REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. 370 OF 2014

MANJULA DHIRAJLAL SONI

Herself and on behalf of the Estate of

DHIRAJLAL RATILAL SONI (Deceased).....PLAINTIFF

VERSUS

DUKES INVESTMENTS INTERNATIONAL LIMITED.....1ST DEFENDANT

JOSEPH MISATI GESORA.....2ND DEFENDANT

AND

CHANDULAL RATILAL BHURABHAI SONI.....INTERESTED PARTY

RULING

Background:

The Plaintiff brought this suit against the Defendants on 26th March, 2014 seeking various reliefs set out in her plaint dated 24th March, 2014. Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 24th March, 2014 seeking a temporary injunction to restrain the Defendants from transferring, registering or taking possession of all that parcel of land known as L.R No. 209/525/4 (hereinafter referred to only as "the suit property") pending the hearing and determination of the suit.

The Plaintiff's application that was brought under certificate of urgency was listed for hearing before Nyamweya J. on 5th April, 2014. When the matter was called out, the advocates for the parties informed the court that they were discussing the matter with a view to reaching an out of court settlement and that they had agreed to maintain the status quo then prevailing in relation to the suit property. Nyamweya J. fixed the matter for mention on 3rd June, 2014 and ordered that the status quo be maintained. The said order of status quo was extended on 3rd June, 2014 when the matter came up for mention and the parties informed the court that they had not reached a settlement and wished to argue the plaintiff's application for injunction.

While the Plaintiff's application for injunction was pending hearing, Middle East Bank Kenya limited (hereinafter referred to only as "the Bank") which was not a party to the suit brought an application by way of Notice of Motion dated 25th June, 2014 seeking an order that the order for the maintenance of status quo that was made on 5th April, 2014 and extended on 3rd June, 2014 by Nyamweya J. be set aside on the grounds that the suit property was charged to it and that it had not been made a party to the suit although the said orders were prejudicial to it.

On 15th July, 2014, Chandulal Ratilal Bhurabhai Soni (hereinafter referred to only as "the interested party") also brought an application by way of Chamber Summons dated 30th June, 2014 seeking leave to be joined in the suit as interested party and for an injunction restraining the Plaintiff and the Defendants from selling, transferring, taking possession, leasing, charging or in any other manner whatsoever dealing with the suit property or receiving and/or releasing any payment or performing any term or part of the sale Agreement dated 28th September, 2013 or at all pending the hearing and determination of the application interpartes. The Interested Party's application was brought on the grounds that the Interested Party was the duly appointed administrator of the estate of the late Ratilal Bhurabhai Soni (deceased) who was the bona fide owner of the suit property and that one, Dhirajlal Ratital Soni (also deceased) in respect of whose estate the Plaintiff was the administrator had unlawfully caused the suit property to be registered in his name and on his death, the plaintiff wrongfully included the suit property as part of his estate.

The Interested Party averred that he had made an application for revocation of Grant that was issued to the Plaintiff in respect of the estate of Dhirajlal Ratilal Soni (deceased) on account of the Plaintiff's inclusion of the suit property as part of Dhirajlal Ratilal Soni's estate. The Interested Party averred that while his application for revocation of the said Grant in which the court had granted some orders to preserve the suit property was pending, he learnt that the Plaintiff had secretly entered into a sale agreement dated 28th September, 2013 to sell the suit property to the Defendants at a consideration of Kshs.350,0000,000/=. The Interested Party averred that the Plaintiff brought this suit to enforce the said transaction in flagrant violation of the orders the court had issued in High Court Succession Cause No. 1800 of 2004 in which he had sought the revocation of the Grant of Letters of Administration held by the Plaintiff in respect of the estate of Dhirajlal Ratilal Soni.

The Bank and the Interested Party's applications were opposed by the Plaintiff and the Defendants. The Bank and the Interested Party also opposed each other's application. The two applications were heard together by Nyamweya J. In a detailed and well reasoned ruling delivered on 18th December, 2014, Nyamweya J. allowed the Interested Party's application and rejected the application by the Bank. With regard to the application by the Bank, the judge held that the Bank not having been joined in the suit as a party had no *locus standi* to bring an application seeking the discharge of the orders that the court had granted on 5th May, 2014 and extended on 3rd June, 2014. The court held further that the Bank had no *locus standi* to oppose the Interested Party's application. On 23rd December, 2014, the Bank applied for uncertified copies of the proceedings and a certified copy of the ruling by Nyamweya J. for the purposes of appealing against the same. From the record, the proceedings were typed and made available to the Bank. However, no appeal was filed by the Bank against the said decision.

