



Wainaina & another v Midlands Limited & 3 others; Primestar Holding Limited & another (Interested Parties) (Commercial Suit 93 of 2016) [2023] KEHC 26193 (KLR) (Commercial and Tax) (30 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT 93 OF 2016
JWW MONG'ARE, J
NOVEMBER 30, 2023**

BETWEEN

JUNGHAE WAINAINA 1ST PLAINTIFF

JUANCO GROUP LIMITED 2ND PLAINTIFF

AND

MIDLANDS LIMITED 1ST DEFENDANT

AFRICAN AGRICULTURAL CAPITAL FUND LLC 2ND DEFENDANT

GITHIMA LIMITED 3RD DEFENDANT

PRIMESTAR HOLDING LIMITED 4TH DEFENDANT

AND

PRIMESTAR HOLDING LIMITED INTERESTED PARTY

EQUITY BANK (KENYA) LIMITED INTERESTED PARTY

RULING

1. The 1st Plaintiff filed a Notice of Motion application dated 7th June 2022, brought under Order 1 Rule 1 (a) (b) Rule 3(1), (3) and Section 3A of the Civil Procedure Rules seeking the following orders:-
 - i. Spent
 - ii. An order to enjoin Equity Bank (K) Limited as the 2nd Interested Party to the suit.



- iii. An Interim Injunction restraining the 2nd Interested Party from selling by way of public auction or private treaty Land reference numbers Nyandarua/Njabini/6092, Nyandarua/Njabini/6091, Nyandarua/Njabini/6090, Nyandarua/Njabini/6089, Nyandarua/Njabini/6088, and Nyandarua/Njabini 6087 pending the hearing and determination of the application as well as the suit.
 - iv. An order of injunction restraining the 1st Defendant, 2nd Defendant, 4th Defendant 1st Interested Party by themselves, their agents and/or employees from disposing by way of sale or otherwise the assets, and shares of the 1st Defendant pending the hearing and determination of the suit.
2. The application is supported by the annexed affidavit of Junghae Wainaina the 1st Plaintiff sworn on 7th June 2022.
 3. A brief background to the dispute herein, the 1st Defendant, being a limited liability company, obtained a loan from the 2nd Defendant which loan was guaranteed by the Plaintiffs and 3rd Defendants respectively.
 4. The 1st Defendant defaulted in repaying the loan and failed to communicate with the guarantors. The assets of the 1st Defendant are in danger of being disposed off, by Equity Bank (K) Limited, and there is a need to preserve the said parcel of land which is the substratum of the suit.
 5. The 1st Plaintiff avers he holds 9,092,919 shares in the 1st Defendant Company. it is the 1st Plaintiff's case that the 1st Defendant has acted in a reckless manner of failing to service the loan facility concealing default notices to the plaintiffs who are guarantors and fraudulently discharging the 3rd Defendant as a guarantor in order to facilitate the 3rd Defendant take over the 1st Defendant. The Director of the proposed 2nd Interested Party is the beneficial owner of the 3rd Defendant who wants to take over the 1st Defendant. the default to pay the loan was deliberate, intentional and a wider scheme to have the 3rd Defendant take over by the 2nd Defendant.
 6. In opposing the 1st Plaintiff's application, the 2nd Interested Party filed a Notice of Preliminary Objection and grounds of Objection both dated 15th June 2022 citing the following grounds:-
 - i. The Plaintiff/Applicant lacks the requisite locus standi to file and/or bring the instant application which can only be done through a derivative action and/or claim on behalf of the 1st Defendant.
 - ii. The 1st Defendant is the only rightful applicant to bring any action against the actions whatsoever against the proposed 2nd Interested Party with regards to the intended auction of the securities in the exercise of the proposed 2nd Interested Party's statutory power of sale.
 - iii. The order of injunction that the 1st Plaintiff is seeking cannot be legally issued given there is no auction of the securities slated for 22nd June 2022 as alleged.
 - iv. The proposed 2nd Interested Party issued to the 1st Defendant the ninety (90) day's statutory notice pursuant to Section 90 of the Land Act on the 3rd of January 2022 and the 40 days of statutory notices pursuant to Section 96 (2) (3) of the Land Act on 13th May 2022 whereas the 40 days' statutory notices lapsed on 22nd June 2022 the 2nd Interested Party is yet to issue the 45 days auctioneer's notice.
 - v. Orders cannot therefore be issued in vain.



