



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC CASE NO. E022 OF 2021**

ABEY ABDINOOR OSMAN.....PLAINTIFF/APPLICANT

VERSUS

SAMUEL NDIRITU.....1<sup>ST</sup> DEFENDANT/RESPONDENT

PAUL MASILA KIMEU.....2<sup>ND</sup> DEFENDANT/RESPONDENT

CHRISTOPHER NGEI MULILI.....3<sup>RD</sup> DEFENDANT/RESPONDENT

**CONSOLIDATED WITH**

**ELC CASE NO. E023 OF 2021**

PAUL MASILA KIMEU (Suing as Administrator of

and on behalf of Syokimau Farm Limited.....PLAINTIFF

VERSUS

MUNGAI NGARUIYA.....1<sup>ST</sup> DEFENDANT

ABDI NOOR ALI.....2<sup>ND</sup> DEFENDANT

MOHAMED ALI ABDI.....3<sup>RD</sup> DEFENDANT

**CONSOLIDATED WITH**

**ELC CASE NO. E025 OF 2021**

ZAMCO DEVELOPERS AGENCY LIMITED.....PLAINTIFF

VERSUS

SYOKIMAU FARM LIMITED.....1<sup>ST</sup> DEFENDANT

ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....2<sup>ND</sup> DEFENDANT

**RULING**

**Introduction**

1. On 25<sup>th</sup> February 2021, Abey Abdinoor Osman, filed a plaint dated even date, against the defendants herein vide Machakos ELC Case No. 22 of 2021. He averred that he is the registered proprietor of land parcel L.R NO. 12715/13912 Original Number 12715/308/1 L.R NO.

12715/13913 Original Number 12715/308/2, Mavoko (the suit property) from the Government of Kenya for a period of 99 years from 1<sup>st</sup> November 1983, having purchased the same on 7<sup>th</sup> October 2008, from one Christopher Ngei Mwilu at a consideration of Kshs. 10, 000,000/=. That he later subdivided the said titles resulting in parcel L.R Nos. 12715/14402-14419(Original Number 12715/13912/2-9 and LR Nos. 12715/14420-14437 (Original Number 12715/13913/2-19 (suit property).

2. He further contended that the defendants had without any justification trespassed on his land. He sought inter alia for a permanent injunction to bar the defendants from interfering with the suit property and also a declaration that the defendants' entry on the suit land was unlawful.

3. Simultaneous with filing the plaint, the Plaintiff filed the Notice of Motion dated 25<sup>th</sup> February 2021 under certificate of urgency seeking for a temporary injunction to restrain the defendants from interfering with the suit property, pending determination of this suit.

4. Vide Machakos ELC Case No. 23 of 2021, Paul Masila Kimeu, (who is the 2<sup>nd</sup> Defendant in Machakos ELC No. 22 of 2021 stated above), filed a plaint dated 25<sup>th</sup> February 2021, which he amended on 8<sup>th</sup> March 2021 against, Muigai Ngaruiya, Abdi Noor Ali and Mohammed Ali Abdi. He describes himself as suing as caretaker/Administrator of and on behalf of Syokimau Farm Limited, who he alleges is the registered owner of land parcel L.R NO. 12715/307 and L.R NO. 12715/308, having been allotted the same on 1<sup>st</sup> November 1983 by the Government of Kenya. It was also his contention that the defendants had trespassed on the suit property and he sought for a permanent injunction to restrain the defendants from interfering with the suit property.

5. On the said date of 25<sup>th</sup> February 2021, Paul Masila Kimeu also filed a Notice of Motion under certificate of urgency dated even date and sought for a temporary injunction to restrain the defendants from interfering with the suit property.

6. On 4<sup>th</sup> March 2021, the Plaintiff and Defendants counsel having entered consent, a consent order was made restraining the defendants from interfering with the suit land pending hearing and determination of the suit.

7. On 10<sup>th</sup> March 2021, the plaintiff filed the application dated 8<sup>th</sup> March 2021, seeking for leave to amend the Notice of Motion dated 25<sup>th</sup> February 2021, to include LR No. 12715/307 in the properties which the Defendants ought to be enjoined against.

