



REPUBLIC OF KENYA



**Soita (Suing as a Representative of the Estate of Peter Soita Shitanda
- Deceased) v Malumasi & 2 others (Environment & Land Case
4 of 2022) [2023] KEELC 21106 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21106 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 4 OF 2022
EC CHERONO, J
OCTOBER 25, 2023**

BETWEEN

**BETTY GLORIOUS SOITA (SUING AS A REPRESENTATIVE OF THE ESTATE
OF PETER SOITA SHITANDA - DECEASED) PLAINTIFF**

AND

GEORGE MALUMASI 1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION 2ND DEFENDANT

KABRAS FARM LTD 3RD DEFENDANT

RULING

Introduction

1. What is before me for determination is the plaintiff's Notice of Preliminary Objection dated 4th February, 2023 and filed in court on 7th February 2023 raising the following grounds;
 - a. This Honourable Court lacks jurisdiction to hear the matter herein as the issues are commercial in nature;
 - b. The Applicant has no *locus standi* to institute suit on behalf of an incorporated company;
 - c. The Applicant has not complied with section 10 of the *Arbitration Act*;
 - d. The Applicant has not complied with rule 65 of the *Land Regulations* 2017

Plaintiff's Written Submissins

2. The plaintiff through the firm of Chesoli and Co. Advocates argued that the issues that present itself for determination in the preliminary objection are as follows;



- I. Whether the Respondent’s preliminary objection has met the standards set in law
- II. Whether Honourable has jurisdiction to determine issues herein which are commercial in nature
- III. Whether the applicant has locus standi to institute suit on behalf of an incorporated company.
- IV. Whether the applicant has exhausted all the mechanisms provided by the Articles of Association of the 3rd respondent which subjects itself to the [Arbitration Act](#)

Whether the respondent’s preliminary objection has met the standards set in law.

3. On this issue, the Counsel answered in the affirmative and submitted that the preliminary objection herein meets the requirements as it raises questions of the power of the Court granted by Article 162(2) (b) of the [Constitution](#) of Kenya 2010. He relied on the following cases; *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*(1969)E.A 696, *Janet Syokau Kaswii v Kathonzweni Financial Service Association*(2014) eKLR, *Sauti Africa Ltd v Cheraik Management Ltd & Anor*(2012) eKLR, *Kensan Insurance Brokers Ltd & Anor v Kenindia Assurance Company* Civil Application NO. 94 of 1997, *Litein Tea Factory Company Ltd v Davis Kiplagat Mutai & 5 Others* (2015) eKLR, and *Stephen Mugo Muthongori & 3 Others v Commissioner of Lands & 2 Others* HCCC 932 of 2003 (2003) eKLR .

Whether honourable court has jurisdiction to determine issues which are commercial in nature

4. The plaintiff submitted that Kabras Farm Limited is the owner of the suit land and the estate of one of the directors has occupied the suit land for over 15 years. He argued that the Articles of Association governs the relationship between directors and the affairs of the Company. He further submitted that the defendants have not produced any resolution made by the company upsetting status quo of occupation of the suit property and that, having determined the issue of ownership, this court has no jurisdiction to determine the affairs of a company furthermore the court would have smeared itself with issues that are ordinarily determined by the High Court as there would be need to lift the corporate veil to determine on the issue of contribution. He submitted that it would be just and fair if parties pursue this route which shall settle this dispute once and for all. He relied in section 13 of the [ELC Act](#) and Article 162(2)(b) of the [constitution](#) of Kenya, 2010.

Whether the 3rd applicant has locus standi to institute suit on behalf of an incorporated company

5. The plaintiff’s counsel submitted that at the inception of the 3rd Applicant’s/Defendants counter-claim, no resolution or any valid resolution of the Kabras Farm Limited(3rd Applicant herein) board was filed contemporaneously with the filing of this case, sanctioning or authorising the institution of this case, and or appointing the firm of Mayende & Busiega Advocates to file and prosecute this case and/or nominating and authorizing George Malumasi to swear the supporting affidavit and any other depositions in support of the 3rd Defendant/Applicant case which he submitted, is contrary to Order 4 Rule 1(4) of the [Civil Procedure Rules](#). He relied on the following authorities; *Kenya Commercial Bank Ltd v Stage Coach Management Ltd* (2014) eKLR, *Anne Mwangi Hinga v Victoria Njoki Gathara* (2009) eKLR.
6. In conclusion, the plaintiff submitted that the aggrieved director should have declared dispute by issuing a dispute notice and further forwarding the matter to an Arbitration rather than commencing this suit against the estate of the co-director.



The 1st and 3rd defendants' submissions

7. The 1st and 3rd Defendants through the firm of Mayende & Busiega Advocates framed four (4) issues and submitted as follows;

A. Whether this is a commercial dispute/matter and therefore depriving this honourable court of jurisdiction

8. The learned counsel submitted that the guiding factor to determine of what the cause of action is involved in any matter is always pleadings filed by parties. It is submitted that in this case, there is a Counter-claim dated 14th March 2022 and defence dated 5th April 2022, He submitted that the counterclaimant's case is for trespass and transfer of the suit property to its name. the 1st and 3rd defendants further submitted that since its purchase in 2008 to date, the property is still registered in the name of its previous owner namely, Nirosim Farm Ltd. The 1st and 3rd defendants further submitted that this is the right court to hear and determine the issue pursuant to section 13(1) of the [ELC Act](#). They averred that there is no dispute about apportionment of shareholding, liabilities, lifting corporate veil, contribution, winding up of the company, or voting rights as alluded in submissions by the plaintiff. They submitted that the counter-claim has not sought any order that fall outside the purview of section 13(1) of the [Environment and Land Court Act](#).
9. The 1st and 3rd defendants also submitted that the suit land belongs to the 3rd defendant as decreed by Lady Justice Mugure Thande and Justice B.N Olao. They referred to the plaintiff's defence to the counterclaim where she opposed to the transfer of the suit property to the name of the 3rd defendant, the eviction order and prayer for damages for trespass which they submitted, fall within the ambit of section 13 of the [Environment and Land Court Act](#).
10. The 1st and 3rd defendants also submitted that a similar objection that this matter is about a dispute of shares was rejected by Justice Boaz N. Olao in his ruling of 7th July, 2022 and which the plaintiff did not appeal or apply for review. They submitted that to try and reintroduce the same objection through these submissions is to invite the court to sit on appeal of its own decision which is untenable. They argued that the estate of a deceased shareholder of a company is not entitled to the company's property and have no say at all and that this court has already rendered itself on this aspect affirming that the property belongs to the company and not to any individual shareholders.

B. Need for a resolution to file affidavit and instruct an advocate

11. On this issue, the 1st and 3rd defendants submitted that it is common ground that the 3rd defendant had only two directors, the late Peter Soita Shitanda and the 1st Defendant George Malumasi and that the 3rd defendant has not replaced the late Peter Soita Shitanda as a director and therefore the company remains with only one surviving director who is the 1st defendant herein and who is transacting daily activities of the 3rd defendant. They submitted that the 1st defendant herein swore a verifying affidavit dated 14th March, 2022 in support of the counterclaim in which he deposed that he is well versed with the matter, is duly authorised to swear the affidavit as the surviving director and that the firm of Mayende & Busiega Advocates is duly representing the 3rd Defendant/counterclaimant. The further submitted that that deposition clearly shows that the 1st Defendant is authorized to swear the affidavit in support of the counterclaim and cannot be questioned by the plaintiff who is neither a director nor a member of the 3rd Defendant and therefore lacks capacity to question the 1st Defendant in his capacity as the surviving director of Kabras Farm Limited. They submitted that it is also imperative to point out that the letters of administration ad litem obtained by the plaintiff on 10th February, 2022 to file



suit limited her to that purpose only and does not in any way give her mandate to be a director of the estate of the late Peter Soita Shitanda as she is attempting to be through the back door.

12. The learned Counsel further submitted that there is no requirement in law for a company to present a resolution indicating that it has authorized the filing of a suit or has authorized the swearing of an affidavit on its behalf nor, for that matter, confirming it has authorized an advocate to represent it and that it suffices for the deponent to state that he has authority to do such act.
13. They relied on the following cases; *Fubeco China Fushun v Naiposha Company Limited* & 11 *Others*(2014) eKLR and *Arthi Highway Developers Limited v West End Butchery Limited* & 6 *Others*(2015) eKLR.
14. It is submitted that it is apparent that there is no requirement for a company to present a resolution of a company indicating that it has authorized the filing of a suit or has authorized the swearing of an affidavit on its behalf nor, for that matter, confirming it has authorized an advocate to represent it and that it suffices for the deponent to state that he/she has authority to do such act. In summary, the learned Counsel submitted that it should not be lost that it is the plaintiff who instituted the primary sued against the 1st and 3rd defendants and wondered how she expected the 3rd defendant to defend itself in this Case? They submitted that the 3rd Defendant defended itself by making an application to strike out the suit and the court agreed with it on 7th July, 2022 when it struck out the suit with costs and therefore, this objection on lack of a resolution is hence an afterthought and completely unmerited.

