



REPUBLIC OF KENYA



KENYA LAW
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Belsoi & another v Kenya Tourism Development Corporation & 2 others (Civil Case 04 of 2015) [2023] KEHC 1720 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1720 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL CASE 04 OF 2015
AN ONGERI, J
FEBRUARY 24, 2023**

BETWEEN

HENRY BELSOI 1ST PLAINTIFF

JAMES CHIRCHIR 2ND PLAINTIFF

AND

KENYA TOURISM DEVELOPMENT CORPORATION 1ST DEFENDANT

DAVY KOECH 2ND DEFENDANT

SOLOLO INVESTMENT LIMITED 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs in this case Henry Belsoi and James Chirchir (here after referred to as the 1st & 2nd Plaintiffs) sued Kenya Tourist Development Authority and another in the Plaint dated 5/2/2015.
2. The 1st and 2nd Plaintiffs filed this suit as Directors of Yasangwan Holdings Limited and also on their own behalf and on behalf of the Public since they alleged this matter is of great public interest.
3. The 1st and 2nd Plaintiffs withdrew the suit against the 2nd Defendant.
4. It alleges in the Plaint that the 1st Defendant is a body Corporate that was first established pursuant to Section 3 of the Kenya Tourist Development authority Act Cap 382 Laws of Kenya that came into effect on 11/9/1965.
5. The 3rd Defendant is a Limited Liability company incorporated pursuant to the Provisions of the *Companies Act*.
6. The genesis of the Action is the fraudulent sale of 12,000/= ordinary shares that the 1st Defendant held in Tea Hotel to the 2nd and 3rd Defendants jointly which transaction the 1st and 2nd Plaintiffs leant in the year 2013



7. The 1st and 2nd Plaintiffs are seeking the following remedies against the 1st and 3rd Defendants;
 - i. That the sale and transfer of 12,000 (60%) ordinary shares that the 1st Defendant held in Tea Hotel Limited to the 1st & 2nd Defendants be declared as null and void ab initio.
 - ii. Costs of this suit be borne by the Defendant.
 - iii. any other or further relief that this Honourable Court may deem fit to grant.
8. The Defendants entered appearance and filed a Defence denying the Plaintiff's claim.
9. The 1st Plaintiff testified as PW.1. He adopted his statements dated 5/2/2015 and further statement dated 18/9/2017 as his evidence in Chief.
10. The 1st Plaintiff stated as follows in the said statements.
11. He stated that he was one of the Directors of Yasangwan Holdings Limited a public company with 363 members.
12. That together with the 2 Plaintiff they filed the suit on fraud by the Defendants after learning towards the end of the year 2013 that Tea Hotel was sold in the year 1993 without an up-dated valuation despite the State Corporation Advisory Committee authorizing the 1st Defendant to sell its shares in Tea Hotel Limited subject to a fresh valuation and that even the Registrar of Companies had no evidence of how the shareholding changed from the 1st Defendant to the 3rd Defendant and that the said defendants have not produced any evidence to date.
13. The plaintiff stated that one Kipchumba Samuel Kipkato whom the 2nd Defendant claim was a Director/secretary of the 3rd Defendant has sworn an affidavit denying ever signing a Sale Agreement dated 22/9/2003 and that the said Agreement was done in furtherance of fraud committed by the Defendants as the Auditor-General (Corporation) stated that the Sale Agreement between the 1st Defendant and the 3rd Defendant was signed 2 years after the purported sale of shares had taken place.
14. The 1st plaintiff avers that together with one Kipchumba Samuel Kipkato, they made a report on 9/6/2014 and recorded a statement with the National Police Service at the Directorate of Criminal Investigation to investigate forgery made by the 2nd Defendant.
15. It was the 1st plaintiff's statement that before filling this suit he had lodged Kericho High Court Petition No.2 of 2014 and the 2nd Plaintiff had lodged Kericho High Court Petition No. 3 of 2014 seeking orders compelling the Defendants to provide documents supporting the disposal of 60% shares that the 1st Defendant held in Tea Hotel Limited to the 2nd and the 3rd Defendant and that though both petitions were not successful, the Defendants supplied documents confirming fraud and that they have since lodged an appeal and waiting for the Court to supply certified copies of proceedings to enable them complete the record of appeal and set the matter down for hearing.
16. The 1st Plaintiff avers that the suit is of great public interest and qualifies to be termed as public interest litigation.
17. The 1st Plaintiff urged that the 1st Defendant's statement be expunged from the court records for the reason that Pre-trial directions were already concluded and matter set up for hearing and that court's leave was not sought before the 1st Defendant filed its statements.
18. In cross-examination, PW.1 said the transaction took place in 1993. He learnt about it 20 years later in 2013.