8. On 15<sup>th</sup> April 2021, the 1<sup>st</sup> Defendant filed an application dated 14<sup>th</sup> April 2021 seeking to discharge, vary and or set aside the consent order of temporary injunction granted on 4<sup>th</sup> March 2021.

9. On 26<sup>th</sup> April 2021, the Defendants filed a preliminary objection dated 21<sup>st</sup> April 2021, stating that the Plaintiff had no capacity to file suit as he was not a licensed Insolvency practitioner.

10. Vide Machakos ELC Case No. 25 of 2021, Zamco Developers Agency Limited, filed a Plaint on 3<sup>rd</sup> March 2021, against Syokimau Farm Limited and the Attorney General. They claimed that they were the registered proprietor of parcel L.R NO. 12715/308 I.R No. 44811, having acquired the said property from one Clay Mbutu Benjamin in 2012. They also contended that in February 2021 agents of Syokimau Farm Limited fraudulently obtained title of the suit land and trespassed thereon by constructing a wall thereat. They sought for a permanent injunction against the defendants, a declaration that they are the lawful owners of the suit property and cancellation of the 1<sup>st</sup> Defendant's title.

11. Zamco Developers Agency Limited also filed a Notice of Motion dated 26<sup>th</sup> February 2021 seeking to restrain the 1<sup>st</sup> Defendant from interfering with L.R NO. 12715/308 I.R No. 44811.

12. On 29<sup>th</sup> April 2021, this court made orders that the parties in ELC NO. 22 of 2021, 23 of 2021 and 25 of 2021 to keep off the suit properties and not to damage the existing perimeter wall and the gate pending hearing of the applications and preliminary objection.

13. On 9<sup>th</sup> February 2022, this court directed that the Preliminary objection dated 21<sup>st</sup> April 2021, the application dated 25<sup>th</sup> February 2021 in ELC 22 of 2021, the application dated 25<sup>th</sup> February 2021 in ELC 23 of 2021, the Application dated 26<sup>th</sup> February 2021 in ELC 25 of 2021, the application dated 8<sup>th</sup> March 2021 in ELC 23 of 2021, the application dated 14<sup>th</sup> April in ELC 23 OF 2021 be heard together.

#### **Preliminary Objection dated 21<sup>st</sup> April 2021**

14. In the Preliminary objection dated 21<sup>st</sup> April 2021, the 1<sup>st</sup> Defendant in ELC 23 OF 2021, sought to have the 1<sup>st</sup> Plaintiff's suit struck out on grounds that Paul Masila Kimeu, the Plaintiff therein was not a licensed insolvency practitioner as provided for under the Insolvency Act No. 18 of 2015 as read together with the Insolvency Regulations of 2016, and therefore he lacks capacity to institute ELC 23 of 2021.

15. The Plaintiff filed a replying affidavit sworn on 31<sup>st</sup> May 2021 and filed on 7<sup>th</sup> October 2021 and deposed that Syokimau Farm Limited was registered in 1965 and on 26<sup>th</sup> July 2013, the shareholders passed a resolution to wind up the company; that the company was put under liquidation vide legal Notice No. 11485 dated 26<sup>th</sup> July 2013; that the Plaintiff was appointed as administrator by a unanimous resolution of the members of the company; that his mandate included filing suits; that the company was wound up in accordance with section 273 of the repealed Companies Act; that the plaintiff is acting under section 734 on transitional provisions in the Insolvency Act; that section 1024 (b) of the Companies Act protects the Plaintiff's actions; that the plaintiff is lawfully discharging his mandate and that the matters raised in the preliminary objection need evidence to prove and it will be draconian to strike out the Plaintiff's suit without giving him a hearing.

**Application dated 25<sup>th</sup> February 2021 in ELC 22 of 2021**

16. In the application dated 25<sup>th</sup> February 2021, the Plaintiff/Applicant sought for orders of temporary injunction to restrain the defendants, their servants and agents from harassing or intimidating the Plaintiff, alienating, trespassing, charging, transferring selling or in any manner interfering with the suit property or interrupting the Plaintiff's quiet possession and enjoyment of L.R NO. 12715/14420-14437 (Original Number 12715/13913/2-19) and Land Reference Number 12715/14402-14419 (Original Number 12715/13912/2-19), pending hearing and determination of the suit.

