



Otieno (Suing as the Legal Administrator of the Estate of Gilbert Otieno Apondu Deceased) v Omuga (Environment & Land Case 006 of 2024) [2025] KEELC 1482 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 006 OF 2024**

**AE DENA, J
MARCH 20, 2025**

BETWEEN

BRIAN OTIENO OTIENO (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF GILBERT OTIENO APONDU DECEASED) THE DIRECTOR HOTEL SAVANA LTD PLAINTIFF

AND

CONCELLIA AOKO OMUGA DEFENDANT

RULING

1. This suit was commenced by way of amended Plaintiff filed on 17th May 2024. It is averred that the suit property is registered in the name of Hotel Savana Ltd. That the Plaintiff is the son of Gilbert Otieno Apondu (deceased) the registered owner of the hotel. That the Defendant following the death of the deceased entered the suit property in 2017 and erected some structures without the consent of the Plaintiff who is the administrator of the estate of the deceased. The Defendant has continued to carry out business therein contrary to the provisions of section 45 of the *Law of Succession Act* since no succession cause to the deceased estate had been completed or even commenced. The Plaintiff prays for an eviction order for this occupancy against the Defendant who has denied him and the dependants of the deceased proper use of their land the suit property.

Notice of Preliminary

2. The Defendant filed a Notice of Preliminary objection dated 20/05/2024 on the following summary grounds:-
 1. The official search filed by the Plaintiff indicates the suit property was registered in the name of Savana Limited on 16/05/1996 and which is a legal entity independent from its shareholders, directors, employees and agents



2. Based on the certificate of incorporation dated 26/03/1993 the initial subscribers to the Memorandum and Articles of Association were Gilbert Otieno and Florence Sunday Ogola Apondu
 3. That the Company is not a party to this suit and even if the Plaintiff is related to any of the shareholders and or directors he still cannot institute and or maintain this suit in his own name as the company is an independent legal entity with powers to own property sue and be sued in its own name
 4. The Plaintiff is a busy body with no capacity to file or maintain this suit.
3. This ruling is therefore the subject of the preliminary objection herein. The preliminary objection was canvassed by way of written submissions.

Defendants Submissions

4. The Defendant submissions are dated 7/2/2025 and were filed on even date. The Defendants cite the case of Salomon v Salomon & Co. Limited to buttress its contention that a company is a legal person separate from its directors. The court is also referred to the rule in Foss v Harbottle [1843] 67 ER 189,[1843]2 Hare 461 that whenever a wrong is committed against a company, it is for the company to bring proceedings against the wrong doer to remedy the wrong and not a shareholder or director. The court is further referred to the Court of Appeal decision in Civil Appeal No. 3 of 2003 Sultan Hasham Lalji & 2 Others v Ahmed Hasham Lalji & 4 Others [2014]eKLR which applied the two principles. It is submitted that the Plaintiff is a complete stranger to the proprietor of the suit property. The Defendant prays that the suit is struck out with costs.

Plaintiffs Submission

5. The Plaintiffs' submissions are dated 25/02/25. It is submitted that preliminary objection is not properly raised since no particular point of law or section of the Civil Procedure Rules has been cited as the substratum of the objection. On the Plaintiffs capacity to institute these proceedings it is stated the Plaintiff is the son of the deceased who left behind a company, which company has assets including the suit property to which he and the dependants are entitled to yet they cannot access its income. That the plaint was amended on 18/052024 substituting the Plaintiff as suing on behalf of Gilbert Apondu the Director of the Amended Plaintiff company. The Hotel Savana Ltd is now the Plaintiff. That the amended Plaint predated the preliminary objection by 3 days. It is submitted that the suit is properly before the court.
6. The court is invited to consider substantial justice since the Plaintiff filed the suit in person but amended it in his own capacity and directing further amendments to the pleadings if need be. Counsel for the Plaintiff was appointed after the fact and that land disputes are known to be sensitive.

