



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 294 OF 2017

CHRISTOPHE HAPPE.....PLAINTIFF

-VERSUS-

ALESSANDANDRO TORRIANI & 19 OTHERS.....DEFENDANTS

RULING

1. The 1st & 2nd defendants raised preliminary objections to the plaintiff's suit on the following grounds:

1. The dispute between the Plaintiff and the 1st and 2nd Defendant being Commercial in nature, the Environment and Land Court lacks the jurisdiction to hear and determine this case.

2. The dispute between the Plaintiff and the 1st and 2nd Defendant is alleged to be about transfer of shares and hence falls before the Commercial Civil Division of the High Court. The jurisdiction of the Environment or Land Court has been invoked in vain.

3. The dispute between the Plaintiff and the 1st and 2nd Defendant being a dispute about and concerning ownership of shares in Limited Liability Companies, the dispute falls squarely and should be heard under the statutory regime provided for under the Companies Act. The jurisdiction of this Honourable Court has been wrongly invoked and in vain.

4. The Plaintiff plead Oral Contracts/Business proposals made sometimes in 2005 before the parties disagreed in or about March, 2007. The claim arising out of contract cannot lie as the same is expressly barred and or defeated by Section 4 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

5. The plaintiff has not exhibited a single contract of Sale of Land in writing and his claim is expressly barred by Section 3 of the Law of Contract Act, Cap 23 of the Laws of Kenya.

6. The plaintiff's suit is fatally defective for failure to comply with the Provisions of Order 4 Rule 1 (i) (f) of the Civil Procedure Rules, 2010, this rendering the entire suit for striking out.

2. The objections are supported by the rest of the defendants who also filed similar preliminary objections. The advocates for the parties agreed to argue the preliminary objection by way of written submissions. Consequently there is filed and on record submissions by the plaintiff dated 30th November 2017, submissions by the 1st & 2nd defendants dated 2nd November 2017, submissions by the 3rd – 7th & 9th – 11th defendants dated 6th November 2017 submissions by 12 – 15 defendants dated 23.10.2017 and lastly submissions by the 17th & 18th defendants dated 1st December 2017. I have had occasion to read all these submissions hence I do not need to reproduce their contents here.

3. I will first determine whether this Court has jurisdiction to deal with this suit. The defendants contend that the plaintiff's claim arises out of a commercial transaction therefore the proper Court to determine the dispute is the High Court. The plaintiff in his 73 page document submits this Court has jurisdiction to hear the matter. In his opening statement, the plaintiff urged the Court to get the answer in section 16 (2) and 19 of the Companies Act Cap 486 (repealed). That the subscribers to the memorandum of association have powers even after incorporation to do all things that an incorporated company can do. That a subscriber keeps his identity after incorporation.

4. The plaintiff submitted on issues of fact which in my view I find as irrelevant while determining the issue of jurisdiction. I state so because in the case of **Mukisa Biscuits vs West End Distributors Ltd (1969) E. A 696**, the Court of Appeal held that a preliminary objection on a point of law does not require to be proved by adducing of evidence. It ought to be clear on the face of the pleadings as filed.

5. I have perused the plaint. Paragraphs 7, 8, 9, 10, 11 deals with incorporation of the companies held between the plaintiff and the 1st & 2nd defendant. Paragraphs 12, 13, 14 & 15 refers to the fall out between the three and or an alleged sale of shares of the plaintiff in the said companies. In paragraph 17, the plaintiff pleaded that the defendants had commenced massive coral mining operation on plot number Kwale/Funzi Island/155 without his permission and before determination of HCC Nos. 16 & 130 of 2010. It was therefore necessary to protect all the plots whose numbers are given (totaling 49) so that persons who have committed the **serious share fraud** does not dispose off them. The remainder of the paragraphs also makes reference to the plaintiff's shareholding in the respective companies.

6. In the prayers sought in the plaint, prayers (a), (b), (c), (d), (e) asks the Court to make a declaration on matters relating to the sale and transfer of the plaintiff's shares in the 4th defendant or any company. Prayer (g) & (h) are seeking orders of injunction. Prayer (l), (m), (n), (o) requests the Court to issue a mandatory injunction compelling the named defendants to cancel, delete and reverse the registration of the 1st & 2nd defendants as shareholders and directors of the 4th, 5th, 6th to 9th & 11th defendants respectively. Prayer (q) is seeking for sharing of profits made by the 1st, 2nd & 4th defendants from the sale of coral blocks quarried from plot No Kwale/Funzi Island/155.

7. The pleadings taken on its face clearly demonstrate that the plaintiff is disputing the manner in which his shares in the various companies herein sued as defendants were sold or transferred. No wonder in his own submissions he directs the Court that the answer to the objections are to be found in sections 16 (2) and 19 of the Companies Act (repealed). The dispute is clearly on the directorship of the 4th – 11th defendants and whether the sale and or transfers they undertook over the suit property was properly done in accordance with the Companies Act.

8. In light of the pleadings set forth in the plaint & the objections by the defendants in regard to jurisdiction supported by the case law cited in the defendants' submissions, I am satisfied that the Environment & Land Court lacks jurisdiction to hear and determine this matter. Therefore on this account, I will not deal with the other limbs of the objection as the proper thing for me to do is to down my tools (as was stated in the decision of **Owners of Motor Vessel Lilian 'S' vs Caltex Kenya Ltd (1989) KLR I**. I will however in the interest of justice and in the exercise of my discretion not strike out the suit but instead transmit over to the proper Court to determine the dispute which is the High Court Civil Commercial & Admiralty division to deal with it. I leave it to the Judge in High Court Civil & Commercial Division to decide on the issue of costs of the objections since I have only partially determined the objections raised by the defendants.

Dated, signed & delivered at Mombasa this 25th May 2018

A. OMOLLO

JUDGE