- vi. The application is incompetent, misconceived, mischievous, frivolous and an abuse of the court process. Reasons whereof the proposed 2nd Interested Party urged the court to dismiss the application.
7. Additionally, the 2nd proposed Interested Party, Equity Bank Limited, through its replying affidavit sworn by John Njenga, on 30th September 2022 argued that the application was devoid of merit, frivolous, vexatious and unfounded in law and ought to be dismissed.
8. The Proposed Interested Party took the position that the 1st Defendant, Midlands Limited, obtained a loan from the 2nd proposed Interested Party for a sum of Kshs.51,389,782/- and the same was secured by a legal charge dated 20th September 2007 and a further charge of 3rd November 2010 created over properties L.R NOS. NYANDARUA/NJABINI/6092, NYANDARUA/NJABINI/6091, NYANDARUA/NJABINI/6090, NYANDARUA/NJABINI/6089, NYANDARUA/NJABINI/6088, and NYANDARUA/NJABINI/6087.
9. There was default in servicing the loans by the 1st Defendant and that it had, in accordance with law, moved to issue the requisite statutory notices but was yet to issue the final 45-day notice of redemption through its appointed agents, the auctioneers. And hence this application was filed prematurely as there was no pending sale by public auction over the charged properties.
10. In addition, the proposed 2nd Interested Party argued that it was not interested in being invited internal wrangles between shareholders of the 1st Defendant and wondered whether the Applicant had locus to bring the application seeing that he had not sought leave of the court to bring a derivative suit on behalf of the company, 1st Defendant herein.
11. By way of response to the Replying Affidavit by the proposed 2nd Interested Party, the 1st Plaintiff, Junghae Wainaina, argued in his further affidavit sworn on 26th April 2023, as at the time the 1st Defendant took the loan leading to the dispute herein he was a majority shareholder he had locus to bring the instant application and that the proposed 2nd Interested Party is an important party to the suit as the intended crystallization of the legal charge over the suit property will amount to foreclosure of the 1st Defendant.

Analysis And Determination

12. I have carefully considered the application, the affidavits both in support and opposition, the annexures as well as the submissions filed and note that the following issues emerge for determination:
 - i. Whether the Applicant has the locus standi to bring the current application.
 - ii. Whether the proposed 2nd Interested Party ought to be enjoined as a party.
 - iii. Whether the Applicant has met the threshold of granting the temporary injunction.
 - iv. whether the Applicant has the locus standi to bring the current application.
13. Black's Law Dictionary 9th Edition as "the right to bring an action or to be heard in a given forum." The 1st Plaintiff/Applicant argues that it has the locus to bring the suit and the application herein to enjoin the Proposed Interested Party. The Applicant has urged the court to be guided by the decisions



of the court in the case of Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another (2016)eKLR, where the court held that:-

“...In Kenya the court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population”.

The Applicant further cited the decision in Khelef Khalifa El-Busaidy vs, Commissioner of Lands & 2 others (2002)eKLR where the court held 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 an interest must be above that of other members of the public in general.”

The Plaintiff/Applicant argues that in seeking to enjoin the proposed Interested Party to the suit, he seeks to preserve the status quo of the charged properties which risk to be disposed off by the proposed 2nd Interested Party, who has already kicked off the statutory sale under its rights as chargee. The Applicant argues it has locus standi to bring the suit as it has done, having been a majority shareholder ousted by sale of its shares to redeem the loan of the 1st Defendant has entrenched rights that it seeks to protect.

14. In opposing the application, the proposed 2nd Interested Party filed a Preliminary Objection is that the Applicant is a minority shareholder in the 1st Defendant and thus ought to have brought a derivative suit against the 1st Defendant. It is also argued that an application for joinder ought to have been brought by the 1st Defendant and not the 1st Plaintiff.
15. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, where Law J A stated that; “So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”. In the instant application the issue of locus standi as raised by the proposed 2nd Interested Party falls within the ambit of a Preliminary Objection since determining the issue of locus standi may dispose of the instant application. The proposed 2nd Interested Party argues that the application as filed is frivolous, incompetent and vexatious as the Applicant was not privy to the loan contract entered into between the 1st Defendant and the proposed 2nd Interested Party.
16. Locus standi is a point of law which is paramount to the court and ought to be determined first. In Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that;-“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.
17. Going by the above authority locus standi can be taken to refer to the right of a party to appear in court and be heard and that if a party is deemed not to have locus standi, a claim cannot stand. The issue in dispute is the dissolution of the 1st Defendant and the crystallization of its assets in favour of the loan advanced to it by the proposed 2nd Interested Party. The proposed 2nd Interested Party avers that it amounts to the internal wrangle of the company which it has no interest in and it ought not to be curtailed to meet its obligation of the statutory sale. It also argues that the Applicant ought to obtain the leave of the court before bringing the current application as the 1st Defendant is a separate legal entity from the Applicant and capable of being sued and suing on its own behalf.
18. In bringing this application, the Applicant claims some to have beneficial interest in the 1st Defendant’s suit property. He argues that he was a majority director but has been ousted as the majority shareholder



due to the non-repayment of the loan by the 1st Defendant as he guaranteed the loan using his shares. He has sued the 1st Defendant and seeks to enjoin the proposed 2nd Interested Party “the chargee” who also has some interest in the suit property.