17. The application was premised on the affidavit sworn by the Applicant where he deposed that he was the registered owner of LR No. L.R NO. 12715/14420-14437 (Original Number 12715/13913/2-19) and Land Reference Number 12715/14402-14419 (Original Number 12715/13912/2-19) which he purchased from one Christopher Ngei Mwilu. That on 20<sup>th</sup> February 2021, the defendants trespassed on the suit property and have been harassing and intimidating the Plaintiff. Further that he is an innocent purchaser for value without notice and that the 1<sup>st</sup> Defendant is not a licenced insolvency practitioner.

18. The application is opposed. The 1<sup>st</sup> Defendant filed a replying affidavit on 26<sup>th</sup> April 2021 where he deposed that he was the caretaker and administrator of Syokimau Farm Limited, which company was voluntarily wound up on 26<sup>th</sup> July 2013; that the suit property belonged to Syokimau Farm Limited, was allotted to one Mulili Muasya who failed to comply with the terms of the company, hence the suit property reverted to the Company.

**Application dated 25<sup>th</sup> February 2021 in ELC 23 OF 2021**

19. In the application dated 25<sup>th</sup> February 2021, filed in ELC 23 of 2021, Paul Masila Kimeu, the Plaintiff therein sought for a temporary injunction to restrain the defendants from trespassing, entering, occupying, stopping, causing delay or disrupting the construction works or interfering in any manner with LR No. 12715/308 and that the OCS Athi River police station be directed to ensure enforcement of the orders granted by the court.

20. The application is premised on the affidavit of Paul Masila Kimeu, where he deposed that the suit property is registered in the name of Syokimau Farm Limited, whereof he is an administrator having been appointed on 26<sup>th</sup> June 2012, when the company was voluntarily wound up; that on 8<sup>th</sup> February 2021, when the Company began construction of a wall on the suit properties, the defendants trespassed thereon, disrupted the construction and made away with the construction materials. He sought for protection of the court by way of temporary injunction.

21. The application was opposed. The 1<sup>st</sup> Defendant Mungai Ngaruiya filed a replying affidavit sworn on 14<sup>th</sup> April 2021 in opposition of the application. He averred that he owns LR No. 12715/307 while a company called Samura Engineering Ltd, where he is a shareholder, owns LR No. 12715/308 and is in occupation of the same; that ownership of LR No. 12715/308 is subject to litigation in ELC 2 of 2021, where there are interim orders stopping third parties including the parties herein from interfering with the said property; that the plaintiff's documents are forgeries; that the plaintiff has the habit of suing non-existent parties, and the pleadings filed in court are meant to mislead the court; that he has never appointed the law firm which purportedly entered into consent with the Plaintiff's counsel and that orders sought should not be granted.

**Application dated 8<sup>th</sup> March 2021 in ELC 23 OF 2021**

22. The application dated 8<sup>th</sup> March 2021, filed by Paul Masila Kimeu, the Plaintiff, sought for leave to amend the Notice of Motion dated 25<sup>th</sup> February 2021 and the Plaintiff to include LR No. 12715/307 in the properties which the plaintiff sought to injunct the Defendants.

23. The application is premised on the supporting affidavit of Isaiah Kandie, sworn on 8<sup>th</sup> March 2021, where he deposed that LR No. 12715/307 was inadvertently excluded from the Notice of Motion dated 25<sup>th</sup> February 2021, and that its inclusion will assist the court to determine the real issues in dispute and that excluding that property will leave it exposed to trespass.

**Application dated 14<sup>th</sup> April 2021 in ELC 23 OF 2021**

24. The application dated 14<sup>th</sup> April 2021 was filed by the Mungai Ngaruiya the 1<sup>st</sup> Defendant and sought to discharge, vary and or set aside the order of temporary injunction granted on 4<sup>th</sup> March 2021 in favour of the Plaintiff Paul Masila Kimeu. It is premised on the affidavit of Mungai Ngaruiya, the 1<sup>st</sup> Defendant, sworn on even date. He deposed that although he had never met Wilfred K. Babu & Company Advocates, nor instructed them to represent him in this matter, on 4<sup>th</sup> March 2021, the said law firm without instructions entered into a consent for grant of injunction against the 1<sup>st</sup> Defendant injuncting the 1<sup>st</sup> defendant from trespassing, entering, occupying, stopping, causing delay or disrupting construction works and or interfering in any manner whatsoever with ownership and possession of L.R No. 12715/308 pending hearing of the suit; that the orders greatly prejudiced the 1<sup>st</sup> Defendant and the same ought to be discharged.

