REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 870 of 2003

(CONSOLIDATED WITH HCCC NO. 2905 OF 1993 AND HCCC NO. 877 OF 2003)

M.O. OSEKO.....1ST PLAINTIFF

J. O. OSEKO.....2ND PLAINTIFF

-VERSUS-

DAVID AWORI.....1ST DEFENDANT

MARIA LILIAN O. OUYA.....2ND DEFENDANT

JUDITH MHINA.....3RD DEFENDANT

RULING

The dispute herein revolves around properties known as L.R. No. 12219/3 and L.R. No. 12219/4 (hereinafter referred to as "the suit properties"). The plaintiffs herein entered into a sale agreement with Lero Luno Enterprises and Nicholas Wandia Raballa on or about 15th March 1993 pursuant to which Lero Luno Enterprises and Nicholas Wandia Raballa agreed to sell and the plaintiffs agreed to purchase the suit properties on the terms and conditions which were set out in the said agreement. The plaintiffs took possession of the suit properties upon making part payment of the purchase price. The sale transaction between the plaintiffs on the one hand and Lero Luno Enterprises and Nicholas Wandia Raballa on the other hand was never completed. Consequently, the suit properties were never transferred to the plaintiffs. The plaintiffs instituted HCCC No. 2905 of 1993 against Lero Luno Enterprises and Nicholas Wandia Raballa seeking among others, specific performance of the said agreement and injunctive orders.

While HCCC No. 2905 of 1993 was pending, Lero Luno Enterprises transferred the suit properties to one, Judith Mhina, the 3rd defendant herein who subsequently transferred L.R No. 12219/3 to David Awori, the 1st Defendant herein and L.R No. 12219/4 to Maria Lilian O. Ouya, the 2nd defendant herein. The plaintiffs then instituted this suit against the 1st , 2nd and 3rd defendants herein seeking among others a declaration that the transfer of the suit properties by Lero Runo Enterprises Ltd. to the 3rd defendant and the subsequent transfer of the same by the 3rd defendant to the 1st and 2nd defendants were illegal, fraudulent and null and void. Not knowing that they had been sued, the 1st and 2nd defendants also instituted HCCC No. 877 of 2003 against the plaintiffs herein seeking among other orders, a declaration that they were the rightful registered proprietors of the suit properties. On 28th August 2003, the court made an order consolidating this suit with HCCC No. 877 of 2003. Further orders were made on 29th September 2003 consolidating the two suits with HCCC No. 2905 of 1993 which was filed by the

plaintiffs earlier.

The plaintiffs in HCCC No. 2509 of 1993 filed a preliminary objection dated 16th June 2005 seeking to strike out HCCC No. 877 of 2003 on the grounds that the same was based on titles derived from illegal transfers which were effected while HCCC No. 2905 of 1993 was pending contrary to the doctrine of *lis pendens*. In a ruling delivered on 4th May 2007, the court (Nambuye J.as she then was) declined to consider the merits of the preliminary objection and deferred the same pending the regularization of the pleadings in the consolidated suits by the parties. The court made a finding that the advocates for the plaintiffs in HCCC No. 2905 of 1993 lacked *locus standi* to attack the pleadings in HCCC No. 877 of 2003. The court observed that the advocates for the plaintiffs in HCCC No. 2905 of 1993 had moved in that case to strike out HCCC No. 877 of 2003 while the plaintiffs in HCCC No. 877 of 2003 were not parties to HCCC No. 2905 of 1993. The court also observed that the advocates for the plaintiffs in HCCC No. 2905 of 1993 were not acting for the defendants in HCCC No. 877 of 2003. The court held that due to the state of the pleadings and representation of the parties, the plaintiffs herein lacked the *locus standi* to maintain the preliminary objection they had brought in HCCC No. 2905 of 1993.

What is now before the court for consideration is the plaintiffs' Notice of Motion dated 4th February 2008 in which the plaintiffs are seeking a review of the said ruling of 4th May 2007. The plaintiffs have contended that in the aforesaid ruling, the court mistakenly held that they lacked *locus standi* to attack the plaint filed in HCCC No. 877 of 2003 because they had not filed a defence in that suit. The plaintiffs have averred that that finding was mistaken since they had filed their defence in HCCC No.877 of 2003 on 19th July 2015. It is the plaintiff's case that if the court would have taken note of the said defence, the findings of the court on the issue of *locus standi* would have been different. The plaintiffs have contended that failure by the court to see the defence filed in HCCC No.877 of 2003 which was on record amounted to an error on the face of the record. The plaintiffs have also contended that the court had mistakenly held that the defendants in HCCC No. 877 of 2003 did not ask the court to uphold the plaintiffs' preliminary objection which was not the case. Finally, the plaintiffs have contended that upon consolidation of this suit with HCCC No. 2905 of 1993 and HCCC No. 877 of 2003, all parties obtained the requisite *locus standi* to attack any pleading in the consolidated suit. The plaintiffs have contended that the court mistakenly overlooked this legal point.

