



**Warui & 12 others v Nduhiu & 3 others (Environment & Land Case E011 of 2021) [2023] KEELC 18968 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18968 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE E011 OF 2021**

**YM ANGIMA, J  
JULY 20, 2023**

**BETWEEN**

**PAUL NDERI WARUI & 12 OTHERS ..... PLAINTIFF**

**AND**

**CHRYSOGON WANG'ONDU NDUHIU & 3 OTHERS ..... DEFENDANT**

**RULING**

**A. Introduction**

1. By a plaint dated March 25, 2021 the Plaintiffs sought the following reliefs against the Defendants:
  - a. A declaration that the sale and transfer of all those parcels of land known as IR No 203537 — 203570 is illegal for having been conducted by the 1<sup>st</sup> and 2<sup>d</sup> Defendants in breach of trust and directors fiduciary duty to shareholders of the 13<sup>h</sup> Plaintiff company and is therefore null and void.
  - b. An order for cancellation of the 3<sup>d</sup> Defendant's registration as proprietor of all those parcels of land known as IR No 203527 -203570 and restoration of the 13 Plaintiff's name as the proprietor thereof.
  - c. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to surrender and deposit into court, titles for a portion of 233 acres out of the original land parcel bought by the 13<sup>th</sup> Plaintiff company from Sosian Limited failing to which execution to issue against them.
  - d. Costs of the suit plus interest thereon at court rates.
  - e. Any other or better relief deemed fit by the honourable court.
2. The Plaintiffs pleaded that they were all shareholders of the 13<sup>th</sup> Plaintiff (the company) which had acquired I-R. No 8033/A (IR. No 10181) measuring approximately 1000 acres for the benefit of its



members. It was further pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had purportedly sold 757 acres out of the suit property to the 3<sup>rd</sup> Defendant without the consent of the members. It was contended that the sale was vitiated by fraud and breach of trust on the part of the company's directors particulars whereof were pleaded in paragraph 18 of the plaint.

## **B. The Plaintiffs' Instant Application**

3. Vide a notice of motion dated 06.04.2021 expressed to be based upon Sections 238 and 239 of the Companies Act, 2015, Section 3(1) of the Environment and Land Court Act, 2011, Sections 1A, 1B, 3A and 63(c) of the Civil Procedure Act (Cap. 21), Section 68 of the Land Registration Act, 2012 & Order 40 Rules 1 and 2, Order 51 Rules 1 & 3 of the Civil Procedure Rules and all other enabling provision of the law the Plaintiffs sought the following orders:
  - a. Spent;
  - b. That the honourable court be pleased to grant leave to the 1<sup>st</sup> to 12<sup>th</sup> Plaintiffs to continue this suit as a derivative action.
  - c. Spent;
  - d. Spent;
  - e. That pending hearing and determination of this suit, a temporary injunction do issue restraining the 3<sup>rd</sup> & 4<sup>th</sup> Defendants from selling, transferring, charging or in any other manner dealing with land parcels known as IR No 203527 - 203570.
  - f. That pending the hearing and determination of this suit, there be an order of inhibition restricting dealings with land parcels known as IR No 203527-203570.
  - g. That the costs of this application be provided for.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1<sup>st</sup> Plaintiff, Paul Nderi Warui, on April 7, 2021 and the exhibits thereto. The Plaintiffs stated that they were intending to challenge the sale of the suit properties essentially because it was undertaken in breach of trust and breach of the directors' fiduciary duty owed to the shareholders of the company.
5. It was contended that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had purported to hold a board meeting of the company which authorized the sale which was not quorate. It was further contended that the suit properties were sold at a gross undervalue. It was further contended that the 2 directors did not act in the best interest of the company hence they failed to promote the success of the company. In the premises, it was asserted that leave of court was necessary under the Companies Act, 2015 to redress the alleged wrongs by the directors against the company. The Plaintiffs further contended that the interim orders sought were necessary for the purpose of preserving the suit properties pending the hearing and determination of the suit.