**Application dated 26<sup>th</sup> February 2021 in ELC E025 OF 2021**

25. In the application dated 26<sup>th</sup> February 2021, Zamco Developers Agency Limited, the Plaintiffs therein sought for an order of injunction barring Syokimau Farm Limited, the 1<sup>st</sup> Defendant from entering, constructing on, subdividing, selling, charging, transferring or in any other manner interfering with the Plaintiff's quiet possession and proprietorship of LR No. 12715/308 IR No. 44811/1 North West Athi River pending the hearing and determination of this suit. They also sought for an order that the Officer Commanding Athi River Police Station do supervise the observance of the orders issued by this court by the parties hereto.

26. The application is premised on the supporting affidavit of Ali Abubakar Mohamed sworn on 26<sup>th</sup> February 2021 as well as his supplementary affidavit sworn on 3<sup>rd</sup> October 2021, whereof he deposed that the Plaintiff is the *bona fide* proprietor of LR No. 12715/308 I.R No. 44811/1, having purchased the same from one Mbutu Benjamin at Kshs. 50, 000,000/=; that the 1<sup>st</sup> Defendant's agents are digging a trench around the Plaintiff's land with intent to construct a perimeter wall; that in 2020, the 1<sup>st</sup> Defendant obtained a fraudulent title to the suit land; that the 1<sup>st</sup> Defendant is using force and threats of violence against the Plaintiff's representatives and the Plaintiff is apprehensive that if the 1<sup>st</sup> Defendant is not barred by court from continued trespass on the suit property, they may suffer irreparable injury; that the 1<sup>st</sup> Defendant's resolution for its winding up has never been filed with the Registrar of companies; that on 26<sup>th</sup> June 2013 when the 1<sup>st</sup> Defendant was appointed administrator, the Plaintiff was already registered as proprietor of LR No. 12715/308; that the 1<sup>st</sup> Defendant and one Samuel Ndiritu have been harassing genuine property owners of Syokimau Farm Limited and unlawfully repossessing land from their owners; that the title documents by Abey Abdinoor, the Plaintiff in ELC 022 of 2021 are fraudulent and his application for injunction ought to be dismissed.

27. The application is opposed. Paul Masila Kimeu Administrator of Syokimau Farm Limited, the 1<sup>st</sup> Defendant, swore a replying affidavit dated 31st May 2021, and deposed that the 1<sup>st</sup> Defendant was registered in 1965 and vide a unanimous resolution of the members of the 1<sup>st</sup> Defendant to wind up the 1<sup>st</sup> Defendant, he was appointed the administrator on 26<sup>th</sup> June 2013; that LR No. 12715/308 was allotted to Mr. Mulili Muasya member No. 284 but that he failed to comply with the terms of the company whereof the property reverted to the 1<sup>st</sup> Defendant and that the administrator has paid all the land rates and Land rent.

### **Submissions**

28. The preliminary objection together with the applications herein were canvassed by written submissions. Parties filed consolidated submissions in respect of the same, which this court has considered. On record are submissions by the firm of Ahmednasir, Abdukadir & Co Advocates dated 7<sup>th</sup> September 2021 filed on behalf of Abey Abdinoor Osman, the Plaintiff in ELC E022 of 2021; submissions by the firm of Khaminwa & Khaminwa Advocates dated 15<sup>th</sup> July 2021 filed on 7<sup>th</sup> October on behalf of Paul Masila Kimeu, the Plaintiff in ELC E023 of 2021; two sets of submissions filed by the firm of N.K Mugo & Company Advocates dated 27<sup>th</sup> September 2021 and 10<sup>th</sup> February 2022 respectively and filed on behalf of Mungai Ngaruiya, the 1<sup>st</sup> Defendant in ELC E023 of 2021 and submissions by the firm of Wagara, Koyoko & Company Advocates dated 6<sup>th</sup> October 2021 filed on behalf of Zamco Developers Agency Limited, the Plaintiff in ELC E025 OF 2021.