The application was opposed by the 3rd defendant through grounds of objection dated 24th April 2008. The 3rd defendant contended that the application was only intended to rectify an inadvertent omission on the part of the court. The 3rd defendant contended that the plaintiffs had failed to comply with the directions which were given by the court in the said ruling of 4th May 2007 which is sought to be reviewed. The 3rd defendant contended that even if the alleged error on record is corrected, the plaintiffs would be unable to prosecute the preliminary objection dated 16th June 2005. The 1st and 2nd defendants adopted the 3rd defendant's grounds of objection in opposition to the application.

When the application came up for hearing on 17th January 2017, parties relied on their respective written submissions. The plaintiffs filed submissions dated 17th November 2010 in which they argued that the court ruling delivered on 4th May 2007 did not consider their defence which had been filed on 19th July 2005. The plaintiffs contended that had the court considered the said defence which was on record, the court would have arrived at a different conclusion in the matter. The plaintiffs submitted that having filed a defence, the issue of *locus standi* was a non-starter. The plaintiffs submitted that the failure by the court to see their memorandum of appearance and defence filed in HCCC No. 877 of 2003 which were on record constituted an error on the face of the record which justifies a review of the ruling made on 4th May 2007 *ex debito justiciae* for the sole purpose of doing justice. The court was referred to the case of Nyamogo & Nyamogo Advocates vs. Moses Kipkolum Kogo (2001) 1 E.A 173 in support of the submission that where an error is substantial, obvious and self-evident, an order for review ought to be issued.

The plaintiffs submitted that their preliminary objection was premised on the fact that a party who has committed an illegality lacks the requisite *locus standi* to maintain an action. The plaintiffs submitted that

the purported transfers of the suit properties to the defendants were done in contravention of section 52 of the Transfer of Property Act of 1882 (now repealed) in that by the date of the alleged transfers, the plaintiffs had instituted HCCC No. 2905 of 1993. The plaintiffs submitted that pursuant to section 52 of the said Act, a party to a suit concerning a property cannot confer any title in respect of that property to another person during the pendency of the suit. The plaintiffs submitted that the purported transfers were illegal. The plaintiffs contended that HCCC No. 877 of 2003 was founded on illegality and as such was untenable in law. The plaintiffs contended that the court should have addressed its mind to the issue of the defendants' illegality before delivering its ruling dated 4th May 2007. The plaintiffs made reference to the case of Snell vs. Unity Finance Ltd(1963)3 All ER 50 in support of their submission that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. Further reliance was placed on the case of National Bank of Kenya Ltd vs. Wilson Ndolo Ayah Nairobi CA No. 199 of 2002 where the court stated that it is good policy that courts enforce the law and avoid perpetuating acts of illegality by deeming as invalid acts done in pursuance of an illegality. The plaintiffs submitted that failure by the court to address the issue amounts to an error on the face of record.

The plaintiffs submitted that the application for review would not prejudice the respondents in that the respondents lack capacity to file and urge their cases before the court since their pleadings as filed were illegal and a nullity *ab initio*. With regard to the issue of delay, the plaintiffs submitted that on the face and an illegality, delay cannot be a defence. On the issue of failure to extract the order sought to be reviewed, the plaintiffs argued that the respondents were non-suited and as such could not raise the issue. The plaintiffs submitted that the court order dated 4th May 2007 was made without jurisdiction as the court should not have entertained the defendants' claim had it considered the plaintiffs defence which raised the issue of illegality and want of jurisdiction thereof. The plaintiffs contended that, accordingly, the said order was of no legal effect and that legally, there was no order to extract.

The 1st and 2nd defendants in their submissions dated 19th September 2013 contended that in its ruling of 4th May 2007, the court made a finding of fact that there was no order endorsed in HCCC No. 2905 of 1993 consolidating it with ELC No. 870 of 2003 and HCCC No. 877 of 2003. The 1st and 2nd defendants submitted that the said finding had not been set aside. The 1st and 2nd defendants submitted further, that the orders sought in the plaintiffs' application were not available to the plaintiffs who had failed to regularize their pleadings as directed by the court in the said ruling of 4th May 2007.

The 1st and 2nd defendants also submitted that the 1st defendant was never served with summons in HCCC No. 2905 of 1993 and that since no application for extension of summons was made, HCCC No. 2905 of 1993 abated against the 1st defendant. The 1st and 2nd defendants submitted that since HCCC No. 2905 of 1993 was non-existent for want of summons and owing to the plaintiffs' non-compliance with directions given on 4th May 2007, the orders sought against the 1st defendant in HCCC No. 2905 of 1993 cannot be granted since the court cannot act in vain. The 1st and 2nd defendants urged the court to dismiss the plaintiffs' claims and order their immediate surrender of the suit properties.