Analysis And Determination

7. The court has considered the preliminary objection, the submissions in support and also in response thereto. Three issues arise for determination namely
 - a. Whether the preliminary objection is properly raised?
 - b. If the answer to a) above is in the affirmative whether the preliminary objection is merited
 - c. Whether amendment to the plaint cures the defect in the pleadings



8. In the case of *Nitin Properties Ltd v Singh Kalsi & Another* [1995] eKLR a preliminary objection was defined as an objection that raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It was stated that a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 it was defined to mean an objection that consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. These could cover inter alia jurisdiction and limitation.
9. The original plaint commencing this suit states that the registered proprietor of the suit property is Hotel Savana Limited and which is a Limited Liability Company. The Plaintiff avers at paragraph 4 that he is the son of Gilbert Otieno Apondu who is the registered owner of the said Hotel Savana. The Plaintiff is also suing as the Legal administrator of the deceased. These facts are not disputed. The preliminary objection is that only Hotel Savana Limited can institute suit to recover its land being a company that can sue and be sued in its own name. There is nothing for the court to ascertain the details coming from the Plaintiff. This issue in my view can dispose of the suit at this stage.
10. It is therefore this court's finding that the preliminary objection has been properly raised.
11. Having answered the first issue in the affirmative, I must now consider whether the preliminary objection is merited.
12. It is trite that directors are distinct and separate legal persons from the company as enunciated in the case of *Salomon versus Salomon & Co Ltd* [1986] UKHL [1987] AC 22 and *Macaura versus Northern Assurance Co Ltd & Others* [1925] ALL ER 51. The principle established in the above cases still holds good and in Kenya courts have also not shied from applying this principle as has been demonstrated in *Sultan Hasham Lalji & 2 Others v Ahmed Hasham Lalji & 4 Others* (supra) cited by the Plaintiff. Also see the Court of Appeal in *Victor Mabachi & Another v Nurtun Bates Limited* [2013] eKLR.
13. Applying the above case law to the circumstances of this case, the suit ought to have been commenced by Savana Hotel Limited as the registered proprietor of the suit property.
14. But I also think the question that emerges from the Plaintiff's submissions is whether the preliminary objection would still hold water in view of the amendment of the plaint which were ostensibly made before the objection was raised. In other words, did the amendment cure the above defect?
15. I have looked at the Amended Plaint filed on 17/05/2024. The original pleading is titled thus; -
 Brian Otieno Otieno (Suing as the legal administrator of the estate of Gilbert Otieno Apondu deceased)
 Plaintiff
 The Amended Plaint is titled; -
 Brian Otieno Otieno (Suing as the legal administrator of the estate of Gilbert Otieno Apondu deceased)
 the Director Hotel Savana Ltd.....plaintiff
16. Guided by the authorities cited hereinbefore on the legal position as enunciated in the case of *Salomon v Salomon* supra, the above amendment cannot help much. Why do I say so? This is for the reason that the Plaintiff still remains Brian Otieno suing as administrator of his father's estate who is a Director of Hotel Savana. In other words, I see a director still instituting this suit on behalf of the Hotel. It is not Hotel Savana Limited suing as the Plaintiff.
17. In any event it is my view that the failure to sue in the name of the Hotel goes to the root of this suit and cannot be infused with life by an amendment. This is not a technicality I would look at in favor of



substantive justice as envisaged under articles 159 of *the Constitution*. The fact that land disputes are sensitive is not a good enough reason either to consider in the circumstances, neither is the fact that the suit was filed in person.

18. The upshot of the foregoing is that; -

1. The suit is hereby struck out.
2. Costs ordinarily follow the event. However, it is also discretionary. In view of the order striking out the suit, there is still an opportunity to file a fresh suit which will cost money. To enhance access to justice let each party bear its own costs.

DELIVERED AND DATED AT SIAYA THIS 20TH DAY OF MARCH 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

20/03/2025

Ruling delivered virtually through Microsoft teams video Conferencing Platform in the presence of:

Mr. Ochido for the Plaintiff

Mr. Omuga for the Defendant

Court Assistant: Ishmael Orwa

