IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE JJ.A)

CIVIL APPEAL NO. 40 OF 2014

BETWEEN

KINYUA KOECH LTD. ….....1ST APPELLANT

EDWIN WAMBAA REGERU ….....2ND APPELLANT

GEORGE WAIYAKI (Suing through the 2nd Appellant).....3RD APPELLANT

AND

NAIROBI HOMES (MOMBASA) LIMITED ….....1ST RESPONDENT

WINGFIELD NG'ANG'A REGERU ….... 2ND RESPONDENT

CATHERINE NYANGUI REGERU ….....3RD RESPONDENT

ESTHER WANJA REGERU.....4TH RESPONDENT

EMMA MUTHONI WAMBAA ….....5TH RESPONDENT

PAULINE WANJIKU WAMBAA ….....6TH RESPONDENT

VIRGINIA WANJIKU KIREGA ….....7TH RESPONDENT

STEPHEN KAGECHE REGERU ….....8TH RESPONDENT

JOSEPH KABATI REGERU …..... …….9TH RESPONDENT

DENNIS WAMBAA REGERU ….....10TH RESPONDENT

DANSON MUCHUGIA REGERU ….....11TH RESPONDENT

PIUS WAITHAKA REGERU …..... 12TH RESPONDENT

(Appeal from the Ruling and Order of the Environment and Land Court of Kenya at Mombasa

(Mukunya, J) dated the 2nd day of July 2014

in

ELC. NO. 58 OF 2014)

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JUDGMENT OF THE COURT

Edwin Wambaa Regeru (the 2nd appellant) and **Emma Muthoni Wambaa** (the 5th respondent) are heirs and joint-administrators of the estate of the late **Lawrence Regeru Wambaa** (the deceased) who died on 4th February 2007. They were appointed joint administrators on 28th July 2008 in Nairobi Succession Cause No. 2051 of 2007, and a confirmed grant was subsequently issued to them on 8th July 2009. The 3rd appellant, is a heir of the estate who suffers from a mental condition and instituted his claim to the estate through his legally appointed guardian, the 2nd appellant. The 2nd – 12th respondents are similarly heirs of the estate of the deceased.

At the time of his death, the deceased was the registered proprietor of a two storey building on **LR No. Mombasa/Block XX/281** known as Syndicate Building in the centre of Mombasa City "the suit premises". It is alleged that the suit premises had over 60 tenants and generated collective monthly rental income of over Kshs.500,000/-. The estate extends way beyond the suit premises and is the subject of numerous court cases in succession causes, civil suits, appeals, the business premises rent tribunal and the Environment and Land Courts.

The appellants filed suit in Mombasa Environment and Land Court being **Case Number 58 of 2014** on 18th March 2013. It was alleged in that suit that the administrators appointed the 1st respondent as the managing agent of the suit premises in December 2008 but terminated the same in January 2012. On 23rd January 2012, the joint-administrators appointed the 1st appellant as the agent or manager of the suit premises for a term of 5 years. The 1st appellant carried out its duties without interruption until 4th March 2014 when the respondents invaded its office situate on the 2nd floor of the suit premises and evicted it. Apparently, the heirs of the estate on 30th October 2013 had compromised on some of their disputes over the suit premises that the heirs would jointly incorporate a company to manage the suit premises upon the expiry of the management agreement. It emerged that the 2nd – 12th respondents had incorporated a company known as **Lawrence Regeru Wambaa Holdings Limited** "the company" without reference to the 2nd and 3rd appellants who are also heirs to the estate and entitled to shares in the company. The company on 10th February 2014 appointed the 1st respondent as the managing agent over the suit premises, replacing the 1st appellant. The certificate of incorporation of the company had been issued on 10th January 2014 and its authenticity is however the subject of Nairobi Judicial Review Application No. 75 of 2014, in which a suspension of the certificate was issued on 26th February 2014. The suspension operated to terminate the 1st respondent's appointment, following which the 2nd – 12th respondents on 3rd March 2014 in their capacities as part heirs of the estate, re-appointed the 1st respondent. After the re-appointment, the 1st respondent locked the 1st appellant out of its offices, and communicated a change in the management services to the tenants. These are that facts that precipitated the Environment and Land Court Suit herein in which the appellants sought several declarations, permanent injunction, special and general damages as well as costs. Filed simultaneously with the Case was a Notice of Motion dated 17th March 2014 seeking to retrain the respondents from entering into the suit premises or interfering with its management or its tenants, pending the hearing and determination of the application as well as the suit. In the application, the appellants accused the respondents of causing great confusion among the tenants of the suit premises through issuance of purported circulars on the change in management, and by trespassing in the office of the 1st appellant on the suit premises. The High Court at Mombasa (**Mukunya, J.**) upon hearing the application ex parte granted interim interlocutory orders on 20th March 2014 pending

the hearing of the application inter parties.

