



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CAUSE NO. 293 OF 2014**

**KORE FORESTS LIMITED.....PLAINTIFF**

**-VERSUS-**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR KWALE.....2<sup>ND</sup> DEFENDANT**

**E N MARWANGA.....3<sup>RD</sup> DEFENDANT**

**MWANAJUMA ALI RUWA.....4<sup>TH</sup> DEFENDANT**

**TWALIB ALI RAGUNDA.....5<sup>TH</sup> DEFENDANT**

**WELLINGTON ODIMIDI.....6<sup>TH</sup> DEFENDANT**

**AND**

**IDI MOHAMED MWATANDARA.....1<sup>ST</sup> INTERESTED PARTY**

**KASSIM ABDALLA SAHIMU.....2<sup>ND</sup> INTERESTED PARTY**

**MTENGO MOHAMED DOSA.....3<sup>RD</sup> INTERESTED PARTY**

**ATHMAN HAMISI ALI.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. The application for determination is dated 21<sup>st</sup> January 2016. It is brought under the provisions of section 80 Civil Procedure Act, Order 45 Rule 1 and Order 40 rule 1 of the Civil Procedure Rules and the inherent power of the Court. The applicant prays for orders:

**1. Spent**

**2. The order issued on 9<sup>th</sup> December 2015 be reviewed and set aside.**

**3. Spent**

**4. That defendants and the interested parties either by themselves or their agents and/or employees or otherwise howsoever from transferring, offering for sale, leasing, subletting, charging the property and/or interfering and/or otherwise dealing in any other manner howsoever with the property known as KWALE/MSAMBWENI 'A'/1707 pending the hearing and determination of this application.**

**5. The costs of this application be provided for.**

2. The application is supported by 23 grounds listed on the face of it and an affidavit sworn by **Michael Somen**. The grounds *inter alia* states that Sominam Limited is the duly registered and bonafide owner of the property known as Kwale/Msambweni A/1707 (“the property”) having purchased the property at a public auction in 1986. That on 15<sup>th</sup> March 2012 Sominam Limited learnt that the plaintiff (“Kore Forests Limited”) had been fraudulently registered as the owner of the property with effect from 30<sup>th</sup> September 2011. Sominam limited had never at any time transferred the property to Kore Forests Limited. That Mohamed Said Dosa; Haji Said Shehe; Tumbu Mbaruku; Kassimu Mkungu; the 1<sup>st</sup> and 4<sup>th</sup> interested parties had previously been fraudulently registered as owners of the property on 12<sup>th</sup> February, 2010 after purportedly obtaining rights under adverse possession in **Nairobi HCCC 916 of 2007 (OS) Mohamed Said Dosa; Hai Said Shehe; Tumu Mbaruku, Athumani Hamisi Ali, Ali Kassimu Mkingu and Idi Mohamed Mwatandara v Peter Gitau Kabiru, Raojibhai G Patel, Sominam Limited and Pan Staff Development Company Limited.**

3. The order emanating from the suit referred to in paragraph 2 above was a forgery as the Court case relied upon never existed. That the fraud in registration of Mohamed Said Dosa; Haji Said Shehe; Tumbu Mbaruku; Kassimu Mkungu, the 1<sup>st</sup> and 4<sup>th</sup> interested parties was cancelled on 9<sup>th</sup> February 2011 following a challenge by Sominam Limited through *inter alia* the registration of a caution and representations made to the then Land Registrar at Kwale. The property had been fraudulently transferred to Kore Forests Limited by Mohamed Said Dosa; Hai Said Shehe; Tumbu Mbaruku; Kassim Mkungu; the 1<sup>st</sup> and 4<sup>th</sup> interested parties who were the alleged plaintiffs in Nairobi HCCC916 of 2007 (OS). The fraudulent registration of Kore Forests Limited as the registered proprietor of the property was cancelled on 16<sup>th</sup> April 2012 following a further challenge by Sominam Limited through *inter alia* the registration of a Caution and further representations made to the Land Registrar, Kwale and the Chief Land Registrar in the Ministry of Lands.

4. The grounds stated further that in May, 2014 Sominam Limited learnt that the 4<sup>th</sup> & 5<sup>th</sup> defendants had been fraudulently registered as the owners of the property with effect from 7<sup>th</sup> February, 2014 pursuant to a Court order issued on 6<sup>th</sup> September 2011 in **Misc. High Court Cause No. 807 of 2011 Mwanajuma Ali Ruwa and Twalib Akida Rugunda v Saddiq Ghalia**. The 4<sup>th</sup> & 5<sup>th</sup> defendants had filed the suit by an application dated 2<sup>nd</sup> September, 2011 and applied for a Vesting Order over Kwale/Msambweni 'A'/1703, 1704, 1706, 1707 and 1708. By an application dated 20<sup>th</sup> September, 2011 and a Preliminary Objection dated 28<sup>th</sup> March, 2012 the estate of Saddiq Ghalia, who was the registered owner of Kwale/Msambweni 'A'/1703 and 1704, applied for the order of 6<sup>th</sup> September, 2011 in Misc. High Court Cause No. 807 of 2011 Mwanajuma Ali Buwa and Twalib Akida Rugunda v Saddiq Ghalia to be set aside and the entire proceedings struck out. A ruling was delivered by the Court in Misc. High Court Cause No. 807 of 2011 Mwanajuma Ali Buwa and Twalib Akida Rugunda v Saddiq Ghalia on 4<sup>th</sup> September, 2014 allowing Saddiq Ghalia's application of 20<sup>th</sup> September, 2014 and striking out those proceedings. An order was extracted on 8<sup>th</sup> October, 2014. On 13<sup>th</sup> January, 2016 Sominam Limited again learnt that the 4<sup>th</sup> defendant and 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> interested parties had been fraudulently registered as the owners of the property with effect from 14<sup>th</sup> December, 2015 pursuant to a Court order issued on 9<sup>th</sup> December, 2015 by this Honourable Court. Kore Forests Limited had filed this suit praying for *inter alia* orders that it be restored as the registered owner of Kwale/Msambweni 1706, 1707 and 1708. Kore Forests Limited did not disclose to the Court in its pleadings the circumstances that led to the cancellation of its fraudulent total over the property on 16<sup>th</sup> April, 2012. By the time the 4<sup>th</sup> and 5<sup>th</sup> defendants filed their defence on this matter on 25<sup>th</sup> March, 2015, and later amended it on 10<sup>th</sup> June, 2015, their alleged rights over the

property had been **extinguished by virtue** of the **Order of 8<sup>th</sup> October, 2014 issued** in Misc. High Court Cause No. 807 of 2011 Mwanajuma Ali Buwa and Twalib Akida Rungunda v Saddiq Ghalia.

5. The affidavit in support of the application was equally detailed. It deposed to facts set out on the grounds. Mr Michael Somen deposed that he had no knowledge of the judgement in NBI HCCC No 916 of 2007 (OS) which cancelled their title neither had they instructed Wangalwa & Co advocates to enter appearance on their behalf. A copy of this judgement was annexed to the affidavit. Mr Somen deposed further on the steps they took to verify this judgement in paragraphs 13 – 22 of his affidavit. The consequence of their action is that the Land Registrar Kwale cancelled the registrations obtained pursuant to the decree in HCCC No 916 of 2007. Subsequently Mr Khatib advocate on 7<sup>th</sup> March 2011 wrote to the Land Registrar demanding that the caution registered on the 3 titles which included the applicant's title be removed. In reply Mr Inamdar for the applicant forwarded the results of their investigations as regards the authenticity of the judgement in HCCC 916 of 2007 to Mr Khatib advocate.

6. The applicant also deposed on actions taken by them from March 2012 – April 2012 to safe guard their interest in this property (paragraph 34 – 44 of the affidavit). It is deposed that on May 2014, the applicant discovered that the 4<sup>th</sup> & 5<sup>th</sup> defendants had been fraudulently registered as owners of this property, pursuant to an order obtained in Misc HCC No 807 of 2011. The summary of the action taken in regard to Misc cause No 807 of 2011 is deposed to in paragraph 48 -51 of the supporting affidavit with the result that the order in Misc cause No 807 of 2011 was struck out and the order extracted and served on the Land Registrar Kwale.

