



REPUBLIC OF KENYA



**Matumbo Company Limited v Kihara & another (Civil Suit 37 of 2013)
[2022] KEHC 15016 (KLR) (Civ) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 15016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 37 OF 2013

CW MEOLI, J

OCTOBER 28, 2022

BETWEEN

MATUMBO COMPANY LIMITED PLAINTIFF

AND

MARY WAHU KIHARA 1ST DEFENDANT

VERONICA NYAMBURA 2ND DEFENDANT

RULING

1. Mary Wahu Kihara (hereafter the applicant) filed a motion dated July 16, 2021 seeking among others that the entire suit herein be struck out with costs for want of jurisdiction and or locus standi. The motion is expressed to be brought under section 1A, 1B & 3A of the *Civil Procedure Act* and order 2 rule 15(c) & (d) of the *Civil Procedure Rules*. The grounds on the face of the motion are amplified in the supporting affidavit of the applicant.
2. She asserts that Bernard Kanyi who filed the suit is not a director of the Matumbo Company Limited (hereafter the respondent) and thus had no authority to bring the suit as alleged in his verifying affidavit filed alongside the plaint. That the court lacks jurisdiction to hear and determine the matter in view of the fact that Nairobi High Court Succession Cause No 2636 of 2006 and Nairobi High Court Succession Cause No 1355 of 2012 conclusively dealt with matters concerning the property known as LR No 209/138/164 (hereafter the suit property) and that disputes relating to the suit property fall within the purview of the Environment and Land Court. She further elaborates that the suit relates to the matter of the estate of the James Kinuthia Kinyanjui (deceased) who was the registered proprietor of suit property and whose succession was determined vide Succession Cause No 2636 of 2006; that she is neither an administrator nor a beneficiary to the estate of the late James Kinuthia Kinyanjui (hereafter the deceased) and has therefore been wrongly sued as a party.



3. She further deposes that she and James Kinuthia Njenga hold by transmission, and in trust title to the suit property for the benefit of Brian Kihara Njenga and Kennedy Chege Njenga pursuant to grant in Succession Cause No 2636 of 2006 and that the respondent's alleged partnership (if any) stood dissolved by operation of the law upon the demise of James Kinuthia Kinyanjui and therefore cannot be the foundation of any reasonable cause of action against her. She contends that on account of the foregoing grounds the suit ought to be struck out and complains that the respondent has for the last eight (8) years irregularly and illegally encumbered the collection of rent from the suit property. In conclusion she asserts that it is in the interest of justice that the motion be allowed as prayed.
4. The respondent opposes the motion through grounds of opposition dated August 5, 2021, a replying affidavit and supplementary affidavit both dated October 14, 2021. The respondent views the motion as incompetent and the affidavit in support is fatally defective and offends mandatory provisions of the law. Further that, the applicant has used guile and unconventional means to derail the hearing of the matter; that a limited liability company enjoys perpetual succession and therefore the objection is baseless and misconceived; that the honorable court has jurisdiction this being a civil dispute concerning a partnership agreement between the parties and ; that the motion has been brought after undue delay. It is further stated in the grounds that the application is mischievous, a delaying tactic and an abuse of the court process; that the application is brought under the wrong provisions of the law and is not properly before the court and; that it is devoid of grounds that would warrant the orders sought being issued.
5. The affidavit in reply to the motion is deposed by Bernard Kanyi who describes himself as a manager of the respondent company well versed with its day-to-day affairs. He asserts that the motion is misguided, as the suit relates to a dispute between partners concerning partnership ratios, enforcement of rights and how partnerships should be governed including dissolution thereof. He states that the respondent has the necessary locus standi to institute the instant proceedings as the entity which by an agreement dated May 16, 1998 entered into a partnership with the deceased which partnership is the subject of the suit. He disputes that the applicant has been prevented from collecting her rent shares. Finally, he asserts that there is no justification in law and equity to warrant the drastic orders being sought by the applicant, and that at worst, the suit can be transferred to another division of the High Court. He urged the court to dismiss the motion.
6. In his supplementary affidavit he reiterates his position as a director and manager of the respondent drawing authority from letters of administration and confirmed grant showing the distribution of the shareholding interest of the deceased in the respondent. That contrary to the applicant's averments, the legal representatives of the estate of the deceased shareholder-director obtained letters of administration and that the respondent company had passed a resolution to institute this suit against the applicant on account of her interference.
7. The motions were canvassed by way of written submissions. Counsel for the applicant argued that the subject matter relates to LR No 209/138/164 – a property which was registered in the name of deceased whose estate has been conclusively dealt with in Nairobi High Court Succession Cause No 2636 of 2006. That the respondent did not challenge the grant nor did it enjoin itself in the said succession cause in relation to the suit property and thus now belatedly seeks to assert proprietary rights. It was further submitted that the beneficiary of the suit property was the applicant's husband (also deceased) and matters relating to his interests in relation to the suit property were subsequently dealt with in Nairobi High Court Succession Cause No 1355 of 2012. Counsel thus argued on account of the foregoing the court lacks jurisdiction to hear and determine the instant suit as a court of competent jurisdiction had conclusively dealt with the suit property.



8. It was further asserted that even if a competent court had not dealt with the suit property the subject matter falls within the purview of the Environment and Land Court as such this court lacks jurisdiction to entertain the suit. Counsel placed reliance on the of cited decision of *Owner of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd (1989)* to assert the foregoing.
9. Concerning locus standi to institute the instant suit while calling to aid the decisions in HCCC No 45 of 2012 *Kenya Commercial Bank Ltd v Stage Coach Management Ltd*, HCCC No 588 of 2011 – *Bactlab Ltd v Bactlab (EA) Ltd & Others* and restating the provisions of order 4 rule 1(4) & (6) it was argued that Bernard Kanyi is not a director of the respondent and has no authority to plead or depose to the verifying affidavit. The court was urged to allow the motion as prayed.
10. Counsel for the respondent asserted that the suit property is an asset of a partnership between the deceased and the respondent pursuant to a partnership agreement whose terms provide for dissolution of the partnership. That the applicant is estopped from denying the existence of a partnership despite having benefitted from the proceeds of the said partnership. It was submitted that the crux of the suit being on partnership, the court is possessed of jurisdiction to entertain the suit. Addressing the court on the question of locus standi counsel argued that the applicant had failed to discharge the burden of proof.
11. Citing the documents tendered before the court, counsel asserted that Bernard Kanyi is not only a director of the respondent but further that the respondent's directors had duly passed a resolution authorizing the filing of the suit against the applicant for intermeddling with the suit property and tenants thereof. In conclusion it was asserted that the motion lacks merit but that if the court were to make a finding that it lacks jurisdiction to handle the matter, it ought to transfer the suit to the relevant court. The court was urged to dismiss the motion with costs.
12. The court has considered the motion and rival affidavit material. In addition to considering the parties' respective submissions, the court has keenly perused the pleadings herein. Consequently, it is the court's considered view that this motion turns on ground (a)(ii) on the face of the motion. Other issues, key among them the locus standi of Bernard Kanyi or whether the respondent had authorized the filing of the suit will have to await determination by the proper court. For now, the court will deal with the issue of jurisdiction.
13. The respondent's case as encapsulated in their plaint dated February 14, 2013 and reiterated in various subsequent affidavits reveals that the subject matter in this suit is the landed property described as LR No 209/138/164. This property was registered in the name of the deceased at all material times in his lifetime and at his death and the respondent has come to court claiming part ownership of the property while seeking to enforce its asserted proprietary rights thereto pursuant to an alleged partnership agreement with the said deceased.
14. There is no dispute that the suit property is or was always leased to tenants and that since the demise of the deceased, the respondent and or the partnership had been collecting rents from the said tenants, which arrangement the applicant is opposed to. On her part, she asserts title to the whole property as a trustee for the beneficiaries Brian Kihara Njenga and Kennedy Chege Kihara under a confirmed grant in respect of the estate of her deceased husband Nicholas Njenga Kinuthia the son of the deceased upon whom the suit property devolved under the will of the deceased. There is no dispute that the succession causes in respect of the two deceased persons have been concluded, the respective grants duly confirmed, and transmission effected.
15. Thus, in the court's assessment, this dispute is primarily one relating to title to immovable property, regardless of the basis upon which the disputants stake their respective claims. In other words, the twin



questions relating to the alleged ownership, namely, via partnership or title by transmission are only the means by which the parties assert to have acquired title or respective proprietary interest in the suit property. The predominant issue at the heart of the dispute is therefore ownership of the landed property.

16. Superior courts have emphasized on countless occasions that jurisdiction is everything, and without it the court can do no more than down its tools. See *Owners of the Motor Vessel M V Lillian "S" v Caltex Oil (K) Limited [1989] KLR 1*. The jurisdiction of the Environment and Land Court is spelt out in article 162 (2) and (3) of the *Constitution* as well as section 13 of the *Environment and Land Court Act*. Subsection 2(a) of the latter provision vests the jurisdiction to hear disputes relating inter alia to title to land in the Environment and Land Court.
17. And while it is true that in this suit the dominant issue is title to land, questions respecting the respondent's asserted partnership and the defendant's rival claim based on transmission will necessarily come into play. These matters though intertwined with the actual dominant dispute cannot, without more take away the jurisdiction of the Land and Environment Court. In *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR* the Court of Appeal applied the test of the dominant issue in determining which court between the Environment and Land Court and the High Court had the jurisdiction to entertain a dispute arising from a charge executed in favour of a bank. The court stated inter alia that:

“In *Paramount Bank Limited v Vaqvi Syed Qamara & another [2017] eKLR*, this court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under section 12 of the *Employment and Labour Relations Court Act*, the court could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.” (Emphasis added).

18. Similarly in this case, the Environment and Land Court in determining the dominant issue of title to the suit property could entertain all the aspects relating thereto. In the circumstances, the court is persuaded that the arguments advanced by the applicant have merit. However, considering the apparent hybrid nature of the dispute, the court is not persuaded that the remedy lies in taking the draconian step of striking out the suit as prayed in the motion. Instead, the court will order that this suit be transferred to the Environment and Land Court at Nairobi for hearing and determination. Nonetheless, the applicant is awarded the costs of the motion.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH DAY OF OCTOBER, 2022.

**C MEOLI
JUDGE**



In the presence of:

For the applicant: Mr Njugi

For the respondent: Ms Kerubo h/b for Mr Makori

C/A: Carol