The respondents defending the application filed an affidavit sworn by the 5th respondent, in which they deponed that the estate had been fully distributed. That the beneficiaries held a meeting on 31st January which was attended by the 2nd appellant, in which it was unanimously decided to appoint the 1st respondent in place of the 1st appellant to manage the suit premises on account of various failures by the 1st appellant including non-remittance of rent collected for January and February 2014 and accumulation of arrears of rent of up to Kshs.900,000/-.

The respondents also filed a Notice of Motion dated 31st March 2014 seeking to have the interim orders discharged and the rental income collected from the suit premises deposited in an escrow account in a bank to be agreed upon. The grounds in support of the application were in the main that the appellants had failed to disclose material facts, specifically, that the beneficiaries were entitled to and had in fact agreed to appoint the 1st respondent in place of the 1st appellant, which appointment was regular.

This application was also opposed by the 2nd appellant, who swore that the rent collected for January 2014 had been paid out to the beneficiaries, while the rent for February 2014 could not fully be accounted for since by this time the respondents had begun luring tenants to pay the rent to the 1st respondent and some of them did. It denied that the distribution of the estate was complete, adding that the joint-administrators had not yet paid all the liabilities of the estate nor transferred the suit premises to the heirs, and had not been discharged by the court. It claimed that 2nd to 12th respondents were incapable of making decisions over the suit premises, particularly as to its management, since this right was still reserved for the joint-administrators.

On its part, the 1st appellant through the affidavit of **Rosemary G. Muriuki** maintained that it had a valid contract for the management of the suit premises having been appointed by the legal owners of the suit premises – the joint-administrators of the estate. She further deponed that its operations in the building had been curtailed by the shutting of its offices and the advice to some of the tenants to pay their rent to the 1st respondent, adding that the respondents ought not to benefit from their wrongdoing by claiming for unremitted rents. Defending the uncollected arrears, she deponed that they had in fact reduced the same from the arrears inherited from the previous property managers, the 1st respondent. The 1st appellant denied collecting rent for February 2014, and admitted that they collected rent for March 2014 prior to being served with an order for injunction and distributed it to the beneficiaries' accounts.

It is against this backdrop that the learned Judge on 2nd July 2014 dismissed all the applications with no order as to costs, on the basis that first, the co-administrators were no longer in agreement, and therefore any interested party must return to the succession court for further orders on distribution, secondly, the succession court had distributed the estate and thereby decided on the issue of title to the suit premises and distributed shares to each beneficiary and thus the prayers sought in the motion of 17th March 2014 could not be granted. The court declined to transfer the case to the succession court in Nairobi because to its mind, the succession cause no.2051 of 2007 had been finalized. These holdings precipitated this appeal.

The appellants' Memorandum of Appeal lists 12 grounds of appeal and prayed for this court to allow the appeal, set aside the ruling of the Learned Judge delivered on 2nd July 2014 and substitute it with an order allowing the Appellants' application dated 17th March 2014 with costs for the application and for the appeal.

> ***"a) The learned judge erred in determining finally the issues in dispute in the suit in the course of hearing of an interlocutory application.***
>
> ***b) The learned judge misapprehended the issues which were raised by the 1st appellant in its enforcement of its 5 year contract to manage the suit property entered into by it with the 2nd***

appellant and the 5th respondent, the administrator and administratrix respectively of the estate of the deceased.

c) The learned judge erred in holding that there was no dispute as to use and occupation of the suit premises.

d) The learned judge overlooked the fact that the respondents' application dated 31st March 2014 was based on commission of the torts of inducing breach of contract, assault and molestation thereby offending the rule that no party shall base its claim on its own wrong.

e) The learned judge ignored the fact that the 2nd – 12th respondents on 4th March 2014, molested the 1st appellant's caretaker and physically purported to evict the 1st appellant from the said suit premises in breach of the said contract made by the 1st appellant with the administrators on 23rd January 2012.

f) the learned judge ignored the fact that the 2nd appellant and the 5th respondent, the administrator and administratrix respectively of the estate of the deceased – the registered proprietor of the suit premises, were by virtue of section 79 of the Law of Succession Act, the owners of the same and consequently, with the capacity to deal with it.

g) The learned judge erred in not holding that the 2nd – 12th respondents lacked capacity to appoint the 1st respondent the manager of the suit premises.

h) The learned judge erred in not holding that there was no privity of contract between the 2nd – 12th respondents and the 1st appellant.

i) The learned judge erred in delivering on 2nd July 2014, a ruling which created uncertainty or a management vacuum regarding the person entitled to manage the suit premises solve the tenants' problems and collect monthly rent from tenants.

j) The learned judge erred in delivering on 2nd July 2014, a ruling that created a situation where three persons, namely the 1st appellant, the 1st respondent and the 5th respondent have all asserted their respective right to manage the suit premises and collect rent from the tenants during the pendency of the intended appeal.

k) The learned judge erred in not finding as a fact that the respondents are trespassers who invaded the office of the 1st appellant on 4th March 2013, evicted the 1st appellant's caretaker and thereafter, purported to manage the said suit premises.

l) The learned judge erred in not holding that the appellants had satisfied the test for the grant of injunctions laid down by this court in Giella vs Cassman Brown (1973) EA 358"

Counsel for the parties appeared before this court on 19th November 2014 and canvassed the appeal. **Mr. A. Njenga,** learned counsel for the Appellants submitted that the Environment and Land Court Judge in his ruling had in effect terminated the contract between the 1st appellant and the joint-administrators for the management of the suit premises. The heirs could not by themselves enter into a valid contract with the 1st respondent as they had purported to do. The appellants had approached court for injunctive orders, but the Environment and Land Court judge failed to accept that the appellants had satisfied the principles set out in the celebrated case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358,** for the granting of interlocutory injunction. The contract had a termination clause which had been disregarded. As a result there was left confusion as to who should collect the rent. This court was urged to allow the appeal on these grounds. **Chapter 18 of Chitty on Contracts (29th Edition) Vol. 1 page 1075 – 1099** was cited for the proposition that a contract cannot confer rights or impose obligations arising under it on any person

except the parties to it. The Halsbury's Laws of England, 4th Edition, Volume 9 page 202 – 209 on Privity of Contract was also cited. Counsel further relied on the case of **Mwangi v Braeburn Limited (2004) 2 EA 196** where the Court of Appeal held that an injunction could not be allowed on the basis of a contract to which the party was not privy; **Trouistik Union International & Another v Mbeyu & Another (1993) KLR** was cited in support of the position that where the deceased died intestate, only the administrator can act as his personal representative; and **Mellows**: **The Laws of Succession, 5th Edition, Chapter 5: The Rights of Beneficiary during Administration, page 411 – 419,** was also called in aid.

Mrs. W. Wambugu, learned counsel for the respondents submitted that the dispute is predicated on a management agreement which provided for 3 months' notice for termination. The agreement also contained special provisions for termination. The suit premises was distributed among the beneficiaries and a certificate of confirmation of grant was issued to that effect. Each of the beneficiaries was therefore entitled to their respective shares in the suit premises. The parties had consented before the succession court to transfer the suit premises to a company incorporated for that purpose with each beneficiary holding shares in the ratio confirmed in the grant. As the suit premises had changed hands, the 1st appellant's contract was terminated by virtue of the special provisions of clause 9 of the contract. She further submitted that the change in ownership, and not the judge, had terminated the contract. The 2nd – 12th respondents were thus in order to appoint the 1st respondent as managers of the suit premises. The respondents urged that the judge could not be faulted, and the appellants had not demonstrated any reasons why the judge's ruling should be impugned. The judge did not determine any of the issues at the interlocutory stage as alleged. Counsel cited the case of **Kenya Breweries Limited & Another vs. Washington O. Okeyo (2002) eKLR** which sets out the test as to whether or not to grant a mandatory injunction. In that case, the court set aside the High Court's decision to grant a mandatory injunction on the ground that it would relieve the respondent of his obligation to pay a just debt and therefore was inequitable. The cases of **Kamau Mucuha vs The Ripples Limited (1993) eKLR** and **Giella vs Cassman Brown & Company (1973) EA 358** were also cited on the issue of granting injunctions.

We have carefully considered the record of appeal the rival submissions of the learned counsel and this is our take on this appeal.

The jurisdiction of the Environment and Land Court as set out in **Article 162(2)(b)** of the Constitution is to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Land in this case is defined by **Article 260** of the Constitution as the surface of the earth and the subsurface rock; any body of water on or under the surface; marine waters in territorial sea and exclusive economic zone; natural resources completely contained on or under the surface; and the air space above the surface. **Section 13** of the Environment and Land Court Act expounds on the jurisdiction of the court providing that the court shall have power to determine disputes:

> ***(a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***
>
> ***(b) relating to compulsory acquisition of land;***
>
> ***(c) relating to land administration and management;***
>
> ***(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***
>
> ***(e) any other dispute relating to environment and land.***

The issue as posed by the appellants before the High Court was based on the admission that the suit premises is still in the name of the deceased, and was therefore essentially a matter of who between the co-administrators and the beneficiaries may make decisions on its management, and whether the (majority) beneficiaries may take such decisions. This has more to do with the law of contract and the law of succession, than with the title to the suit premises, or an enforceable interest in land as would bring it

squarely within the jurisdiction of the Environment and Land Court. This Court's position on jurisdiction was well settled in the case of **Owners Of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd (1989) KLR where the Court of Appeal stated:-**

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment is holds the opinion that it is without jurisdiction".***

The learned Judge in this case stated at paragraph 10 of his ruling that ***"This court is set up by the Constitution for determining disputes relating to the environment, use and occupation of, and title to land. There is no dispute as to use, or occupation here. The title to the property was decided by the succession court at Nairobi which distributed the estate. The orders the applicant prayed for in the application dated 17th March 2014 cannot therefore be granted."*** In this decision, the court found that it lacked jurisdiction to determine the dispute.

Having found that the court did not have jurisdiction over this matter, it could not be vested with the jurisdiction to transfer the same to another court. See **Kagenyi vs Musiramo and Another [1968] E.A. 43, a decision of the High Court of Uganda which was quoted with approval by the Court of Appeal at Nairobi in the case of George C. Gichuru v Senior Private Kioko & another [2013] eKLR**. The learned Judge however cited his reason for the inability to transfer the suit as being the fact that the Nairobi Succession Cause No. 2051 of 2007 was finalized. The correct position is that as mentioned by the judge in paragraphs 8 – 10 of his ruling, the title to the suit premises is indisputably vested in the estate of the deceased. All decisions on the suit premises must be made by the joint administrators who must act together, and in the event that they do not, their recourse lies in the Succession Cause and not in the environment and land court.

In the premises, it would be inaccurate to state that the learned Judge determined finally the issues in dispute at the interlocutory stage, or that the ruling created uncertainty or a management vacuum regarding the person entitled to manage the suit premises. Confusion reigned long before the court delivered its ruling in which it found that it lacked the requisite jurisdiction to determine the issue. It is noted that there are numerous suits involving the vast estate of the deceased. A number of them appear to revolve around the suit premises. It would have been imprudent for the court, to admit this suit outside its jurisdiction only to add further to the confusion.

A comment may be made on the submissions by counsel for the respondents that the ownership of the suit premises had changed hands when each beneficiary was assigned a share of it in the certificate of confirmation of grant. There is on record a certificate of official search dated 7th September 2011 and a copy of the Certificate of Lease over the property both showing that the property is still registered in the name of the deceased. This is conclusive proof of ownership of the suit premises vesting in the estate. The beneficiaries' interest are yet to be enforced by registration although settled in the consent order before the succession court in Nairobi. On the strength of **Trouistik Union International & Another vs Mbeyu & Another (**supra**)** the court could not have exercised its jurisdiction with regard to any question of ownership, title or possession for the simple reason that the parties in the capacities they appeared before the court lacked locus.

Finally, the court in **Giella vs Cassman Brown** (supra) held that the discretion to grant an injunction should not be interfered with unless it is shown that it was not exercised judicially. An applicant for the grant of an injunction must show a prima facie case with a probability of success, demonstrate that unless it is granted, the applicant might suffer irreparable injury and in the event of doubt, the court will decide the application on the balance of convenience. In this particular case, the court expressed its inability to grant the orders sought for lack of jurisdiction. Again and as already explained above, the locus of the parties too was in question, thus there was no prima facie case. The loss likely to be suffered by the parties is quantifiable and may be accounted for between the 1st appellant and the 1st respondent. The

balance of convenience is in favor of the issues being determined within the succession cause and any other related pending litigation on the matter.

For all these reasons, we cannot fault the learned judge in his ruling the subject of this appeal. Accordingly the appeal is dismissed with costs to the respondents.

Dated and delivered at Malindi this 26th day of February, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR