



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 227 OF 2013

(Formerly Mombasa HCCC No. 246 of 2012)

MADIN CLEARING AND FORWARDING LIMITED..... PLAINTIFF

-VERSUS-

BAMBURI SUPERMARKET LIMITED DEFENDANT

RULING

(Application purportedly filed by the defendant seeking to set aside the judgment; defendant being a limited liability company; affidavit sworn by a person who is neither shareholder, director, or holding any position in the company; deponent being wife of one of the deceased shareholders of the company; clear that deponent has no authority to act for the company; application struck out)

1. The application before me is one dated 12 May 2021 filed on behalf of the defendant. The application is seeking orders to set aside the judgment herein which was delivered on 22 April 2016 (though the application erroneously states that the judgment is of 1 July 2016). The application is opposed.
2. The background of the suit is as follows: - The plaintiff/respondent instituted this suit on 8 August 2012 vide a plaint. The plaintiff's case was that it is the registered owner of the land parcel L.R. No. MN/I/12056 (hereinafter, 'the suit land') and that the defendant had trespassed and was in wrongful occupation of the said land. The plaintiff prayed for judgment against the defendant for *inter alia* a permanent injunction to restrain the defendant from the suit land. The defendant filed a defence and counter claim on 10 September 2012 through the law firm of M/s Nyameta & Company Advocates. Its case was that it is the registered owner of the land parcel L.R No. MN/I/3413. It pleaded that the suit land was illegally created out of its land parcel LR No. MN/I/3413. In the counterclaim the defendant sought orders for a declaration that LR No. MN/I/12056 is irregular and null and void.
3. The matter came first came up for hearing on 24 February 2014 before Mukunya J, with both counsel present. The plaintiff called as PW-1 Sammy Silas Komen Mwaita. The witness gave partial evidence in chief and was stood down. By consent, both counsel agreed to each file a surveyor's report.
4. On 10 March 2015, counsel for the plaintiff took out a hearing date from the registry with the matter scheduled for hearing on 14 October 2015. The hearing notice was duly served upon M/s Nyameta & Company Advocates on 17 March 2015. However, when the matter came up for hearing on 14 October 2015, before Omollo J, counsel for the defendant was absent, and PW-1 proceeded with, and completed, his examination in chief. The plaintiff called as PW-2 one Peter Mwaura Karanja, a licensed surveyor and closed its case.
5. On 29 October 2015, the matter was mentioned to confirm filing of submissions. Both counsel for the plaintiff and defendant were present in court. The plaintiff's counsel had not filed his submissions. Counsel for the defendant averred that they wished to file an application to reopen the case and the court directed that the matter be mentioned on 30 November 2015. By 30 November 2015, no application to reopen the case had been filed and the court reserved judgment for delivery on 15 March 2016.
6. On 2 December 2015, an application dated 1 December 2015 was filed by the defendant seeking to stay further proceedings and to have the case reopened so as to allow the defendant avail its evidence. The court directed that the application be heard on 3 March 2016. On that day, counsel for the defendant did not appear and the application was thus dismissed. Subsequently counsel were notified that judgment would be delivered on 22 April 2016, on which day, only counsel for the plaintiff attended and judgment was duly delivered.
7. On 12 May 2021 the defendant changed counsel from M/s Nyameta & Company Advocates to the law firm of M/s Khalid Salim & Company Advocates and this application was subsequently filed. I have already mentioned that it is an application seeking to set aside the judgment.

8. The application is premised on the grounds that during the pendency of the suit, the defendant company was being run, operated, and managed by one Mr. Prem Gupta and that the defendant's advocate on record at the time never informed Mr. Gupta of the progress of the suit and any upcoming hearing dates. The supporting affidavit is sworn by one Rupa Bulibuli Bose Gupta. She has deposed that she has full authority of the defendant to swear the affidavit. She has introduced herself as the wife of Prem Gupta. She has disclosed that Mr. Gupta died on 24 November 2019. She applied for and was granted letters of administration in respect of his estate on 1 February 2021. She averred that she only came to know of the judgment in May 2021. She blamed the defendant's erstwhile counsel for failing to advise Mr. Gupta of the hearing dates.

