisdiction to preside over property matters grounds;**

**“The order is in itself a nullity as it gives effect to a transaction that had become null and void for want of Land Control Board consent as provided by the Land Control Act Cap 302.**

7. At page 5 of the Judgment, Murithi J at paragraph 10 paraphrased the contents of article 170(5) of the Constitution and Section 5 of the Kadhi's Court Act Cap 11 on jurisdiction of the Kadhi's Court. At paragraph 11, the Judge stated the law on transfer and or disposal of agricultural land that such transaction is void for all purposes if consent of the Land Control Board is not obtained in accordance with Section 6 of CAP 302. He proceeded to conclude at paragraph 12 that in view of the above, the orders of certiorari are granted with costs.

8. From the reading of this Judgment, both the issue of jurisdiction of the Kadhi's Court and the effect of non-availability of the consent of the Land Control Board were for determination. Although the plaintiff never defended the application, the Judge rendered himself over both. The plaintiff has not applied to set aside the said judgement. I am therefore in agreement with the 1<sup>st</sup> defendant that the agreement of 28<sup>th</sup> April 2003 is null and void for lack of Land Control Board consent but the same cannot bar the plaintiff from bringing a claim for extension of time for obtaining of such consent.

9. A suit filed to cure an omission in law cannot be held as res judicata. It is incumbent on the plaintiff to show in the current suit why consent was not obtainable within the time provided in law. In the former suit which was not defended, the show cause for not obtaining a consent was not a matter for determination. Consequently, I decline to find that the current suit is res judicata. Let parties proceed to present their case on merits. The preliminary objection is therefore dismissed with costs to the plaintiff.

**Dated, Signed and Delivered at Mombasa this 27<sup>th</sup> day of June 2019.**

---

**A. OMOLLO**

**JUDGE.**