7. Mr Somen continued that Sominam was never made a party to this suit despite the plaintiff and the 4<sup>th</sup> & 5<sup>th</sup> defendants being aware of his proprietary interest over the suit property and the sequence of events that led to the cancellation of previous registrations. Mr Somen deposed further that inspite of the caution registered on 16<sup>th</sup> May 2014 and the applicant's letter dated 14<sup>th</sup> October 2015, the 2<sup>nd</sup> defendant allowed the transfer between the 4<sup>th</sup> & 5<sup>th</sup> defendants and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties to be registered and title deed issued on 14<sup>th</sup> December 2015. That Sominam is apprehensive this is a fresh attempt at land grabbing by Kore Forest. It is on this account that he seeks review/and or setting aside of the order issued on 9<sup>th</sup> December 2015.

8. In response to the application, the plaintiff filed a notice of preliminary objection to the effect that the applicant is not a party to the proceedings and has neither been joined. All the defendants and the interested parties did not file any document in opposition to the application.

9. The applicant and the plaintiff each filed written submissions which were orally highlighted in court. I have read and considered the submissions and the case law cited. The applicant submits that the words used in section 80 of the Act and Order 45 is **“any person”**. Further that the phrase **“any person”** was determined both in this Court and the Court of appeal decisions. In the case of **Ngororo vs Ndutha & Another (1994) KLR 402 at 403** it was held that :

**1. Any person though not a party to the suit whose direct interest is being affected by the judgement is entitled to apply for a review.**

**2. That the words “any person” and “for any sufficient reason” used in section 80 of the Act clearly are meant to include a person who has a direct interest in litigation or its result but has been deprived of a hearing as a party in relation to his interest.**

10. It is the applicant's submissions that the orders of 9<sup>th</sup> December deprived him of his interest in the property despite the plaintiff being aware of his interest. The applicant also submitted that the doctrine of *functus officio* has exceptions where there is an error. He referred the Court to the case of **John Ochanda & Others vs Telkom** that the applicant has substantiated what the error is i.e that the registration of the Interested Parties was set aside on 9<sup>th</sup> February 2011. That the applicant met Mr Khatib advocate and explained the fraud. Therefore Mr Khatib was aware of the applicant's interest since he represented the

Interested Parties whose title had been cancelled.

11. That although this was a consent order, the applicant submitted they have shown collusion between the plaintiff, the 4<sup>th</sup> & 5<sup>th</sup> defendants and the Interested Parties and relied on case law of **R vs Registrar of Societies** where it was held that the act of excluding a bonafide party is itself fraudulent. The applicant argues his application has merit and should thus be allowed.

12. Mr Khatib submitted that his preliminary objection was on two limbs :

**a) The applicant is not a party to these proceedings and has not asked to be joined.**

**b) The Court is *functus officio*.**

The plaintiff submits that all correspondences between Sominam and Kwale Lands Office were never copied to the plaintiff and that the plaintiff was not active in the fraud.

13. The plaintiff continued that having recorded the consent on the facts before it, the Court is now *functus officio*. That the issue of fraud can only be pleaded by parties to a contract and the contract cannot be varied by an outsider. That the issues before the Court were determined conclusively. As between the parties there is no error apparent on the face of the record. That the error should be easily discernible and the issue of fraud is not easily discernible from the pleadings. He urged the Court to disallow the application.

14. The plaintiff relied on the following case law to support their claim to support their claim

**1. NBI HCC 571 of 2011 Belleview Development Co vs Vinayak Builders & Another**

**2. John Ochanda & Others vs Telkom (K) LTD NBI HCC 216 of 2007**

**3. Nakuru HCC No 275 of 1998 – Dhanji Jadra Ramji vs Commissioner of Prisons & A.G**

**4. MSA HCC 95 of 2000: The Public Trustee vs Ahmed Omar Mohamed & Others.**

15. From the pleadings filed and the submissions rendered, I find the following three issues for my determination :

**a) Whether the applicant not being a party to these proceedings can apply for review of the orders of 9<sup>th</sup> December 2015.**

**b) Whether this Court is *functus officio* and therefore the orders sought cannot be granted.**

**c) Whether the order of consent can be set aside by an “outsider” to the consent.**

16. On the first issue, it is not in dispute that the applicant is not a party to this suit. The applicant submits that “*any person*” phrase used in section 80 of the Act and Order 45 of the Rules refers to any person that is directly affected by the order sought to be reviewed. In support of his submissions, he cited the case of **Ngororo supra**. Section 80 of the Civil Procedure Act begins by these words, “*any person who considers himself aggrieved*”. Similar words are used in the opening of Order 45 of the Civil Procedure Rules.