The issues which I need to determine are first, whether the plaintiffs have established a case for review and secondly, whether the court should allow the plaintiffs' preliminary objection dated 16th June 2005. The court's power to review its orders is provided for in section 80 of the Civil Procedure Act which states as follow:-

> *"Any person who considers himself aggrieved –*
>
> *a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or*
>
> *b) By a decree or order from which no appeal is allowed by this Act;*
>
> *May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."*

Order 45 of the Civil Procedure Rules provides that an application for review should be brought without unreasonable delay and sets out the following as grounds for review:-

> *a) Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.*
>
> *b) Where there is a mistake or error apparent on the face of the record.*
>
> *c) For any other sufficient reason.*

In the case of National Bank of Kenya Limited vs. Ndungu Njau, Civil Appeal No. 211 of 1996 the court stated as follows;

> *"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…"*

In the case of Nyamogo and Nyamogo Advocates vs. Kogo (2001)1 E.A. 173 the court stated as follows:-

> *"An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."*

I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the grounds of objection which was relied upon by the defendants in opposition to the application. Finally I have considered the parties' respective submissions and the authorities which were cited in support thereof. My view on the matter is that the plaintiff's application has no merit and must fail. As I have stated above, Order 45 rule (1) (1) of the Civil Procedure Rules provides that an application for judicial review should be brought without unreasonable delay. The application before me was brought after a lapse of eight months from the date when the order sought to be reviewed was made. The plaintiffs have not explained this delay in bringing the application which in my view is unreasonable. In their submissions, the plaintiffs instead of explaining the delay had contended that the defendants were not entitled to raise the issue because their claim was tainted with illegality. The court is yet to make a finding on the issue of whether or not the suit properties were transferred to the defendants illegally. I find the plaintiffs' response to the issue of delay unsatisfactory. It is my finding that the plaintiff's application was brought after unreasonable delay.

This finding a lone should disentitle the plaintiffs to the orders sought. On the merit of the application, again, I find the application misconceived. The ruling of the court made on 4th May 2007 speaks for itself. I am in agreement with the plaintiffs that the court seems not to have had sight of the memorandum of appearance and defence which they had filed in HCCC No. 877 of 2003. This is because the court only referred to a notice of appointment of advocates and a replying affidavit. I am not satisfied however that the court would have ruled otherwise if it had seen the two documents. The court's finding that the plaintiffs had no *locus standi* to prosecute the preliminary objection was not based solely on the fact that the plaintiffs had neither entered appearance nor filed a defence in HCCC No. 877 of 2003. This is what the court said;

> "*The locus standi to attack any pleading herein has to be gained in the normal way through service of summons to enter appearance and then entry of appearance. Entry of appearance either alone or with filing of defence gives one locus standi to attack the pleading. In addition counsel prosecuting must be properly on record in the matter sought to be faulted which is not the case herein. In the absence of locus standi the merits of the preliminary objection whether the same is to be upheld however strong it may be cannot be gone into. For these reasons, it is the finding of this court that counsel for the 3rd defendant in HCCC No. 870/03 who purported to attack the existence of HCCC No. 2905/93 has no locus standi to do so as the 3rd defendant in HCCC No. 870/03 is not a party in HCCC No. 2905/93. Likewise, counsel prosecuting the preliminary objection on behalf of the plaintiffs in HCCC No. 870/03 has no locus standi to attack the proceedings in HCCC No. 877/03".*

It is clear from the foregoing that the court found the plaintiffs to have no *locus standi* to maintain the preliminary objection also on the grounds of misjoinder and non-joinder of parties and on account of the fact that the advocates who were representing the plaintiffs in HCCC No. 2905 1993 were not the same advocates who were representing them in HCCC No. 877 of 2003 where the plaintiffs were defendants. This fact is clear from the directions or guidelines which the court gave at the end of the ruling which the parties are yet to comply with. It follows from the foregoing that even if the court had taken note of the fact that the plaintiffs had entered appearance and filed a defence in HCCC No. 877 of 2003, the court's decision would not have been different. For the same reason, I am also of the view that even if the court had taken notice of the fact that the advocates who were representing the defendants in HCCC No. 877 of 2003 had supported the preliminary objection, the court would still have arrived at the same decision. The other grounds which were raised in the application and the submissions by the plaintiffs were in my view outside the scope of the court's power of review.

In conclusion, it is my finding that although there are apparent errors on the face of the record, the same did not affect the decision of the court. There is therefore no basis for the review sought. The plaintiff's Notice of Motion dated 4th February 2008 fails not only for having been brought after unreasonable delay but also for lack of merit. The application is accordingly dismissed with costs to the defendants.

Due to the parties' failure to regularize the pleadings as directed by the court on 4th May 2007 so that the pending preliminary objection can be considered on merit, this court in exercise of its powers under sections 1A, 1B and 3A of the Civil Procedure Act hereby directs that in the event that the plaintiffs still wish to pursue their preliminary objection dated 16th June 2005, they should raise the issues contained therein in their final submissions after the hearing of the consolidated suits for determination by the court in its final judgement on the matter. This will pave way for the hearing of the consolidated suits one of which has been pending in court for the last 24 years.

Delivered and Signed at Nairobi this 15th day of September, 2017

S. OKONG'O

JUDGE

Ruling read in open court in presence of:

No appearance	for Plaintiffs
Mr. Wachira h/b for Kimathi	for 1st Defendant
No appearance	for 2nd Defendant
Mr. Simiyu h/b for Asinuli	for 3rd Defendant
Catherine	Court Assistant