The application before the court:

On 18th May, 2016 after a lapse of over one (1) year from the date of the said ruling, the Bank brought an application by way of Notice of Motion dated 29th April, 2016 seeking the following orders:

1. That the ex parte injunction granted to the Plaintiff on 5th May, 2014 and extended thereafter be set aside.

2. That the order dismissing the Bank's application dated 25th June, 2014 to set aside the said ex parte injunction be set aside.

3. That an order making Chandulal Ratilal Bhurabhai Soni an Interested Party and other consequential orders made on 18th December, 2014 be set aside.

This is the application which is the subject of this ruling. The Bank's application which was not supported by an affidavit was brought on a single ground that Nyamweya J. who made the ruling dated 18th December, 2014 dismissing the Bank's application dated 25th June, 2014 and allowing the Interested Party's application dated 30th June, 2014 was not a judge of the Environment and Land Court and as such lacked jurisdiction to make the orders that she made which were null and void and of no legal effect.

The application was not opposed by any of the parties to the suit. The Bank filed written submissions in support of the application through Esmail & Esmail Advocates and Mr. Esmail advocate highlighted the submissions on 20th February, 2018 when the application came up for hearing. Due to the importance that the court attached to the issue that the court was called upon to determine, the court allowed the advocates for the Plaintiff, the Defendants and the Interested Party to address the court on the application although they had not formally responded to the application.

I have considered the Bank's application and the submissions that were made in support thereof. I have also considered the submissions by the Plaintiff, the Defendants and the Interested Party in response to the application. The following is my view on the matter. What this court has been called upon to do by the Bank is to review and set aside the orders that were made by Nyamweya J. on 18th December, 2014 and to hear afresh the Bank's Notice of Motion application dated 25th June, 2014 that was dismissed and the Interested Party's application dated 30th June, 2014 that was allowed on the ground that Nyamwaya J. had no jurisdiction to hear the two (2) applications because she was not an Environment and Land Court judge.

I am of the opinion that I have no jurisdiction to set aside the orders that were made by Nyamweya J. on 18th December, 2014 on the grounds that have been put forward by the Bank. As stated earlier, the Bank has contended that Nyamweya J. had no jurisdiction to hear and determine the Bank's and the Interested Party's applications that were before her and as such her ruling was null and void. Under Order 45 Rule (1) of the Civil Procedure Rules, a person who is aggrieved with an order or a decree from which no appeal has been preferred or from which no appeal is allowed may apply for review of the order or decree to the court which passed the decree or made the order. The rule provides that such application can be brought on discovery of new and important matter or evidence which was not within the knowledge of the applicant or could not be produced by him at the time when the decree or order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The rule also provides that the application must be brought without unreasonable delay.

I am in agreement with the Bank that Nyamweya J. was not an Environment and Land Court judge when she heard the Bank's and the Interested Party's applications that gave rise to the orders sought to be set aside. I am also in agreement with the Bank's contention that since Nyamweya J. was not an Environment and Land Court Judge, she had no jurisdiction to preside over the Environment and Land Court and to hear and determine the two (2) applications that gave rise to the present application. That position is supported by the landmark decision in the case of Republic *v* Karisa Chengo & Others [2017] eKLR. That said the next question that I need to determine is whether lack of jurisdiction can be a ground for review. My answer is in the negative. I am of the view that when a court proceeds to exercise jurisdiction it does not have, that is not a mistake or error apparent on the face of the record but an error of judgment that goes to the merit of the decision. Such error in my view can only be corrected through an appeal process. If a judge is to be called upon to review his decision on the ground of lack of jurisdiction, that would be tantamount to calling upon the judge to sit in an appeal against his own decision. In the case before me, the Bank has contended that the decision of Nyamweya J. was null and void and of no legal effect. A court cannot be called upon to declare its own decision null and void. It is only an appellate court that can do that. Due to the foregoing, it is my finding that the grounds put forward

by the Bank should have formed a basis for an appeal against the decision of Nyamweya J. but not an application for review of the decision. In National Bank of Kenya Limited *v* Ndungu Njau [1997]eKLR it was held that:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review. In the instant case, the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

