



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 17 OF 2016

EDWIN MAKANYANGA MWANGALEPLAINTIFF

VERSUS

MOSES WAFULA KHAOYADEFENDANT

RULING

1. The Plaintiff **Edwin Makanyanga Mwangale** holds a power of Attorney from **Janet Elois Allen** who is a shareholder of Chetambe Estates Limited, a limited liability company incorporated in Kenya which company owns **LR No 3801/3/2**. On 9/3/2012 one **Andrew Sarai Mwangale** and the donee of the Power of Attorney acting in their capacity as executors and or shareholders of the estate of **Elijah Wasike Mwangale** sold to the Defendant 50 acres out of the land owned by the Company. The late **Elijah Wasike Mwangale** was also a shareholder in the company. Again on 21/3/2012, the same vendors sold another 50 acres to the Defendant.

2. The Plaintiff filed a suit against the Defendant seeking a permanent injunction restraining the Defendant from ploughing or in any way interfering with 100 acres forming part of **LR No. 3801/3/2** and also for a declaration that the Defendant was in breach of the agreements of 9/3/2012 and 21/3/2012 and that the same were therefore null and void. The Plaintiff subsequently filed an application in which he sought to restrain the Defendant from Ploughing or in any way interfering with the 100 acres forming part of **LR No. 3801/3/2**.

3. At the hearing of the Applicant's application for injunction, a Preliminary Objection was taken on behalf of the Defendant on the ground that the Plaintiff had no *locus standi* to bring a suit against the Defendant. Mr Kiarie for the Defendant argued that **LR No 3801/3/2** from which the Defendant bought 100 acres belonged to Chetambe Estates Limited and as the donee of the Power of Attorney was a shareholder of the Company, she had no *locus standi* to bring the suit on behalf of the Company.

4. Mr Kiarie argued that property of a Company belongs to the Company and a shareholder of the Company cannot bring of a suit on behalf of the Company. In support of this argument, he referred to **Nairobi HCCC NO 958 of 2001 George W.M. Omondi & another -vs- National Bank of Kenya Ltd & 2 others.**

5. Mr Barongo for the Plaintiff opposed the Preliminary Objection on the basis that the agreements for sale were made between the Defendant and **Janet Elois Allen** in her capacity as shareholder of Chetambe Estates Limited. That the issue at hand is on breach of contract and not on ownership of the land. He argued that the case cited by the Defendant's advocate is distinguishable from the present circumstances in that in that case, a case had been filed on behalf of the Company but in the present case, the case had been filed by **Janet Elois Allen** in her capacity as shareholder. He relied on **NBI HCCC No 219 of 2014 Interactive Advertising Limited & Another – vs- Equity Bank Ltd.**

6. I have considered the submissions by counsel for both the Plaintiff and the Defendant and the two cases relied on by the two sides. The only issue for determination in this matter is whether the Plaintiff has *locus standi* to bring this suit.

7. In the case cited by Mr Kiarie the Plaintiffs had brought a suit on behalf of the Company where they alleged that certain wrongs had been committed against the company where they were Shareholders and Directors. A preliminary objection was taken on among the other grounds that the Plaintiffs had no *locus standi* to bring a suit on behalf of a Company which had a separate legal entity from its Directors and Shareholders. Justice Ringera as he then was upheld the Preliminary Objection and struck out the entire suit as well as the application with costs.

8. Justice Ringera had considered a number of cases cited to him. At page 5 of his ruling he stated as follows:-

*“ As regards whether the Plaintiffs have locus standi to institute this suit, I am in complete agreement with the submissions made by the Defendant's advocates that they do not. It is a basic principle of company law that the Company has a distinct and separate personality from its Shareholders and Directors even when the Directors happen to be the sole Shareholders (see Salmon – vs – Salmon & Co Ltd [1897] AC 22). The property of the Company is distinct from that of its Shareholders and the shareholders have no proprietary rights to the Company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: Only the Company has capacity to take action to enforce its legal rights. The contention by counsel for the Plaintiff that the investment in LVF is by the Plaintiffs and they are accordingly the proper Plaintiffs in this action is manifestly without any legal foundation. And although it is true that the appointment of a receiver manager has the effect of rendering the Board of Directors *functus officio*, it does not destroy the corporate existence and personality of the Company. That appointment makes the directors unable to act in the name of the Company but as I understand the law, it does not make them in their capacity as members equally disabled. On that view, it was open to the two plaintiffs in the name of the Company, but only in the name of the company to institute the present proceedings which relate to alleged wrongs against the Company qua Company. But they definitely lacked legal competence to institute the suit in their own names in their capacities as Directors and Shareholders of LVF. I would on this ground alone order the suit struck out with costs to the Defendants”.*

9. I am in complete agreement with the reasoning of Justice Ringera in the above case. It is not contested that the property from which the Defendant bought 100 acres is registered in the name of **Chetambe Estates Limited**. The donee of the Power of Attorney was one of the Directors of the Company. The property of the Company is distinct and separate from the Directors or Shareholders. It therefore follows that it is only the Company which can file a suit to agitate its rights in its property. A Shareholder or Director cannot purport to do so on behalf of the Company.

10. The case cited by Mr Barongo is distinguishable from the current position. In that case the first Plaintiff was a Limited Liability Company. The second Plaintiff was one of the Directors of the Plaintiff. The other Director was his estranged wife whom he could not see eye to eye. He brought a suit in his name and the Company. A preliminary objection was raised by the Defendant on the ground that there was no resolution of the directors to bring the suit against the Defendant. Justice Ogola overruled the Preliminary Objection holding that it was not possible to have a resolution of the Company when there was evidence that even if the same was sought, it could not be granted by the other Director who could not see eye to eye with the second Plaintiff.

11. Though the Judge arrived at his decision holding that that was a procedural technicality which will not prevent Justice being done, the law is that where one or more Directors or Shareholders are complaining against persons who are in control of the Company, those complaining can bring a suit in their own name. In the case cited by Mr Barongo, the second Plaintiff was complaining that his estranged wife had colluded with the Defendant to defraud the first Plaintiff where he was a Director with his estranged

wife. The Preliminary Objection will therefore not have been sustained as the circumstances fell under the exception permitted by law.

12. In the instant case, there is nothing to show that the Plaintiff was prevented by anything from bringing the suit in the Company name. The property was for the Company. If there was breach of contract, that breach would affect the Company as owner of the property. A Director or Shareholder will not be allowed in the circumstances to bring a suit on behalf of the Company. I uphold the Preliminary Objection and find that the Plaintiff has no *locus standi* to bring this case. The application and the entire suit are hereby struck out with costs to the Defendant.

It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of April 2016.

E. OBAGA

JUDGE

In the presence of Mr Ndarwa for Mr Kiarie for Defendant.

Court Assistant – Isabellah

E. OBAGA

JUDGE

28/4/16