19. A glance of the pleadings suggests the Applicant has sued the Defendants based on the manner in which the loan repayment was conducted, the Applicant has not brought the current application on behalf of the 1st Defendant but on its own behalf and seeks to enjoin the proposed Interested Party who is a necessary party to the suit and who might be affected by the outcome of the court decision. The Applicant having been a director of the 1st Defendant cannot be said to be unaware of the contract between the 1st Defendant and the proposed 2nd Interested Party.
20. In the circumstances the court finds the Applicant has established that he some beneficial interest in the suit premises and therefore has the locus standi to bring the current application before the court.

Whether The Proposed 2nd Interested Party Ought To Be Enjoined As A Party

21. In the *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR the court held that:-

“[An] Interested Party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

22. Further the Black’s Law Dictionary, 9th Edition defines a “Necessary Party” as being “A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings”
23. This court finds the issue in dispute being suit property of the 1st Defendant which the proposed 2nd Interested Party has kicked off the disposal of the same by meeting its obligations of issuing the statutory notices. It is my considered view the proposed 2nd Interested Party has a legal interest in the suit property and as such may be affected by the outcome of this suit. On the other hand, if the proposed 2nd Interested Party is not enjoined to the suit I do agree with the Applicant that it may proceed to dispose of the suit property, if not restrained by the court, as evident that the process is underway which will defeat the substratum of the suit.
24. In the circumstances I am satisfied that the Applicant has made out a good case to enjoin the proposed 2nd Interested Party in the suit herein.

Whether The Applicant Is Entitled To The Orders Sought.

25. The Applicant has sought as part of his prayers an order of injunction to restrain the proposed 2nd Interested Party from disposing off the charged properties enumerated herein before and which are the property of the 1st Defendant. The Applicant has argued that it has met the threshold in *Giella vs Cassman Brown & Co. Ltd* (1973) where a party seeking an order of injunction is required to establish “a prima facie case, demonstrate injury irreparable if the temporary injunction is not granted, and an ally of doubt by showing that the balance of convenience is in his favour.”



26. In the case of *Showind Industries v Guardian Bank Limited & Another* (2002) 1 EA 284 the Learned Judge stated as follows:-

“... an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant’s conduct does not meet the approval of the Court of equity or his equity has been defeated by laches”

27. In the instant case the applicant has demonstrated that the suit property is in the process of being disposed off by the proposed 2nd Interested Party, with only the Redemption Notice by the auctioneer remaining to be served on the 1st Defendant as the proposed 2nd Interested Party has complied with the issuance of the other statutory notices. The Applicant further argued that the process is fraught with fraud and material concealment by the 1st and 3rd Defendants and the proposed 2nd Interested party. It therefore follows that indeed the Applicant has demonstrated a prima facie case.

28. Secondly and flowing from the tenets in *Giella*(supra), the Applicant has demonstrated an irreparable injury will be suffered if the injunction is not issued, the applicant avers that the 1st Defendant’s suit property is in the process of being crystalized and it will be greatly prejudiced by the auction and sale of the suit properties which would defeat the substratum of the suit. Having lost his shares as a majority shareholder and been ousted from the position of control of the 1st Defendant, the 1st Plaintiff has also demonstrated that a sale of the suit premises being, Land reference numbers; Nyandarua/Njabini 6092, Nyandarua/Njabini 6091, Nyandarua/Njabini 6090, Nyandarua/Njabini 6089, Nyandarua/Njabini 6088, and Nyandarua/Njabini 6087 will occasion him great prejudice and anguish as he has already lost through the actions of the defendants.

29. From the above discussion it is the finding of this court that the 1st Plaintiff application dated 7th June 2022 is merited. The same is allowed as follows:-

- i. The proposed 2nd Interested Party is enjoined as a Defendant.
- ii. That pending the hearing and determination of the suit, an order of interim injunction be and is hereby issued restraining the 2nd Interested Party from selling by way of public auction or private treaty Land reference numbers Nyandarua/Njabini 6092, Nyandarua/Njabini 6091, Nyandarua/Njabini 6090, Nyandarua/Njabini 6089, Nyandarua/Njabini 6088, and Nyandarua/Njabini 6087
- iii. That pending the hearing and determination of this suit, an order of temporary injunction be and is hereby issued restraining the 1st Defendant, 2nd Defendant, 4th Defendant 1st Interested Party by themselves, their agents and/or employees from disposing by way of sale or otherwise the assets, and shares of the 1st Defendant pending the hearing and determination of the suit.
- iv. The costs of this application will be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023

J. W. W. MONG’ARE
JUDGE

In the Presence of:-



Maina for the 1st Plaintiff.

Mr. Maina holding brief for Mr. Gathu for the 2nd Plaintiff.

Kahora for the 1st Defendant.

Mbayi for the 2nd Proposed Interested Party.