In the case of Pancras T. Swai *v* Kenya Breweries Limited [2014] eKLR, the Court of Appeal stated that:

"The High Court is presumed to know the law. That is why the Constitution has conferred on the High Court in Article 165(3)(a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20 (3)(a) jurisdiction to develop the law and in Article 20 (3) (b) the mandate to interpret the Bill of Rights. It was expected that counsel, in getting up on the brief would come up with the law and authorities including the Treaty and the case-law. But he failed to do so. It was the duty of the Court to have before it the relevant law and to apply it correctly. Njagi, J. was not well served. He seems to have made an error of law. The appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the Court was wrong either on account of wrong application of the law or due to failure to apply the law at all."

I wish to add that even if the application for review was properly before the court, I would still not have allowed it on account of inordinate delay. The application for review was brought after a lapse of over one (1) year from the date of the decision sought to be reviewed. The delay has not been explained by the Bank.

Assuming that the Bank's application was not for review but a *sui generis* application brought under the inherent power of the court, can the court grant the reliefs sought? My answer is still in the negative. Nyamweya J. was a judge of the High Court when she made the orders complained of. This court was established pursuant to Article 162(2) (b) of the Constitution of Kenya while the High Court is established by Article 165 of the Constitution. This court has the same status as the High Court. This court has no supervisory jurisdiction over the judges of the High Court. A judge of this court cannot therefore nullify the proceedings or decision of a judge of the High Court and vice versa. If I was to accede to the Bank's application, I will have to make a finding that the decision of Nyamweya J. was a nullity. I have no such jurisdiction in law and even the inherent power of the court invoked by the Bank cannot clothe me with such jurisdiction. As I stated earlier, the Bank's remedy rested in appealing against the decision of Nyamweya J. to the Court of Appeal. In the case of Greenfield Investments Limited & Another *v* State of the Republic of Kenya & 3 Others[2013]eKLR, the court stated that:

"In that regard, it is trite that this Court cannot purport to sit as a supervisor or superintendent of a concurrent Court or purport to determine by way of an appeal (by whatever other name called) a decision of such a Court".

In the Matter of the Interim Independent Electoral Commission, Constitutional Application Number 2 of 2011 the Supreme Court stated as follows:

"Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

For the foregoing reasons, the Banks application also fails when considered under the inherent power of the court.

Even if it is assumed that the decision of Nyamweya J. made on 18th December, 2014 was a nullity and as such this court has jurisdiction to determine a fresh the Bank's and the Interested Party's applications dated 25th June, 2014 and 30th June, 2014 respectively, I would still have reached the same decision as Nyamweya J. I have considered the Bank's Notice of Motion application dated 25th June 2014 that was seeking to set aside the order of status quo that was made by consent of the parties on 5th May, 2014 and extended on 3rd June, 2014. I am of the view that the application was misconceived and was bound to fail. The Bank was not and still is not a party to this suit. The Bank did not seek to be joined in the suit before seeking the setting aside of the said order made on 5th May, 2014. However much the Bank was aggrieved with the order, it was a stranger to the proceedings and could not just come in and seek the setting aside of the order that was made by consent of the parties to the suit. As rightly found by Nyamweya J., the Bank did not have the *locus standi* to challenge the said orders of 5th May, 2014.

With regard to the application by the Interested Party dated 30th June, 2014, I am satisfied that the Interested Party laid a proper basis for his joinder to this suit. He established his interest in the suit property and also demonstrated that the Plaintiff had intended to put the suit property beyond his reach by selling the same to the Defendants. The Interested Party was therefore properly joined in the suit and I would have granted his application. In the circumstances, it is not necessary for me to disturb the orders that were granted by Nyamweya J. on 18th December, 2014.

The upshot of the foregoing is that the Bank's application dated 29th April, 2016 fails on all fronts. The application has no merit and the same is dismissed with no order as to costs.

Delivered and Dated at Nairobi this 12th day of November 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

No appearance for the Plaintiff

No appearance for the Defendants

No appearance for the Interested Party

Mr. Karanja for the Bank

Catherine - Court Assistant