### **Analysis and determination**

29. Before, I address the issues in this matter, I must point out that this dispute involves three suits namely ELC E022 of 2021, ELC E023 of 2021 and ELC E025 of 2021. The subject matter in the three suits is the same, namely LR No. 12715/307 and LR No. 12715/308, and or subdivisions arising therefrom. As the parties in the three suits feature in different suits, by order of this court, all the parties were served with pleadings in the three suits. In order to give effect to the overriding objective of the Civil Procedure Act of facilitating the just, expeditious, proportionate and affordable resolution of this dispute, I find that it is proper and reasonable to consolidate the three suits. This will ensure that ultimately substantive justice is delivered to all the parties involved and the court's precious resources are efficiently applied.

30. Consequently, I order that ELC E022 of 2021, ELC E023 of 2021 and ELC E025 of 2021 be and are hereby consolidated. The lead file shall be ELC E022 of 2021. For ease and orderliness of trial, the Plaintiff therein shall be the sole Plaintiff, while the defendants therein are the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Plaintiff in ELC E025 of 2021 shall be deemed the 4<sup>th</sup> Defendant, while the defendants in ELC E023 and ELC E025 respectively shall be deemed to be 5<sup>th</sup> to 9<sup>th</sup> Defendants respectively. All Plaintiffs other than the Plaintiff in ELC E022 of 2021, shall be deemed as counter claims.

31. I now turn to the issues now before court. I have considered the Preliminary objection, the five applications, the responses thereto and the submissions filed by the parties. The issues that arise for determination are as follows;

**a) Whether Paul Masila Kimeu had locus standi to file ELC E023 of 2021.**

**b) Whether the Plaintiff in ELC E023 of 2021 has met the threshold for grant of leave to amend his Notice of Motion dated 25<sup>th</sup> February 2021 as well as the plaint.**

**c) Whether the consent orders of temporary injunction made on 4<sup>th</sup> March 2021, ought to be discharged, varied and or set aside.**

**d) Whether orders of injunction should issue in the circumstances of this case. If yes in what terms?**

32. On whether the question of *Locus Standi* is a matter that can be raised by preliminary objection, the 1<sup>st</sup> Defendant submitted that lack of capacity is a point of law touching on the jurisdiction of the court. The Plaintiff has argued that that question is a matter of evidence and cannot be raised by way of preliminary objection. I agree with the 1<sup>st</sup> Defendant's argument because, if this court were to find that the Plaintiff had no *locus standi* to file the suit herein, then that point alone will have disposed of the matter at the preliminary stage without ascertaining facts. (See **Daykio Plantations Limited v National Bank of Kenya Limited & 2 Others [2019] e KLR**).

33. Now, turning to the issue as to whether Paul Masila Kimeu had capacity to file suit No. ELC E023 of 2021, counsel for the 1<sup>st</sup> Defendant argued that although the Plaintiff describes himself as caretaker/administrator of Syokimau Farm Limited, the repealed Companies Act did not provide for such position. That the said Act only provided under section 299 thereof for the position of liquidator, who has capacity to file suit. Hence, the Plaintiff was not duly appointed under sections 278 and 299 of the repealed Companies Act.

34. Counsel further argued that the Insolvency Act introduced the position of Insolvency Practitioner. Counsel referred to section 6 of that Act and contended that the Plaintiff does not qualify to be an Insolvency Practitioner. Counsel relied on sections 593 of the Insolvency Act to contend that an administrator's appointment ends on expiry of 12 months. Counsel also relied on sections 241 of the Companies Act and sections 528, 593 and 594 of the Insolvency Act. Counsel argued that the plaintiff's appointment as administrator is not true and it is also illegal. In support of the above arguments, reliance was placed on the cases of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Ltd (1969) E.A 696*, *Daykio Plantations Limited v National Bank of Kenya Limited & 2 Others [2019] eKLR*, *Kenya Plantation and Agricultural Workers Union v Unilever Tea (k) Ltd [2012] eKLR* and *Patrick Kiseki Mutisya (Suing as the personal Representative of the estate of Nzomo Mutisya (Deceased v K.B Shangani & Sons Limited & Others [2012])*.

35. On the other hand, the Plaintiff argued that Syokimau Farm Limited ceased to have legal capacity to sue upon commencement of voluntary winding up process and the management of its affairs was taken over by the administrator. Counsel argued that the winding up process commenced by legal Notice number 11485 of 26<sup>th</sup> July 2013, which has never been challenged at the Registrar of Companies. It was also contended that under section 734 of the Insolvency Act and section 1024 of the Companies Act 2015, any past act done under the repealed Companies Act, which had not been completed, may be completed under the provisions of the repealed Act. That therefore the administrator had power to file suit on behalf of Syokimau Farm Limited, without seeking to be an Insolvency practitioner. Counsel relied on the cases of *KSL International Ltd (Under receivership) & 5 Others v Bank of Africa (K) Ltd & 6 Others [2018] eKLR*, *Suraya Holdings Ltd & 4 Others v ICICI Bank & Another (2018) eKLR*, *In the matter of the winding up of Blue Bird Aviation Limited, W.C. No. 7 of 2016* and *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Ltd (1969) E.A 696*.

36. I note that under section 271 of the repealed Companies Act Cap 486 Laws of Kenya, winding up could be done voluntarily, when the period of the duration of the company expires, or the event anticipated occurs; or if the company makes special resolution to voluntarily wind up the company. Besides, where there is cause, section 298 thereof provides for appointment or removal of a liquidator in voluntary winding up. And the powers of a liquidator under section 241 of the said Act included instituting suit.

37. Having considered the arguments on both sides, I note that it is not in dispute that Syokimau Farm Limited was placed under voluntary winding up process by the company's minutes of 26<sup>th</sup> June 2013. This was published vide legal Notice No.11485 dated 26<sup>th</sup> July 2013. Under section 273 of the repealed Companies Act, winding up process is deemed to commence at the time of passing the resolution for voluntary winding up. The plaintiff states that he was appointed as administrator vide minutes of the Annual General Meeting dated 26<sup>th</sup> June 2013, which also wound up the said company. Those minutes are on record. None of the parties herein exhibited any evidence of any objection or challenge filed challenging the voluntary winding up process.

38. Syokimau Farm Limited began the process of winding up on 26<sup>th</sup> June 2013. Apparently, the winding up process yielded the right of the company to sue, to the Plaintiff herein, as administrator. The question that ought to be answered is whether the Plaintiff has sufficiency of interest in the suit land, to give him standing in these proceedings. The Plaintiff states that the suit land is registered in the name of Syokimau Farm Limited. Can Syokimau Farm Limited having commenced the winding up process, have capacity to file suit in its name? I don't think so. And so, if they have no capacity to sue, who has? Or who can protect their interests in court?

39. What I understand the 1<sup>st</sup> Defendant to be saying is that the voluntary winding up process of Syokimau Farm Limited was flawed and instead of appointing a liquidator, the members appointed the Plaintiff as administrator to run the affairs of the company and that in any event, thereafter the Plaintiff failed translate his position to that of an Insolvent Practitioner. Several sections of the repealed Companies Act as well as the provisions of the Insolvency Act were cited by counsel for the 1<sup>st</sup> Defendant to buttress their argument. From undisputed facts on record, the plaintiff is in court today allegedly courtesy of what the members of Syokimau Farm Limited decided and the powers they gave him, including powers to institute suit in the place of the Company and for the members, vide the AGM minutes of 26<sup>th</sup> June 2013. The powers given to the Plaintiff by the members of Syokimau Farm Limited are the same powers a liquidator has under section 241 of the repealed Companies Act.