C. Compliance to section 10 of the *arbitration ACT*.

15. The Counsel submitted that it is the plaintiff who dragged the Defendants to court. They wonder how a litigant who filed a suit allege that the issues under dispute ought to be referred to Arbitration and that the court in which she earlier invoked in filing the suit does not have jurisdiction? They argued that the plaintiff has been heard on various applications, the last one being an application dated 7th February 2023 seeking to set aside the injunctive orders of 3rd February, 2023 which application was dismissed with costs on 27/4/2023.
16. They submitted that pleadings have already closed in respect of the plaint herein and the 1st and 3rd defendants filed their counterclaim and the plaintiff filed defence to counterclaim dated 5th April,2023 and this matter was even fixed for hearing on 27th April 2023, hence an objection based on an arbitral clause cannot oust the jurisdiction of this Honourable Court. The 1st and 3rd defendants further submitted that a party who is genuinely desirous to have the matter referred to Arbitration is mandated by section 6 of the *Arbitration Act*, 1995 to make an application at the earliest opportunity not later than when she enters appearance to file an application for stay of proceedings and reference of the matter to arbitration. They submitted that no such application is before this court and therefore the objection has no merit. They relied on the following cases; *Eunice Soko Mlagui v Suresh Parmar* & 4 *Others* (2017) eKLR, *Charles Njogu Loftly v Bedouin Enterprises Ltd*, C.A 253 of 2003, *Niazons(K) Ltd v China Road & Bridge Corporation Kenya*(2001) KLR 12, *Corporate Insurance Co. v Loise Wanjiru Wachira*, C A NO. 151 of 1995 and *Kenindia Assurance Co. Ltd v Patrick Muturi*, CA NO. 87 of 1993.
17. In conclusion, the 1st and 3rd defendants submitted that the plaintiff places reliance on Articles of Association of a Company which company she is neither a director nor a member. They averred that the limited letters of administration ad litem she obtained on 10/2/2020 do not mandate her to attend to any arbitration on issues around Kabras Farm Limited or the estate of Peter Soita Shitanda as that would be acting beyond her scope of authority.



D. Compliance to ‘rule’ 65 of the land regulations 2017

18. On this issue the Counsel for the 1st and 3rd defendants averred that the plaintiff has not submitted on this ground and that there is no legislation known as Land Regulations 2017 but we have the Land Regulation (General) Regulations 2017 and if that is what the plaintiff meant, that Regulation 65 of the Land Registration (General) Regulations, 2017 has no relevance to this matter at all. They distinguished the Cases relied by the plaintiff as irrelevant and sought to have the objection dismissed with costs.

Legal analysis and decision.

19. I have considered the Objection raised by the plaintiff, the pleadings by the parties, the proceedings, the rival submissions and the applicable law. The plaintiff’s Notice of Preliminary Objection dated 4th February, 2023 and filed in Court on 7th February, 2023 raises the following four(4) grounds;

- a. This Honourable Court lacks Jurisdiction to hear the matter herein as the issues are commercial in nature;
- b. The Applicant has no locus standi to institute suit on behalf of an incorporated Company;
- c. The Applicant has not complied with section 10 of the Arbitration Act and
- d. The Applicant has not complied with rule 65 of the Land Regulations Act

(a). This Honourable Court lacks jurisdiction to hear the matter herein as the issues are commercial in nature.

20. It is not in dispute that this suit was instituted by the plaintiff against the defendants jointly and severally *vide* a plaint dated 17th, February 2022. In response to the plaintiff’s claim, the 1st and 3rd defendants filed a joint statement of defence while the 3rd defendant filed a counterclaim against the plaintiff for trespass on the suit property, Eviction, general Damages as well as mesne profits and costs. Section 13(1), (2), & (7) of the Environment and Land Court Act, 2012 provides as follows;

Part III- jurisdiction of the court

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
 - a. Relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. Relating to compulsory acquisition of land;
 - c. Relating to land administration and management;
 - d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



e. Any other dispute relating to environment and land.

(7) In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including-

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(f) restitution;

(g) declaration; or

(h) Costs.

21. It is clear from the prayers sought by both the plaintiff in her plaint dated 17/02/2022(now struck out) and the 3rd defendant's counterclaim are among the reliefs this Honourable Court has power to grant under Section 13(1)(7) of the [Environment and land court Act](#).

22. There is no dispute from the pleading about apportionment of shareholding, liabilities, lifting of the corporate veil, contribution, winding up of the company or voting rights which this Court has been called upon to make a determination at the hearing. These are issues which have only be alluded to by the counsel for the plaintiff in their submission. The 3rd defendant's counterclaim was responded to in paragraph 9 of the plaintiff's Defence to the counterclaim wherein she averred as follows;

“9. The plaintiff/Defendant is a stranger to the contents of paragraphs 41 of the counterclaim insofar as it relates to the Trespass of the suit property and affirms that the suit property belongs to the estate of Peter Soita Shitanda and therefore invites the counterclaimant to strict proof thereof.”

23. In her defence to the 3rd defendant's counterclaim, the plaintiff is opposing the 3rd defendant's counterclaim on grounds that the suit property belongs to the estate of her Husband, the late Peter Soita Shitanda(deceased). These issues therefore cannot be said to fall outside the ambit of Section 13(1) of the [Environment and land Court Act](#).

24. I have gone through the proceedings in this case and find that the plaintiff had raised a similar objection that this matter is about a dispute of shares and my predecessor Hon. Justice Boaz N. Olao at paragraph 24 of his Ruling delivered on 7th July 2022 held thus;

“ The objection that this Court has no jurisdiction because this dispute involves shares in a company is unfounded. The Applicant's claim is that the suit property belongs to the deceased, that she and her family have invested in it substantially and the 1st Respondent has forcefully entered therein illegally. She therefore seeks the main order that she is the lawful owner thereof and the 1st Respondent be restrained from trespassing, encroaching onto or remaining on any part thereof either by himself, his agents, servants, employees, proxies, successors, or any other person. She also seeks general damages for that trespass. That is a matter for this court whose jurisdiction is set out in section 13(1) of the [Environment and](#)



Land Court Act. There is nothing in the plaint that suggests this dispute is about shares in the company known as Kabras Farm Limited.”

25. There is nothing on record to suggest that the plaintiff was aggrieved by the said order and either appealed or applied for a review. In my view, the issue being raised by the plaintiff now is *res judicata* having been raised previously between the same parties and determined conclusively.
26. My answer to this question is that flowing from the pleadings herein, there is no dispute involving shares in a company, liabilities, lifting of corporate veil, contribution, winding up of the company, or rights as alluded to in the plaintiff’s submissions which in my view are figments of her fertile imaginations. The dispute by the defendants as indicated in its counterclaim which the plaintiff in her defence to counterclaim denies and invites strict proof thereof are issues this Honourable Court has powers to hear and determine under section 13(1) of the Environment and land Court.

2. Need for a resolution to file affidavit and instruct an advocate

27. It is common ground that the 3rd defendant is a legal entity registered as a limited liability company under the companies Act and had two directors, the late Peter Soita Shitanda and George Malumasi, the 1st defendant herein. It is not in dispute that the 3rd defendant has not replaced the late Peter Soita Shitanda as a director and therefore the company remain with one director, that is George Malumasi charged with the daily activities of the 3rd defendant company. It is the same George Malumasi who swore a verifying affidavit in support of the counterclaim dated 14/03/2022 where he deposed that he was well versed with the matter and duly authorized to swear the affidavit as the surviving director and that the firm of Mayende and Busiega Advocates is duly instructed to represent the 3rd defendant.
28. That deposition in my view is a clear testimony that by virtue of being a director, the 1st defendant is authorized to swear the affidavit in support of the counterclaim. It is also my view that the letters of administration ad litem obtained by the plaintiff on 10/2/2022 to file a suit is only limited to that purpose and does not extent her mandate to be a director in place of the estate of her late husband in the 3rd defendant company as she is attempting to do. I agree with counsel for the 1st and 3rd defendants that there is no legal requirement in law for a company to present a resolution indicating that it has authorized the filing of a suit or has authorized the swearing of an affidavit on its behalf or has authorized an advocate to act for it. My position is supported by the Court of Appeal decision in the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR where it was held;

44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor(1970) 1EA 147. The court in that case held;

“ When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”



45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme Court. The authority is *Tatu Naiga & Emporium v Virjee Brothers Ltd* Civil Appeal No. 8 of 2000.
29. The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General*; SCCA No.1 of 1998. The latter case restated the law as follows;
- “...it was now settled, as the law, that, it does not require a Board of Directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the Company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”
30. I agree with the above finding by the Court of appeal which is binding on me. Flowing of the above decision, it is now clear that there is no requirement for a Company to present a resolution of a Company indicating that it has authorized the filing of a suit or has authorized the swearing of an affidavit on its behalf nor confirming it has authorized an advocate to represent it, but it suffices for the deponent to simply state that he has authority to do such act.
31. It is apparent that this suit was instituted by the plaintiff against the defendants including the 3rd defendant herein and it defeats logic how the plaintiff expected the 3rd defendant (Kabras Farm Limited) to defend itself in this matter. It is clear from the record that as part of its defence in this suit, the 3rd defendant filed an application to strike out the suit herein and the court agreed with it on 7th July, 2022 when it struck out the suit herein with costs. The objection on lack of a resolution is an afterthought and devoid of merit. This Court has already pronounced itself that the plaintiff is not a director of the 3rd defendant company and has no legal claim in the suit land purportedly on behalf of the estate of her late husband Peter Soita Shitanda.

3. Compliance to section 10 of the arbitration ACT.

32. It is strange that the plaintiff who dragged the defendants to this court is now turning around saying that the same court she approached for determination of her claim is bereft of jurisdiction. This matter has now been litigated for close to two years and the plaintiff has made numerous applications, the last being an application dated 7th February, 2023 seeking to set aside the injunctive orders of 3rd February 2023 which was dismissed with costs on 27th April, 2023.
33. From the court record, pleadings have already closed after the plaintiff filed Reply to defence and defence to the counterclaim dated 5th April 2022 and this matter was due for hearing on 27/4/2023 hence an objection based on an arbitral clause cannot oust the jurisdiction of this Court.
34. Section 6 of the Arbitration Act 1995 mandates a party who desires to have a matter referred to Arbitration at the earliest opportunity not later than when she enters appearance to file an application for stay of proceedings and reference of the matter to arbitration. No such application is before this court and in any event, the plaintiff who filed this suit against the defendants cannot also raise objection to her own suit as that would be as absurd as it is inconceivable.



35. In the case of *Eunice Soko Mlagui v Suresh Parmar & 4 Others*(2017) eKLR, the Court of Appeal held;
- “ Be that as it may, to the extent that after amendment to section 6(1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre-2009 decision of our courts on the application of section 6(1) are still good law to that extent.
36. In *Charles Njogu Lofty v Bedouin Enterprises Ltd*, C A No. 253 of 2003, this Court considered section 6(1) and held that even if the conditions set out in paragraphs (a) and(b) of are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after the filing of the defence. (see also *Niazon (K) Ltd v China Road & Bridge Corporation Kenya*(2001) eKLR 12, *Corporate Insurance Co. v Loise Wanjiru Wachira*, CA No. 151 of 1995 and *Kenindia Assurance Co. Ltd v Patrick Muturi*, CA NO.87 of 1993),”
37. I agree with the above finding by the Court of Appeal. I also note that the plaintiff cannot place reliance on Articles of Association of the 3rd Defendant where she is neither a director nor a member. The letters of administration ad litem she obtained for the estate of her late husband Peter Soita Shitanda in my view do not give her any mandate as a director of the 3rd defendant to perform any legal function of the company including attending any arbitration on behalf of the 3rd defendant company.

4. Compliance to “Rule” 65 of the land regulations 2017.

38. The counsel for the plaintiff has not submitted on this issue. I have also checked on the table of our recent statutes and subsidiary legislations and find no legislation known as *Land Regulations* 2017. What is in existence is the *land Registration(General) Regulations* 2017. Even assuming the learned counsel meant regulation 65 of the *land Regulation(General) Regulations* 2017 deals with registration of disposition in favour of trustees incorporated under the *Trustees Perpetual Succession Act*, Cap 43 Laws of Kenya which has no relevance to this matter.
39. In view of the matters aforesaid, I find that the Notice of Preliminary Objection dated 4th February 2023 without merit and the same is hereby dismissed with costs to the defendants.

DATED, READ, DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 25TH OCTOBER,2023.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

- 1. Mr Busiega for the 1st & 3rd defendants**
- 2. Mr. Chesoli for the plaintiff**
- 3. M/S Joy C/A**