9. The plaintiff opposed the application vide a replying affidavit sworn by Sammy S.K Mwaita, a director of the plaintiff. Mr. Mwaita deposed on the chronology of the case since its inception. He further deposed that the applicant has no *locus* to bring the application. He deposed that the defendant is a separate legal person with perpetual succession. He annexed a search of the company (CR 12) showing that it has two shareholders and 7 directors and none of them is Rupa Bulibuli Bose Gupta who swore the affidavit on behalf of the defendant.

10. Rupa Bulibuli Bose Gupta filed a supplementary affidavit. She deposed that she has *locus standi* to bring the application as she was issued with a certificate of grant in respect of the estate of the late Mr. Gupta, and hence she is duly authorized to file the application and swear the affidavit. She deposed that under Section 44 of the Law of Succession Act, a duly appointed administrator can act on behalf of the estate of the deceased.

11. Ms. Nafula, learned counsel, who held brief for Mr. Khalid for the defendant, learned counsel for the defendant, submitted that the mistake of the counsel should not be visited upon the client, and that the defendant deserves a chance to be heard. She further submitted that the Mrs. Gupta has locus to bring this application as she holds grant of letters of administration for the estate of the deceased.

12. Ms. Mango learned counsel for the plaintiff, submitted that there is no sufficient reason to re-open the case as a similar application dated 1 December 2015 was filed and dismissed. On the issue of locus standi, Ms. Mango deposed that Mrs. Gupta is the wife to the deceased, and as per the CR12, there are other directors, and no resolution is attached giving her authority. She submitted that a company is a separate legal entity. In response, Ms. Nafula submitted that the fact that no authority by the directors of the company has been annexed should not be reason to dismiss the application. She submitted that it should not be assumed that the deponent had no authority and that an authority can be filed at any time.

13. I have considered the application, the response and the rival submissions of counsel.

14. Before I go too far, there is an issue raised on the locus of Mrs. Gupta and I will address this first. We must recall that the defendant is a limited liability company. It has shareholders and directors. None of them is Mrs. Gupta. Although Mrs. Gupta deposed that she has the authority of the defendant to swear the affidavit, no such authority was filed.

15. Mrs. Gupta's argument is that as long as she is the administrator of the estate of Mr. Gupta, then she has *locus standi* to bring this instant application on behalf of the defendant company. This cannot be the position. A limited liability company is a legal person, separate from its members, as was espoused in the celebrated case of *Salomon vs. Salomon & Co. Ltd [1897] A.C. 122*. The fact that Mrs. Gupta holds letters of administration on behalf of her late husband, who was a shareholder and director of the company, does not give her capacity in respect of the company. She is neither a shareholder nor director of the company. Neither has she deposed that she holds any position in the company. I do not see how she can claim to have locus to represent the company without there being an authority annexed. If she was a director, I may have waived the requirement to annex an authority, because generally, directors have power to act on behalf of companies unless demonstrated otherwise. As far as I can see, Mrs. Gupta is a complete stranger to the defendant company. I do not see how it can be claimed that she has any locus to represent the defendant without there being tangible proof of the same. This is not a situation where an authority can be filed later because there is absolutely nothing connecting Mrs. Gupta to the company. As I have mentioned, the fact that her late husband was a shareholder and director of the company is not sufficient to give her locus, given that a company is a separate legal entity from its subscribers.

16. I am afraid that without locus, it is pointless to go to the merits of the application, as it has been filed by a stranger to the proceedings herein. I have no option but to strike it out and it is hereby struck out with costs. The costs will be shouldered personally by Mrs. Gupta.

17. Orders accordingly.

DATED AND DELIVERED THIS 13TH DAY OF JANUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA