



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CASE NO. ELCC/E126/2020

JAMES NDUGI.....1ST PLAINTIFF
DAVID KURIA MWANGI.....2ND PLAINTIFF
JOHN MWAL.....3RD PLAINTIFF
FRANCIS KABURI.....4TH PLAINTIFF
JULIUS GACHERU NDUGI.....5TH PLAINTIFF

-VERSUS-

JAMLECK WAITHAKA KINYUA.....1ST DEFENDANT
ASHFORD WAITHAKA MWANGI.....2ND DEFENDANT
PETER MWANIKI KIIRU.....3RD DEFENDANT
JAMES GICHUKI MURAYA.....4TH DEFENDANT
JAMES KARIUKI IHURA.....5TH DEFENDANT
PETER KAGWANJA KAMAU.....6TH DEFENDANT
PETER KAROKI KAGWANJA.....7TH DEFENDANT
GITHURE MUTUANGURE CO. LTD.....8TH DEFENDANT

RULING

INTRODUCTION

1. Vide Plaintiff dated the **14th September 2020**, the Plaintiffs herein sought for the following reliefs;

- a. This court be pleased to grant an inhibition against the property known as L.R 209/118/82 pending the hearing and determination of this suit.
- b. The court be pleased to grant an inhibition order against the property known as L.R 209/118/82 until such a time as the Defendants will have involved the Applicants in the process of the sale.
- c. The Honourable court be pleased to grant an order of temporary injunction restraining the defendants, his servants, agents or anyone at his behest from interfering with the suit property known as L.R 209/118/82 pending the hearing and determination of this

matter.

d. The Honourable court do issue an order directing the Defendants herein to involve the Applicants in the process of the sale of the suit property.

e. Consequent to prayer 4 hereof, this Honourable Court be pleased to order the directorship of the company to call a special meeting to get the views of the members with regard to the sale of the suit property.

f. The Honourable court be pleased to order that accounts pertaining to the suit property be taken as the same is and has been accumulating income through the lease.

g. Costs of this suit.

2. Upon filing the subject suit, the Plaintiffs herein also filed a Notice of Motion Application dated the **14th September 2020**, and in respect of which same sought for *inter-alia* orders of temporary injunction.

3. Suffice to observe that the Notice of Motion Application filed by and on behalf of the Plaintiffs was vehemently opposed by the Defendants and same was the subject of Ruling, rendered by this court on the 11th November 2021, whereby this court dismissed the Application on behalf of the Plaintiffs.

4. In the course of the Ruling, the court made several observations touching on and/or concerning whether the Plaintiffs herein were truly shareholders of the 8th Defendant.

5. On the other hand, the court also raised the issue as to whether the Plaintiffs, in their personal capacities, could file and/or prosecute a suit touching on and/or concerning the transactions affecting the property owned and registered in the name of the 8th Defendant, same being a limited liability company.

6. Nevertheless, to the extent that there was no Preliminary Objection that had hitherto been filed, this court could not be able to delve into and/or pronounce itself on the validity of the suit.

7. Consequently, the court confined itself to the Application for temporary orders of injunction, which was effectively dismissed vide the Ruling alluded to herein before.

8. However, on the **2nd of December 2021**, the Defendants herein filed and/or took out a Notice of Preliminary Objection, wherein same have raised three (3) pertinent issues as hereunder;

i. The Plaintiffs suit and particularly the Verifying Affidavit thereto is contrary to and violates the provisions of Order 1 Rule 13 of the Civil Procedure Rules 2010.

ii. The Plaintiffs herein are not seized of the requisite locus standi to commence, mount and/or maintain the subject suit touching on and/or concerning the affairs of the 8th defendant, which is a limited liability company for which they are not shareholders.

iii. The complaint raised before the court touches on the manner in which the 8th Defendant is dealing with and/or alienating on own property and that no suit can be filed against the 8th Defendant in the manner impleaded by the Plaintiffs.

BACKGROUND OF THE CASE

9. The Plaintiffs herein had contended that same were bonafide members of the 8th Defendant company and that in respect of the aforesaid averment, the Plaintiffs had attached to their bundle, a document containing names of persons alleged to be original members of the 8th Defendant company.

10. However, the Plaintiffs names were not contained and/or reflected in the said lease or at all.

11. Subsequently, when the fact that the Plaintiffs' names were not appearing in the list attached to the Plaint was brought to the attention of the court, the Plaintiffs sought leave to file a Further Affidavit and which leave was duly granted.

12. Upon the leave being granted, the Plaintiffs indeed filed a Further Affidavit and in respect of which, same now changed tune and contended that they were the representatives of some of the original members of the company, who have since passed on.

13. Nevertheless, even in respect of the latter allegations, the Plaintiffs herein did not exhibit and/or display any evidence of having taken out and/or obtained Grants of Letters of Administration, whatsoever.

14. Suffice it to observe, that the foregoing issues were discussed and/or deliberated upon vide the Ruling which was rendered on the **11th November 2021**, pertaining to and/or concerning the Application that had hitherto been filed by the Plaintiffs.

SUBMISSIONS ON THE PRELIMINARY OBJECTION

15. The Preliminary Objection came up for mention on **15th December 2021**, on which date directions were given to the effect that the Preliminary Objection be canvassed and/or disposed of by way of written submission.
16. On the other hand, the court proceeded to and gave directions on the timelines for the filing and exchange of the submissions.
17. Pursuant to the directions of the court, the Defendants proceeded to and indeed filed written submissions dated the **18th of February 2022**. However, the Plaintiffs herein despite having been afforded the latitude of filing written submissions, failed and/or neglected to do so.
18. In the premises, the only set of submissions which are on court record are the submissions filed by the Defendants and in respect of which same have submitted as hereunder;
19. First and foremost, the Plaintiffs before the court has been brought for and on behalf of five (5) Plaintiffs, but only one Plaintiff has sworn a Verifying Affidavit in verification thereof.
20. According to the Defendants, it is a requirement to the law that where there are more than one Plaintiffs, any one of the many Plaintiffs can swear a Verifying Affidavit but however before such person swears the Verifying Affidavit on behalf of the rest of the Plaintiffs, same must procure and/or obtained a duly signed authority to do so.
21. As pertains to the subject matter, the Defendants have contended that no such authority was ever procured and/or filed with the court at the time when the suit was lodged.
22. Owing to the foregoing, the Defendants have therefore submitted that the Plaintiffs filed by and/or on behalf of the 2nd to the 5th Plaintiffs, have therefore not been duly verified. Consequently, the Defendants have submitted that the Plaintiffs in this regard violates **Order 1 Rule 13 of the Civil Procedure Rules 2010**.
23. Secondly, the Defendants have also submitted that the Plaintiffs herein have never been members of the 8th Defendant company. For clarity, the Defendants have contended that the totality of the documents attached to the Plaintiffs do not show and/or confirm that indeed the Plaintiffs have been members of the 8th Defendant.
24. Based on the foregoing, the Defendants have therefore contended that the Plaintiffs herein do not have the requisite *locus-standi* to commence and/or mount the subject suit as against the Defendants and in particular the 8th Defendant company.
25. Lastly, the Defendants have submitted that the suit property which is the subject of this proceedings belongs to and is registered in the names of the 8th defendant company.
26. In view of the foregoing, it is the Defendants' submissions that the 8th Defendant company is therefore at liberty to deal with and/or alienate the suit property in any manner that same deems fit and/or appropriate.
27. It was the Defendants' further submissions that if there was any wrong being committed on the property belonging to the 8th Defendant, then the only person who can sue is the company and not otherwise.
28. In support of the foregoing decision, the Defendants' counsel relied on various case law including **Andrew Ileri Njeru, Embu Nyangi Ndiiri proposed society and chairman and others v Daniel Nganga Kangi & Another (2015) eKLR, Mohamed Bwana Obo Athman & 24 others v Kenya Airports Authority (2014) eKLR, Alfred Njau & 5 Others v City Council Of Nairobi (1983) eKLR and finally Grance Wanjiru Wanyinyi & Another v Gedeon Waweru Githunguri & others (2010) eKLR**.
29. In a nutshell, the Defendants implored the court to strike out the suit for being an abuse of the due process of the court and for lack of disclosure of a reasonable cause of action.
30. Despite being afforded an opportunity to file written submissions in response to the Notice of Preliminary Objection, the Plaintiffs herein did not file any written submissions.

ISSUES FOR DETERMINATION

31. Having evaluated the Notice of Preliminary Objection and the legal issues raised therein and having considered the submissions filed by and/or on behalf of the Defendants, the following issues are germane for determination;
 - a. *Whether the Plaintiffs filed by and/or on behalf of the Plaintiffs comply with the provisions of **Order 1 Rule 13 of the Civil Procedure Rule 2010**.*
 - b. *Whether the Plaintiffs herein are possessed with the requisite *locus standi*, to commence, lodge and/or maintain the subject suit.*
 - c. *Whether the Plaintiffs' suit touching on and/or concerning the alienation of the 8th Defendant's property is legally tenable, either as mounted or at all.*

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the *Plaint* filed by and/or on behalf of the *Plaintiffs* comply with the provisions of *Order 1 Rule 13 of the Civil Procedure Rule 2010*.

32. The *Plaint* filed by and/or on behalf of the *Plaintiffs* herein relates to 5 *Plaintiffs* and in this regard, it was expected that the *Plaint* under reference shall be verified by 5 *Verifying Affidavits*, each sworn by every individual *Plaintiff*. **See *Order 4 Rule 1(3) of the Civil Procedure Rules 2010***.

33. On the other hand, it was also possible to have the *Verifying Affidavit* sworn by one *Plaintiff*, provided however that such *Plaintiff* is duly authorized by the rest of the *Plaintiffs* in the matter.

34. Nevertheless, before a single *Plaintiff* is authorized and/or mandated to swear the *Verifying Affidavit* on behalf of the rest of the *Plaintiffs*, it is incumbent upon the rest of the *Plaintiffs*, on whose behalf the *Verifying Affidavit* is being sworn to execute an authority, which must be in writing and duly signed.

35. On the other hand, the written authority, executed by the rest of the *Plaintiffs*, in terms of the preceding paragraphs must be duly filed and/or lodged alongside the pleadings. **See *Order 1 Rule 13 (2) of the Civil Procedure Rule 2010***.

36. Perhaps, it is necessary to reproduce the provisions of **Order 1 Rule 13 (2) of the Civil Procedure Rule 2010**, to appreciate and to understand the import and tenor thereof.

37. For clarity, the provisions of **Order 1 Rule 13 (2) of the Civil Procedure Rules 2010**, are as hereunder;

13. Appearance of one of several plaintiffs or defendants for others [Order 1, rule 13.]

(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

38. Despite the clear provisions of the law, which have been alluded to herein before, the 2nd to 5th *Plaintiffs* herein, did not execute and/or sign any authority to mandate the 1st *Plaintiff* to swear the *Verifying Affidavit* and/or otherwise act on their behalf.

39. In my humble view, the failure to generate, execute and/or sign any such authority, either as required under the law or at all renders the suit filed by and/or on behalf of the 2nd to 5th *Plaintiffs* herein, fatally incompetent.

40. In support of the foregoing observation, I adopt and reiterate the decision in the case of **Andrew Ireri Njeru - Embu Nyangi Ndiiri Proposed Society Chairman & others v Daniel Nganga Kangi & another [2015] eKLR**, where the court observed as hereunder;

The plaintiffs herein sue in their capacity as the representative of the proposed Nyangi Ndiiri Society members. The authority to sue signed by the members has not been annexed to the plaint as required by the law.

41. Nevertheless, it would have been open to the 2nd to 5th *Plaintiffs* herein to approach the court with an *Application* to extend the time within which to remedy the default and thereby file either the authority authorizing the 1st *Plaintiff* to swear the *Verifying Affidavit* on their behalf or better still to file their own *Verifying Affidavits*.

42. However, despite the existence of a window to do so, no application was made, either before or even after the *Preliminary Objection*.

43. In the premises, even though I am seized of the jurisdiction to consider such an application if one was made and to exercise discretion, I must point out that no such discretion can be exercised in vacuum and without prompting.

44. To fortify the foregoing observation, I would reiterate and adopt the statement of the law as espoused in the decision in the case **Research International East Africa Ltd v Julius Arisi & 213 Others [2007] eKLR**, where the Court of Appeal observed as hereunder;

In our view, the true construction of rule 1 (2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule.

Moreover, the Grace Ndegwa's case (supra) and rule 12(1) of Order I CP Rules leave no doubt that one or more of the co-plaintiffs can validly file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-plaintiffs with their authority in writing.

Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of Order VII CP Rules.

The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule.

45. In a nutshell, it is my finding and holding that the suit by and/or behalf of the 2nd to the 5th Plaintiffs is not duly verified, in accordance with the law. Consequently, the suit filed by and/or behalf of the 2nd to 5th Plaintiffs be and are hereby struck out.

ISSUE NUMBER 2

Whether the Plaintiffs herein are possessed with the requisite locus standi, to commence, lodge and/or maintain the subject suit.

46. The Plaintiffs herein have filed and/or mounted the subject suit on the basis that same are lawful and bonafide members of the 8th Defendant company.

47. To fortify their claim, that is of being the lawful and bonafide members of the 8th Defendant company, the Plaintiffs herein generated and attached a list of members, to aid and support their contention of membership.

48. However, a glance at the list which is attached to the Plaintiffs' documents shows that the Plaintiffs' names are not reflected and/or contained therein.

49. Nevertheless, the Plaintiffs herein filed a Supplementary Affidavit sworn on the 12th November 2020 and in respect of which same now contended that most of the original members of the 8th Defendant company have since passed on and that the Plaintiffs are the survivors and/or heirs of the original members.

50. Whichever way the Plaintiffs would want to propagate their claim, one thing is certain. This is, that the Plaintiffs by themselves have not placed before the court as part of their pleadings, evidence to show the existence of any nexus between themselves and the 8th Defendant.

51. Simply put, the Plaintiffs herein have not shown and/or exhibited that same have the requisite locus standi, to commence, originate and/or maintain the subject suit, more particularly as against the 8th Defendant, who is admitted to be the registered owner and/or proprietor of the suit property.

52. In the absence of locus, I am afraid that the Plaintiffs herein cannot continue to propagate the subject claim before the court. For clarity, locus standi is an essential ingredient in the commencement and prosecution of a lawsuit.

53. To fortify the foregoing observation, I can do no better than to adopt and rely on the decision in the case of **Alfred Njau & 5 others v City Council of Nairobi[1983] eKLR**, where the court stated as hereunder;

The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.

54. In short, it was incumbent upon the Plaintiffs to show and/or establish that same have the requisite locus standi, by generating and/or exhibiting a document showing a nexus between them and the 8th Defendant.

55. However, non-has been put forth and in this regard, I find and hold that the Plaintiffs are not seized and/or possessed of such capacity to maintain the subject suit.

ISSUE NUMBER 3

Whether the Plaintiffs suit touching on and/or concerning the alienation of the 8th Defendants property is legally tenable, either as mounted or at all.

56. The gravamen of the subject suit is that the suit property belonging to and registered in the name of the 8th Defendant company is being alienated and/or sold by and/or behalf of the 8th Defendant.

57. However, the Plaintiffs, who claims to be members and/or shareholders of the 8th Defendant company, contend that same have not been consulted and/or involved in the process of the sale.

58. On the other hand, it has been averred that the 1st to the 7th Defendants, who are Directors to the 8th Defendant are mis-using their mandates and/or offices as such directors and hence the assets of the 8th Defendant are being mismanaged.

59. Be that as it may, the central issue in dispute herein is whether the Plaintiffs in their individual capacity can file a suit to challenge the affairs of the 8th Defendant company, including the manner in which the 8th Defendant company, is alienating and/or disposing of her assets.

60. In my humble view, the 8th Defendant is a limited liability company and therefore same is separate and distinct from her director, shareholders and/or members. In this regard, if there is an issue affecting the affairs and/or rights of the 8th Defendant, the only person who can sue to safe guard issues and/or rights, is non-other than the 8th Defendant.

61. For the avoidance of doubt, neither the shareholders, members nor directors of the company usurp the mandates and/or authority of the company and purport to sue on behalf of the company.

62. If any action were to be brought by a shareholder, member and/or director, allegedly on behalf of the company and in a bid to protect the assets and/or interests of the company, such an action or legal proceedings, would be incompetent, void ab initio.

63. Consequently, it is my finding and holding, that whatever the nature of interests and/or rights that the Plaintiffs herein may be having in the 8th Defendant (and for which non has been delineated), same cannot purport to file a suit in their personal capacity to challenge the manner in which the company is alienating her properties and/or assets.

64. In the premises, I find and hold that the Plaintiffs' suit, which is clearly not a derivative action, is incompetent and thus legally untenable.

65. In support of the foregoing observation, it is sufficient to invoke and rely on the decision in the case of **Ardhi Highway Developers Ltd vs Westend Butchery Ltd & Others [2015] eKLR** where the Court of Appeal referred to **Moir V. Wallersteiner [1975] 1 ALL ER 849atp. 857** and observed as hereunder;

*“Lord Denning MR in his characteristic literary style summed up the law in **Moir V. Wallersteiner [1975] 1 ALL ER 849atp. 857**, as follows:*

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage.

*Such is the rule in **Foss V. Harbottle[1843] 2 Hane 461**. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue.”*

66. From the foregoing decision, it is evident that if the property in question belongs to the company and the company is allegedly being defrauded, whether by outsiders and/or insiders, albeit of a minor nature, the only person who can commence civil proceedings for the protection of property is the company and not a member, subscriber and/or shareholder.

FINAL DISPOSITION

67. Having reviewed the issues for determination, it is my conclusion that the Notice of Preliminary Objection dated the 2nd December 2021, was well taken.

68. Consequently, the Preliminary Objection be and is hereby allowed and, in the premises, the Plaintiffs' suit be and is hereby struck out.

69. Costs of the Preliminary Objection and of the suit, be and are hereby awarded to the Defendants.

70. It is hereby Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. S.B Otieno for the Defendants

Mr. Matheka H/B for Mr. Akoto for the Plaintiffs