



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 43 OF 2006

MAVOLONI COMPANY LIMITED.....PLAINTIFF

VERSUS

THE LAND REGISTRAR, THIKA DISTRICT.....1ST DEFENDANT

THE LAND REGISTRAR, MACHAKOS DISTRICT.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

AGRICULTURAL FINANCE CORPORATION

GREEN ACRES VEGETABLE AND FLOWER.....1ST INTERESTED PARTY

EXPORTING COMPANY.....2ND INTERESTED PARTY

RULING

What is before court for determination is the Plaintiff’s Notice of Motion application dated the 23rd September, 2020 where it seeks the following orders:

1. That the 2nd Interested Party’s suit as against the Plaintiff and all pleadings filed by the 2nd Interested Party herein be struck out.
2. That JOSEPH MUISYO NZIOKA be ordered to avail the directors of the 2nd Interested Party/Applicant before this court to confirm that they authorized him to file the said suit and sign pleadings on their behalf.
3. That the costs of this suit and the application be awarded to the Plaintiff.

The application is premised on the grounds on the face of it and the supporting affidavit of JOSEPH MUNYAO MUTISYA where he explains that the Plaintiff filed the instant suit vide a Plaint dated the 24th July, 1998. He contends that the 2nd Interested Party vide a Notice of Motion application dated 1st September, 2011 sought to be enjoined in these proceedings which application was allowed and it was admitted herein. Further, that the application for joinder as an Interested Party and all other pleadings were signed by one JOSEPH MUISYO NZIOKA who purported to be the Managing Director of the 2nd Interested Party. He claims that the said JOSEPH MUISYO NZIOKA is not the Managing Director of the 2nd Interested Party nor was he authorized by the directors to bring this suit. He insists that it is in the interest of justice to have the suit and all pleadings filed by the 2nd Interested Party struck out and/ or that directors of the 2nd Interested Party be availed in court to confirm that they had given authority to JOSEPH MUISYO NZIOKA to bring this suit. He reiterates that the 2nd Interested Party’s suit is scandalous, frivolous and/or vexatious and an abuse of the court process meant to delay or embarrass fair trial.

The 2nd Interested Party opposed the application by filing a replying affidavit sworn by JOSEPH MUISYU NZIOKA who confirms he is its director and the current Managing Director. He explains that when the 2nd Interested Party was incorporated his name was entered erroneously as JOE MUSYO NZIOKA instead of JOSEPH MUISYU NZIOKA. Further, that he has had the same corrected at the Company Registry. He avers that the 2nd Interested Party together with others was sued by the Plaintiff in Nairobi High Court Commercial Suit No. 337 of 1998, which suit was consolidated with the instant suit. He insists the only issue that can be discerned from the Plaintiff’s application

is that since his name was entered incorrectly and misspelt in the CR12 annexed to the Plaintiff's application, then the 2nd Interested Party's pleadings ought to be struck out. He reiterates that there is no merit or substance in the instant application and that the Plaintiff is engaging in diversionary tactic in order to delay the resolution of the main dispute hence the application is an abuse of the court process. He states that the 2nd Interested Party was enjoined in this suit in 2011 and the said orders have not been reviewed or appealed against. Further, the Plaintiff will not suffer any prejudice if the orders sought are not granted.

The Plaintiff filed a supplementary affidavit sworn by JOSEPH MUNYAO MUTISYA reiterating its averments and denying that it is seeking to review and/or appeal against the decision to enjoin the 2nd Interested Party in this matter. He avers that the Plaintiff's application seeks to strike out documents filed by the 2nd Interested Party as they were filed by an advocate without instructions.

The application was canvassed by way of written submissions.

Analysis and Determination:

Upon consideration of the Notice of Motion application dated 23rd September, 2020 including the respective affidavits and rivaling submissions, the only issue for determination is whether the 2nd Interested Party's suit against the Plaintiff should be struck out with costs.