19. He also said the Public Investment Report prepared a Report on the same and the Report is not signed.
20. PW.1 also said the sale took place on 22/9/1993. The transfer of shares was done on 2/2/2002 and the certificate was issued on 23/01/2001 before the transfer.
21. The 1st Plaintiff also said in cross-examination that he has not filed any CR.12 Form to show that he is a Director of Yasangwan Holdings Limited.
22. PW.1 said he reported this case to DCI in 2014 but no action has been taken.
23. PW.2 the 2nd Plaintiff James Kibet Chirchir also adopted his statement dated 5/2/2015 in which he stated that he is a shareholder, Director and the chairman of Yasangwan Holdings Limited.
24. The 2nd Plaintiff also said he associated himself with the sentiments of the 1st Plaintiff
25. The parties agreed to adopt the witness statements filed by the 1st and 3rd Defendants as their evidence in Chief together with their statements.
26. The statements by Moses Evans Ademba dated 23/2/2018 and that of Musa Kiptoo Koech dated 31/3/2015 were accordingly adopted with their documents.
27. The said statements in summary are as follows:-
28. The 1st Defendant through the statement of Moses Evans Ademba stated that the 1st Defendant sold its 60% shareholding in Tea Hotel Limited to the 3rd Defendant for Kshs. 15,000,000/= free from any encumbrance and that the 1st Defendant held 60% shares while Yasangwan Holdings Limited, which was majorly owned by people from Kericho Town held 40% shares in the said Tea Hotel Limited.
29. He stated that following repeated requests by Yasangwan Holdings Limited to buy the 1st Defendant out of Tea Hotel, the State Corporations Advisory Committee (SCAC) authorized the 1st Defendant to sell its shares to the Yasangwan Holdings Limited subject to the price being approved by SCAC and that after the said price was fixed, the 1st Defendant made a firm offer to the Yasangwan Holdings Limited but the said company made a conditional acceptance for the price to be negotiated downwards.
30. It was his statement that after the SCAC sought explanation from the 1st Defendant on the progress made on the sale of its shares, the 1st Defendant issued a 90 Days' notice to Yasangwan Holdings Limited to take up the offer and deposit a substantial amount, failure to which the offer made was to be revoked and Yasangwan Holdings Limited having failed to respond, the 1st Defendant sought from SCAC the authority to revoke its original offer to Yasangwan Holdings Limited and to sell its shares in Tea Hotel Limited to any other willing buyer.
31. He continued that the said request was approved by SCAC and the 1st Defendant received various enquiries from local groups who were interested in purchasing its shares the 3rd defendant being one of them, necessitating formal negotiation and after the valuation the 1st Defendant and the 3rd Defendant agreed to have the purchase price of the shares at Kshs. 15,000,000/=.
32. He further stated that the 3rd defendant paid a deposit of 10% after which the 1st Defendant forwarded to the 3rd Defendant a copy of the Hotel's Memorandum and Articles of Association, the Company Seal, and Minute Books and the balance of the purchase price was paid on or about 19/1/1997.
33. He explained that transfer of shares to the 3rd Defendant took a while to be finalized as the 1st Defendant needed the approval of the Auditor-General and once the said approval was obtained, the 1st Defendant forwarded the transfer forms duly signed and sealed together with the stamp duty form to the 3rd Defendant on 7/2/2001.



34. He asserted that the definite process was followed before, during and after the sale of 1st Defendants shares in Tea Hotel Limited and the Board of Tea Hotel Limited which the Yasangwan Holdings Limited is fully represented was kept abreast with the sale of the 1st Defendant's shares and that the sale was not carried out fraudulently.
35. The 3rd Defendant through the statement of Musa Kiptoo Koech associated itself with the statements of the 1st Defendant save that there was no formal agreement entered between the 3rd Defendant and the 1st Defendant and that the contract of sale was concluded by way of exchange of letters between the years 1991 to 2001.
36. He added that since the 3rd Defendant bought the 1st Defendant's shares, Tea Hotel Limited has been run by the directors of the two companies and the board meetings have been chaired by the members of Yasangwan Holdings Limited
37. The parties filed submissions as follows:-
38. The Plaintiffs submitted that the defendants having failed to call witnesses to court, their defence must fail as the claim raised in the defence was not substantiated hence the plaintiff's case turned out to be a case of formal proof. He cited the case of *Enya Akiba Micro Financing Limited v Ezekiel Chebi & 14 Others* [2013] eKLR, Nairobi Civil Case 644 of 2005.
39. It was the Plaintiffs' further submissions that the plaintiff proved their case on a balance of probability as the Plaintiffs witnesses attended court and gave credible evidence which was not controverted as the Defendants witnesses did not attend court.
40. The Plaintiffs contended that the 1st and the 3rd Defendant's statement of defence did not disclose any defence, that the 1st and the 3rd defendant had contradicted themselves in their defence and were therefore guilty of misjoinder of issues.
41. It was the Plaintiffs' submissions that they filed the suit in their capacity as individual Kenyan citizens on public interest and as wellbeing members/directors of Yasangwan Holdings Limited.
42. The 3rd Defendant submitted that upon the close of the Plaintiffs' case on 7/10/2021, parties filed a consent which dispensed with the attendance of the Defendants' witnesses and allowed for production of various Defendants' documents on record, that the Plaintiff had ingeniously tailored their submissions as if no consent existed on record and that contrary to the Plaintiffs contention, it was the Defendants evidence that was unchallenged since the Plaintiffs by signing the consent, elected not to cross-examine the Defendants' witnesses.
43. The 3rd Defendant asserted that the consent having been duly adopted by the court, the testimony and the evidence of the defendants were firmly on record and the same having not been subjected to cross-examination remained uncontroverted. He cited the case of *Moses Wanjala Lukoye V Benard Alfred Wekesa Sambu & 3 others* [2013] eKLR, Bungoma Election Petition 2 of 2013.
44. The 3rd Defendant submitted that the Plaintiff had not proved their case on a balance of probabilities as they failed to produce the makers of the documents hence several documents filed by the plaintiffs were not produced in evidence and that the suit was contra statute and illegal as the Plaintiff had approached the Court directly without first appealing to the State Corporations Appeal Tribunal established under Section 22 of the *State Corporations Act*, and therefore the court lacked jurisdiction to entertain the matter. He cited the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, Nairobi Civil Application NAI 92 of 1992 (NAI 40/92 UR).



45. It was the 3rd Defendants submissions that the Plaintiffs lacked the locus standi to bring the suit against the Defendants as no evidence was placed on record to show the directorship/shareholding of Yasangwan Holdings Limited and that it was not known who among the alleged 363 members of Yasangwan Holdings Limited together with the Plaintiffs were either minority or majority shareholders as the Plaintiff's only indicated that they were members of the public, and that such is unknown in company law.
46. The 3rd Defendant maintained that the suit was time barred the same having been filed more than 23 years after the said transfer of shares was duly undertaken.
47. The 3rd Defendant prayed that the Plaintiffs suit be dismissed with costs since it was not a public interest litigation.
48. I have considered the evidence on record together with submissions filed by the parties.
49. the issues for determination are as follows:-
- i. Whether the Plaintiffs have locus standi to file this suit.
 - ii. Whether this case qualifies to be classified as Public Interest Litigation designed to serve the purpose of protecting rights of the public at large
 - iii. Whether this suit is statute time barred.
 - iv. Whether the sale and transfer of 12,000 (60%) ordinary shares should be nullified.
 - v. Who bears the costs of this suit?
50. On the issue as to whether the Plaintiffs have locus standi, the Plaintiffs are saying they have filed this suit as Directors of Yasangwan Holdings which holds 40% of Tea Hotel Limited.
51. However, I find that the Plaintiffs did not produce any evidence that they are Directors of Yasangwan Holdings or whether they had authority to file this suit.
52. In *Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others* [2002] eKLR , Mombasa civ case 613 of 01 while canvassing the issue of Locus Standi the court stated that:
- “...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general.”
53. On the issue as to whether this case qualifies to be classified as Public Interest Litigation designed to serve the purpose of protecting rights of the public at large, I find that the Plaintiffs are claiming this is a Public Litigation Suit but the same is filed as a Civil Suit.
54. In *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* [2017] eKLR, Nairobi Petition 429 of 2017, the court clarifying on public interest litigation observed as follows:
- “ 60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the



petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. *The constitution* envisages the judiciary as "a bastion of rights and justice..."

63. The question is whether the proceedings before me are frivolous or vexatious bearing in mind that it is the duty of the court to see whether the petitioner who approaches the court has a bona fide intention and not a motive for personal gain, private profit or political or other oblique considerations."
55. On the issue as to whether this suit is statute time barred, I find that the Plaintiffs said the sale took place in 1993 and they discovered the fraud 20 years later in 2013.
56. I find that the suit is statute time barred the same having been filed more than 20 years after the said transfer of shares was duly undertaken.
57. I find that Equity does not assist the indolent but it comes to the aid of the vigilant.
58. In *Amina Karama v Njagi Gachangua & 3 others* [2020] eKLR, Embu Environment and Land Case 09 of 2020, the court observed as follows:
- It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi [2014] eKLR the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. (31st Edition) at page 99:
- "The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing."
59. On the issue as to whether the sale and transfer of 12,000 (60%) of Ordinary Shares should be nullified, I find that the answer is in the negative because of the reasons stated above.
60. I find that the Plaintiffs have not established that they are Directors of Yasangwan Holdings Limited.
61. I also find that Limited Companies are creatures of the *Companies Act* and they supposed to conduct their affairs in accordance with the said Act.
62. The plaintiffs said that they are the Directors of Yasangwan Holdings Limited, a public company with 363 members.
63. A limited company is a legal entity that can sue and be sued in its own name and the two Plaintiffs had no business suing in their own names.
64. I also find that the Doctrine of laches has caught up with this suit.
65. I dismiss the suit and direct that each party bears its own costs of this suit.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 24TH DAY OF FEBRUARY 2023.

A. N. ONGERI

JUDGE