17. It is the applicant’s argument that **any person** is not the same as **any party**. That since the order disentitled them of their property they are entitled to seek the Court’s intervention through review. None of the cases cited by the plaintiff related to the issue of review under the provisions of section 80 and Order 45. The first authority was on joinder of parties, a subject distinguishable with the circumstance of this case.

18. Has the applicant proved that he is that **any person** (bold mine for emphasis) that is aggrieved by the order sought to be reviewed? Part (ii) of the questioned order stated;

**“plot No Kwale/Msambweni A/1707 shall be registered in the names of,**

**a) Iddi Mohamed Mwatandara**

**b) Kassim Abdalla Shahamri**

**c) Mtengo Mohamed Dosa**

**d) Athmani Hamisi Ali**

**e) Mwanajuma Ali Buwa”**

In the affidavit of Michael Somen, he set out the facts on how the applicant acquired this property Kwale/Msambeni A/1707. These facts were not controverted by any of the parties herein the plaintiff included. The facts were also supported by documents that were annexed.

19. The applicant deposed further that these facts were brought to the attention of Mr Khatib advocate in 2012 and Mr Khatib even wrote a letter dated 7<sup>th</sup> March 2011 asking for the removal of the caution placed by the applicant. Mr Khatib advocate did not deny this fact although in his submission he stated that the correspondence between the applicant and the Land Registrar Kwale was never copied to the plaintiff. He was thus aware of the applicant’s interest and when he was instructed to file suit he ought to have joined the applicant to these proceedings. I am therefore satisfied that the applicant has shown that he has interest in the property (**sufficient cause**) and that he is aggrieved by the order. I also concur and I am bound by the holding in the **Ngororo** case that **“any person”** though not a party to the suit is entitled to seek review.

20. The second issue is whether the Court is *functus officio*. The plaintiff submitted that this Court having heard the facts placed before it and having recorded the consent cannot re-open the matter. Section 80 allows any person aggrieved by a decree or order from which no appeal has been preferred or where no appeal is allowed to apply for *“review of judgement of the Court who passed the decree and the Court may make such order thereon as it thinks fit”*.

21. From the nature of the orders sought, it is not the kind that would be said the Court is *functus officio* otherwise the law would not have created room for applications for review of decrees and/or orders. In the Telkom case *supra* referred to by the plaintiff, the parties therein wanted to re-open and retry a matter that had been heard and determined by a Court of competent jurisdiction by directing parties to adduce further evidence through filing of further affidavits. The Court of Appeal in the Telkom case quoted **Chandler vs Alberta Associates of Architects (1989) 2 S.C R 848** that the general rule that a final decision cannot be re-opened derives from the decision of the English Court of Appeal *In re St Nazaire Co. (1879) 12. Ch D 88*. The basis was that the power to re-hear was transferred to the appellate division.

22. In this instant, the applicant is not seeking to have the matter re-tried by adducing further evidence. It instead seeks review and or setting aside of the decree therefore distinguishable from the facts in the Telkom case. This limb of objection is unmerited and is dismissed.

23. Lastly whether the consent order can be set aside by an *“outsider”*. On this limb, I will be brief. The applicant has come before the Court to review the decree/order of 9<sup>th</sup> Dec 2015. As to whether the decree/order was a result of a judgement rendered after hearing the case on merits or it was a consent judgement is immaterial when seeing for review. The applicant has stated that he is **aggrieved by the decree**. For me the core of this application was whether the grounds for review had been met. The court is not called to consider the grounds for setting aside a consent judgement. In any event and without prejudice to the foregoing, the court record shows the consent was signed by the plaintiff and the defendants but not the Interested Parties. Further the deposition made by Mr Somen and documents

annexed showed the defendants already knew the applicant's interest in the suit land but went ahead to sign the consent "bestowing the applicant's title" to the Interested Parties. This in my view is fraud/collusion that can be discerned just by looking at the documents annexed.

24. In conclusion therefore I am satisfied that there is merit in the application. I do allow the application in terms of order 2 and set aside the consent order entered into on 9<sup>th</sup> December 2015 and all the consequential orders emanating from this order. The matter shall proceed with the participation of the applicant being joined as a 7<sup>th</sup> defendant to these proceedings. Costs of this application abide the outcome of the main suit.

**Signed and delivered at Mombasa this 26<sup>th</sup> day of October 2016.**

**A. OMOLLO**

**JUDGE**