The Plaintiff in its submissions reiterated their its averments as per the supporting affidavit and contends that the Court should order the directors of the 2nd Interested Party to appear in court and confirm whether they are aware of the existence of the instant suit. To support its arguments, it relied on the following decisions: **Anspar Beverages Limited Vs Development Bank of Kenya Limited, East African Development Bank, International Finance Corporation, Abn Amro Bank N.V (2003) eKLR and Affordable Homes Limited Vs Ian Henderson & 2 Others (2004) eKLR.**

The 2nd Interested Party relied on the following authorities to oppose the instant application: **Masole Enterprises Limited & 7 Others V Shakhhalaga Khwa Jirongo & Another (2018) eKLR; Saraf Limited V Augusto Arduin (2016) eKLR; DT Dobie & Company (Kenya) Limited V Joseph Mbaria Muchina & Another (1980) eKLR; GBM Kariuki V Nation Media Group Limited & 3 others (2012) eKLR; Kenya Power & Lighting Company Limited V American Life Insurance Company (K) Limited (2015) eKLR; Charo Hassan Nyange V Mwashetani Hatibu & 3 Others (2014) eKLR; Rotam Agrochemical Co. Limited V Twiga Chemical Industries Limited (2012) eKLR and Private Developers Co. Ltd V Rebecca Ngonyo & 2 others (2018) eKLR.**

The Plaintiff has sought for the 2nd Interested Party's suit to be struck out as the deponent JOSEPH MUISYO NZIOKA did not have instructions to institute the said suit and was not its Managing Director. Further, that the directors of the 2nd Interested Party be ordered to appear in court to confirm if they had instructions to institute this suit. The legal provisions governing striking out of pleadings is contained in Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 which provides as follows: -

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is an abuse of the process of the court.”

In the case of **Delphis Bank Limited v Caneland Limited [2014] eKLR**, the Court of Appeal on striking out pleadings held that:’

“The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which the application striking the defences was based is perhaps D.T. Dobie & company (Kenya) Ltd vs Muchina which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that; “The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.”

In the Indian Supreme Court Case of **PREM LALA NAHATA & ANOTHER VS CHANDI PRASAD SIKARIA, (2007) 2, SUPREME COURT CASES 551** at paragraph 18:-

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits”

In the case of **Johnstone Ogada Vikiru V Nathan Kaduka [2011] eKLR** the Court held that:

‘Striking out in any event is a drastic measure and should only be taken when it is absolutely necessary to do so. I do not see that

this is a case where I should invoke such an order. In any event, once I have consolidated the twin suits, it would a travesty of justice to strike out a statement of defence in one suit while another is existing and before directions can be taken on who will be the Plaintiff and Defendant in the consolidated suit.'

In this instance, I note orders were issued by Justice E K Ogola in **Nairobi HCCC No. 337 of 1998 Mavoloni Company Limited V Standard Chartered Estate Management Limited, Rosam Enterprises, Green Acre Vegetable and Flower Export Company, The Chief Registrar** on 3rd October, 2014, for consolidation of the said suit and this instant suit. Further, in the said suit, the Plaintiff herein had sued the 2nd Interested Party as the 3rd Defendant. I note the 2nd Interested Party is the current registered proprietor of the suit land and were included as a necessary party herein. The 2nd Interested Party in their replying affidavit at annexure 'JMN1' which is a CR 12 dated the 27th January, 2021, confirms JOSEPH MUISYO NZIOKA is indeed its Director.

In the case of **Saraf Limited v Augusto Arduin [2016] eKLR**, the Court of Appeal held that it is not a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of directors or its shareholders have authorized it to defend the suit.

It is my considered view that there are triable issues raised by the 2nd Interested Party cum 3rd Defendant. Further, since the suits are already consolidated, it is my view that it is unnecessary for the 2nd Interested Party to furnish proof that its Board of directors have authorized it to defend the suit. I find that the Plaintiff seeks to rely on technicalities which is a defeated avenue in accordance with Article 159 (2) (d) of the Constitution. The other issue raised by the Plaintiff, seeking the directors of the 2nd Interested Party to attend court and confirm if they issued instructions to commence the suit is a matter of evidence which can only be dealt with at the point of hearing.

Based on the facts as presented while relying on the legal provisions cited above including associating myself with the quoted decisions, I find that since these two suits were consolidated, they are indeed one and hence I am unable to strike out the Nairobi HCC NO. 337 of 1998, where it is actually the Plaintiff that had sued the 2nd Interested Party as 3rd Defendant.

Further, I am of the view that the issues raised by the Plaintiff can be dealt with during the hearing and in the interest of justice since the 2nd Interested Party also claims ownership of the suit land, it is pertinent that they remain parties to the proceedings herein as the orders issued will affect them.

In the circumstance, I find the application dated the 23rd September, 2020 unmerited and will dismiss it.

Costs will be in the cause

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF FEBRUARY, 2022

CHRISTINE OCHIENG

JUDGE