### **C. The 1<sup>st</sup> Defendant's Response**

6. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on March 14, 2022 in opposition to the application upon, inter alia, the following grounds:
  - a. That the sale of the suit property was undertaken at the request and with the authority of the members of the company. It was contended that among the members who made the request were the 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, & 8<sup>th</sup> Plaintiffs.
  - b. That the sale of the suit properties was further ratified by a majority of the members of the company who received a share of the sale proceeds and signed for the same.
  - c. That accordingly, the decision of the majority shareholders was binding upon the Plaintiffs who were minority shareholders.
  - d. That the company had no claim or grievance against him on account of the action complained of.

### **D. The 3<sup>rd</sup> Defendant's Response**

7. The 3<sup>rd</sup> Defendant filed a replying affidavit sworn by Paul Kamura Babu on March 14, 2022 in opposition to the application. He stated that he was a director of the 3<sup>rd</sup> Defendant which bought the suit properties from the company vide a sale agreement dated April 7, 2019 in consequence whereof the same were transferred to the 3<sup>rd</sup> Defendant. It was stated that the 3<sup>rd</sup> Defendant had conducted due diligence prior to the purchase and was unaware of the Plaintiffs' grievances.
8. It was further stated that the 3<sup>rd</sup> Defendant had since sub-divided the suit properties further and sold portions thereof to third parties for valuable consideration since the suit properties were vacant at the time of purchase. It was thus contended that the grant of any interim orders would occasion massive injury and litigation involving third party purchasers. It was further contended that the Plaintiffs were not entitled to the equitable remedy of injunction on account of undue delay and laches.

### **E. Plaintiffs' Rejoinder**

9. The Plaintiffs filed a supplementary affidavit sworn by Paul Nderi Warui on April 21, 2022 in reply to the replying affidavits sworn by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. It was reiterated that the sale of the suit properties was not sanctioned by either a general meeting of the company or a properly constituted board of directors. It was stated that about 7 of the members who were alleged to have attended a company meeting in 2013 were already deceased by that time.
10. It was contended that the 3<sup>rd</sup> Defendant did not conduct due diligence before purchasing the suit properties. It was further contended that there was no evidence on record to demonstrate that the 3<sup>rd</sup> Defendant had in fact sold the suit properties to third parties. The rest of the contents of the affidavit merely repeated matters which were contained in the plaint and supporting affidavit.

### **F. Directions on Submissions**

11. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiffs' submissions were filed



on April 22, 2022, the 1<sup>st</sup> Defendant's on March 8, 2023; the 2<sup>nd</sup> and 4<sup>th</sup> Defendants' on March 14, 2023 whereas the 3<sup>rd</sup> Defendant's were filed on March 21, 2023.

### G. Issues for Determination

12. The court has considered the Plaintiffs' notice of motion dated April 6, 2021, the two replying affidavits in opposition thereto as well as the Plaintiffs' supplementary affidavit. The court is of the opinion that the following are the key issues for determination herein:
  - a. Whether the Plaintiffs have made a case for the grant of leave to prosecute a derivative action on behalf of the company.
  - b. Whether the Plaintiffs have demonstrated a case for the grant of the interim injunction sought.
  - c. Whether the Plaintiffs have made a case for the grant of the order of inhibition sought.
  - d. Who shall bear costs of the application.

### H. Analysis and determination

#### (a) Whether the Plaintiffs have made a case for the grant of leave to prosecute a derivative action on behalf of the company

13. The court has considered the material and submissions on record on this issue. In their submissions, the Plaintiffs submitted that as minority shareholders, they needed protection against unlawful actions undertaken by the directors hence the reason for seeking leave. It was submitted that the company did not authorize the sale of the suit properties either at a general meeting or a properly convened and quorate meeting of the board of directors. The court was consequently urged to grant the leave sought.
14. The Defendants, on the other hand, submitted that the Plaintiffs had not satisfied the threshold set out in the *Companies Act, 2015* and case law for the grant of such leave. It was submitted that the sale was authorized by a resolution of the board of directors of the company and that, in any event, the said sale was ratified by the majority of the shareholders of the company who had not challenged the sale and who had accepted payment of their share of the sale proceeds. It was further contended that even if the court found the resolution of the board and ratification by members irregular, the actions complained of were still capable of ratification by the majority hence there was no justification for a derivative action. The 1<sup>st</sup> Defendant relied, inter alia, upon the cases of *Isaiah Waweru Njumi & 2 Others v Muturi Ndungu* [2016] eKLR and *Mohammedin Mohamed & Another v Ibrahim Ismail Isaak & Another* [2021] eKLR and urged the court to disallow the prayer for leave.
15. Section 238 of the *Companies Act, 2015* stipulates as follows:
  1. In this Part, "derivative claim" means proceedings by a member of a company:-
    - a. in respect of a cause of action vested in the company; and
    - b. seeking relief on behalf of the company.
  2. A derivative claim may be brought only—
    - a. under this Part; or



- b. in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
  3. A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
  4. A derivative claim may be brought against the director or another person, or both
  5. It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.
  6. For the purposes of this Part:-
    - a. "director" includes a former director,
    - b. a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.
16. The rationale for granting leave to commence a derivative action on behalf of a company was considered in the Mohammedin Mohamed Case (supra) as follows:
- “It is clear from the Act that the court must satisfy itself that there is a prima facie case on any of the causes of action set out under Section 238(3) of the Act. If the evidence adduced in support of the application does not disclose a case for the giving of permission, the application is for dismissal. The importance of judicial approval under the Act, is therefore to screen out frivolous claims. The court will only allow meritorious claims to be litigated as derivative suits.”
17. The court has also found some useful guidelines to be considered in an application for leave to prosecute a derivative action from the Isaiah Waweru Njumi Case (supra). The factors to be considered were set out as follows:
- a. Whether the Plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed Defendants. If the pleaded cause of action is against the directors, the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors' challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;
  - b. Whether the Plaintiff has made any effort to bring about the action the Plaintiff desires from the directors or from the shareholders. Our Courts have developed this into a demand or futility requirement where a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;
  - c. Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder



seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of *Recchion v Kirby* 637 F. Supp. 1309 (W.D. Pa. 1986), for example, the Court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in Plaintiff's personal lawsuit;

- d. Whether the Plaintiff is acting in good faith;
  - e. Whether the action taken by the Plaintiff is consistent with one of a faithful director acting in adherence to the duty to promote the success of the company would take;
  - f. The extent to which the action complained against - if the complaint is one of lack of authority by the shareholders or the company - is likely to be authorized or ratified by the company in the future; and
  - g. Whether the cause of action contemplated is one that the Plaintiff could bring directly as opposed to a derivative action.
18. The court has fully considered the Plaintiffs' grievances against the material on record. The Plaintiffs are essentially aggrieved because the suit properties which previously belonged to the company were sold irregularly without authorization by proper organs of the company. They wanted the company to retain the entire 1000 acres previously owned by the company for distribution amongst the shareholders whereas the directors resolved to sell 757 acres of the land. The material on record shows that the company has hundreds of shareholders and that the 12 Plaintiffs are minority shareholders.
  19. There is no evidence on record to demonstrate that a significant proportion of the shareholders are aggrieved by the decision to sell 757 acres out of 1000 acres so that the shareholders may share the proceeds of sale as opposed to sharing the land itself. On the contrary, the material on record shows that an overwhelming majority of the members received and accepted their share of the sale proceeds without protest. They appear to have signed various payment vouchers acknowledging payment of their dues. At any rate, they have not raised their grievances before this court and they have not appeared to support the Plaintiffs' application for leave to prosecute a derivative suit on behalf of the company.
  20. Assuming that the directors of the company decided to sell the suit properties without authorization from the proper organs of the company the sale can still be ratified by a majority of the shareholders of the company. It is only an act which is illegal or unlawful which cannot be ratified by a general meeting of a company. The sale of company property is something which is capable of ratification if it has not already been ratified. The material on record shows that the sale is being opposed by about 12 members out of the hundreds who do not seem aggrieved by the sale. The court takes the view that the sale of the suit properties is ratifiable hence it should not form the subject of a derivative suit.
  21. The court has noted from the material on record that the idea of selling the suit properties was mooted way back in 2013, about 10 years ago. The impugned resolution authorizing the sale was passed in 2017 whereas the properties were sold and transferred to the 3<sup>rd</sup> Defendant in 2019. It is not clear why the Plaintiffs did not take steps at least as from 2019 to challenge the sale. The Plaintiffs have not rendered any explanation in their affidavits on record as to why it took them several years to seek legal redress. The court is thus not satisfied that the Plaintiffs have moved the court in good faith.
  22. Finally, the court has considered the Plaintiffs' complaint that the suit properties were sold at a gross undervalue as a result of the directors' breach of their fiduciary duties. The court finds no prima facie evidence on record to suggest that the suit properties were sold at a gross undervalue. That



notwithstanding, the court is of the opinion that if the directors were truly guilty of breach of their fiduciary duties then the appropriate remedy for such a breach would lie in damages against the concerned directors and not a nullification of the sale.

23. For the foregoing reasons, the court is not satisfied that the Plaintiffs' grievances fairly and adequately represent the interests of a significant number of similarly situated shareholders. The court is not satisfied that they are acting in good faith in instituting the instant proceedings belatedly. The court is further of the view that the actions complained of are ratifiable by a majority of the shareholders and that any grievances relating to the value of suit properties can be redressed by individual actions by the respective Plaintiffs for damages. Consequently, the court is not satisfied that the Plaintiffs have made out a case for the grant of leave to prosecute a derivative action on behalf of the company.

**(b) Whether the Plaintiffs have demonstrated a case for the grant of the interim injunction sought**

24. In view of the court's holding on the grant of leave, it is strictly not necessary to consider this issue. However, even if the court had granted the Plaintiffs leave to prosecute a derivative suit it would not have granted them the interim injunction sought. The court is not satisfied from the material on record that the Plaintiffs have satisfied the principles for the grant of an interim injunction as enunciated in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358.
25. The material on record shows that the suit properties were still registered in the name of the company at the time they were sold to the 3<sup>rd</sup> Defendant in 2019. It is well settled in law that a limited company has a separate and distinct legal personality from that of its subscribers and shareholders. A company is capable of owing and holding its own property. See *Salmon v Salmon* [1877] AC 78. The Plaintiffs as shareholders of the company may have had an expectation that they would eventually get a portion of land from it on account of their shareholding. That expectation had not crystallized into a legal right since the company had not transferred any portion of the suit properties to them. The shareholders of a company such as the Plaintiffs can only legitimately lay their claim upon their shares as opposed to the property of the company. In the premises, the court finds that the Plaintiffs have not demonstrated a prima facie case with any probability of success at the trial.
26. The court also finds absolutely no evidence on record to demonstrate that the Plaintiffs shall suffer irreparable harm or injury which cannot adequately be compensated by damages in the absence of an injunction. The Plaintiffs stated that they invested their lifetime savings in the company hence they stood to suffer irreparably. As indicated before, the Plaintiffs' investment in the company was in terms of shares and not the suit properties. The land itself was acquired by and registered in the name of the company. There is no evidence on record to demonstrate that the Plaintiffs' shares in the company were threatened in any way or that any loss of such shares is incapable of monetary compensation. Consequently, the court finds no evidence on record to demonstrate that the Plaintiffs stand to suffer any irreparable loss or damage in the absence of an injunction.

**(c) Whether the Plaintiffs are entitled to the order of inhibition sought**

27. The court has already found and held that the Plaintiffs had no legal interest in the suit properties even at the time they were registered in the name of the company. The court has also found and held that the Plaintiffs have not demonstrated a prima facie case with any probability of success at the trial. In the premises, there would be no basis or justification for granting an order of inhibition to prevent any dealings with the suit properties.



**(d) Who shall bear costs of the application**

28. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful litigants should not be awarded costs of the application. Accordingly, the 1<sup>st</sup> – 4<sup>th</sup> Defendants shall be awarded costs of the application. However, the court will not make any order regarding costs of the suit since the court has declined to grant leave to institute a derivative action.

**I. Conclusion and Disposal Order**

29. The upshot of the foregoing is that the court finds no merit in the Plaintiffs’ application. Consequently, the Plaintiffs’ notice of motion dated April 6, 2021 is refused and the same is hereby dismissed in its entirety with costs to the 1<sup>st</sup> – 4<sup>th</sup> Defendants.

Orders accordingly

**RULING DATED AND SIGNED AT NYAHURURU THIS 20<sup>TH</sup> DAY OF JULY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**Y. M. ANGIMA**

**JUDGE**

In the presence of:

N/A for the Plaintiffs

Mr. Kabugu for the Defendants

