



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. E033 OF 2021

PAUL MASILA KIMEU (*Suing as administrator of and on behalf of*

Syokimau Farm Limited)PLAINTIFF

VERSUS

SUMRA CONSTRUCTION CO. LIMITED.....1ST DEFENDANT

WILFRED NG'ANG'A NGARUIYA.....2ND DEFENDANT

ABDI AZIZ HUSSEIN.....3RD DEFENDANT

RULING

What is before court for determination is the 2nd Defendant's Notice of Preliminary Objection dated the 21st April, 2021 against the Plaintiff's suit. The 2nd Defendant's Notice of Preliminary Objection is seeking to have this suit struck out with costs on the basis that the Plaintiff Paul Masila Kimeu not being a licensed Insolvency Practitioner as provided under the Insolvency Act No. 18 of 2015 as read together with Insolvency Regulations 2016 lacks capacity to commence and/ or maintain the present suit.

Contemporaneously with this suit, the Plaintiff filed an application seeking orders of temporary injunction against the Defendants or their representatives restraining them from trespassing, entering, occupying, stopping, causing delay or disrupting the construction works or interfering with the ownership including possession of Land Reference Number 12715/307 hereinafter referred to as the 'suit land' pending the outcome of the suit.

The 1st Defendant also filed a Notice of Preliminary Objection dated the 14th April, 2021 on the grounds that the application dated 15th March, 2021 is res judicata and should be dismissed with costs.

In response to the 2nd Defendant's Notice of Preliminary Objection, the Plaintiff filed an affidavit providing a history of Syokimau Farm Limited. He confirmed that on 26th June, 2013, the shareholders of the company passed a special resolution for voluntary winding up of the said company and annexed minutes, to that effect. Further, they gave a notice which was advertised in the Kenya gazette. He insists Syokimau Farm Limited is in liquidation pursuant to Legal Notice No. 11485 dated 26th July, 2013. Further, that the said company ceased to exist upon his appointment as the administrator and that Syokimau Farm Ltd lost its legal personality to sue and as such past members can only sue through him. He avers that the company was wound up in 2013 and the law that was operative was repealed Companies Act. Further, all duties and powers that had been conferred upon him as the Administrator pursuant to the minutes during the winding up, are still operational to date. He reiterates that his activities as the administrator of Syokimau Farm Ltd continues to be regulated under the repealed Companies Act Cap 486 to the exclusion of the Insolvency Act altogether. He states that no objection has been received from the Registrar of Companies or any other member of the public in response to the Notice of Winding Up advertised in the Kenya Gazette dated 8th August, 2013 under GN. N No. 11485. He claims since the 2nd Defendant is claiming beneficial interest over the suit land, then the issue of proprietary interest has to be ascertained through evidence.

The Notice of Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the 2nd Defendant's Notice of Preliminary Objection dated 21st April, 2021 including the Plaintiff's replying affidavit and rivaling submissions, the only issue for determination is whether the Plaintiffs' suit should be struck out with costs.

The 2nd Defendant in his submissions has reiterated his averments in the Notice of Preliminary Objection and insists the Plaintiff does not have locus to institute this suit on behalf of Syokimau Farm Limited as he is not an Insolvency Practitioner. Further, that the Plaintiff does not have education qualifications to be an Insolvency Practitioner. He made reference to various legal provisions in the repealed Companies Act and Insolvency Act. To support his arguments, he has relied on the following decisions: **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696; Daykio Plantations Limited V National Bank of Kenya Limited & 2 Others (2019) eKLR; Kenya Plantation & Agricultural Workers Union V Unilever Tea (K) Ltd (2012) eKLR and Patrick Kiseki Mutisya (Suing as the Personal Representatives of the estate of Nzomo Mutisya (Deceased) Vs K. B Shangani & Sons Limited & Others (2012) eKLR.**

The Plaintiff in his submissions reiterates his averments as per the replying affidavit and insists he has locus standi to institute this suit as he was appointed an administrator by members of Syokimau Farm Limited. To buttress his averments, he has relied on the following decisions: **KSC International Limited (Under Receivership) & 5 Others V Bank of Africa (K) Limited & 6 others (2018) eKLR; Suraya Holdings Limited & 4 Others Vs ICICI Bank & Another (2018) eKLR; and Matter of the Winding Up of Blue Bird Aviation Limited, W. C No. 7 of 2016.**

From perusal of the Plaintiff, I note the Plaintiff seeks various orders including a permanent injunction restraining the Defendants from interfering with suit land and general damages.

Except for filing a replying affidavit to the Plaintiff's Notice of Motion application dated the 6th April, 2021, the Defendant did not file a Defence to controvert the Plaintiff's averments but proceeded to file the instant Notice of Preliminary Objection.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held that **'A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.'**

Further in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014**, the Supreme Court reiterated thus: **'A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'**

While in the case of **Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No. 53 of 2004**, the Court held that: **"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."**

Insofar as the 2nd Defendant raises important points and has relied on decisions to prove the Plaintiff does not have locus standi to institute this suit, it is trite that he should have filed a Defence to deny the Plaintiff's averments first and anchor his Preliminary Objection. To my mind the Defendant's averments also require evidentiary proof.

Based on the facts as presented while associating myself with the decisions cited above, I find that there are no pleadings filed to provide a basis for the Preliminary Objection which also requires the court to ascertain facts before the same can be determined. Further, at this juncture I find the Notice of Preliminary Objection premature. I opine that this suit should be set down for hearing and determined on its merits.

I further find by dint of section 13 of the Environment and Land Court Act which confers jurisdiction to this Court, this court is devoid of jurisdiction to determine the issue of whether the Plaintiff is qualified to be an Insolvency Practitioner or not.

In the circumstance, I find the Notice of Preliminary objection dated the 21st April, 2021 unmerited and will disallow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 18TH DAY OF JANUARY, 2022

CHRISTINE OCHIENG

JUDGE