40. It is my considered view that the issues raised by the 1<sup>st</sup> Defendant are issues beyond the beacons of this case and go to the root of the legality of the voluntary winding up process of Syokimau Farm Limited. I am also of the opinion that the questions as to whether the process of voluntary winding up of Syokimau Farm Limited was lawful and whether the appointment of the Plaintiff as administrator instead of liquidator of the company under voluntary winding up, are matters that ought to be raised in accordance with the provisions of Part VI of the repealed Companies Act. Under section 2 of the same Act, the court with jurisdiction to determine such questions is the High Court as established under Article 165 of the Constitution. Under section 298 of the said Act, the High Court has power to appoint or remove a liquidator in respect of a voluntary winding up process. There is no evidence that any such orders have been sought against the Plaintiff or any other relevant orders that would, as it were, regularize the voluntary winding up process, which in the 1<sup>st</sup> Defendant's opinion, is flawed.

41. I therefore find and hold that this court has no jurisdiction to determine the legality or otherwise of the voluntary winding up process undertaken by Syokimau Farm Limited members. I hold the view that as long as the appointment of the Plaintiff to run the affairs of Syokimau Farm Limited (which to my understanding is in liquidation), remains unchallenged, then his capacity to represent the company in court, which emanates from the authority/resolution of the company's membership, cannot be raised in this court.

42. I take the view that *Locus standi* is about sufficiency of interest in the subject matter, adequate enough to grant a person the right to be heard or listened to in a suit. In the case of *Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000*, the court held as follows;

**Locus Standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in court of law. Further in the case of Alfred Njau and Others v City Council of Nairobi (1982) KAR 229, the court also held that; -**

**The term Locus Standi means a right to appear in court and conversely to say that a person has no locus Standi means that he has no right to appear or be heard in such and such proceedings.**

43. In my considered view therefore, the Plaintiff has sufficient interest in this suit, by virtue of his appointment vide the minutes of 26<sup>th</sup> June 2013. The totality of the above is that the preliminary objection herein lacks merit and is untenable.

44. As regards the issue as to whether the Plaintiff in ELC E023 of 2021 ought to be granted leave to amend the plaint and his Notice of Motion dated 25<sup>th</sup> February 2021 to include LR No. 12715/307 therein, it is my considered view that unless an amendment would occasion the other party prejudice which cannot be compensated by costs, the same ought to be allowed. Having looked at the grounds on the face of the application dated 25<sup>th</sup> February 2021, I note that the same makes reference to LR No. 12715/307, the property sought to be included therein. Therefore, I do not find any prejudice that will be suffered by the Respondents, that may not be compensated by costs, if the amendment is allowed.

45. In the case of *Eastern Bakery v Castelino (1958) E.A 461 (U) at p. 462*, the court held that;

**It will be sufficient, for the purpose of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.**

46. Therefore, the amendment sought by the Plaintiff in ELC E023 of 2021 is hereby allowed. In the interests of justice, the application dated 25<sup>th</sup> February 2021, shall hereunder be determined as though the same had included LR No. 12715/307. In addition, the Plaintiff is granted leave to amend the plaint.

47. On the question as to whether the consent orders of temporary injunction made on 4<sup>th</sup> March 2021, should be discharged, varied and or set aside, I note that there was no response filed by the firm of Wilfred K. Babu & Company Advocates, disputing the Applicant's averments that the consent was entered without instructions. It is trite law that consent orders can only be set aside in certain circumstances like where there was fraud, or collusion or where there was no consensus between the parties. See *Brooke Bond Liebig v Mallya (1975) E.A 266*.

48. In the case of *Flora N. Wasike v Desmo Wamboko [1988] e KLR*, the court stated as follows;

**Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court..., or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.**

49. The order sought to be set aside barred the Defendants from interfering with the suit property and also from not interrupting the Plaintiff with the construction on the suit property. If the plaintiff is given the blessing to continue with the construction on the suit property, then essentially, there will be no point of the defendants defending the suit. Considering that the firm of Wilfred K. Babu & Company Advocates have not disputed the allegation that they have never been instructed by the 1<sup>st</sup> Defendant to represent him in this matter, the constitutional right of all the parties to be heard before adverse orders are made against them, and the fact that there are other parties in this dispute whose interests shall be prejudiced if the injunction orders granted on 4<sup>th</sup> March 2021 are maintained, I find that there is a good cause to set aside the said consent orders.

50. The plaintiffs in ELC E022 of 2021, ELC E023 of 2021 and ELC E025 of 2021 have all sought for temporary injunctions against the defendants in their respective suits. They have all exhibited certificates of title to show that they are registered proprietors of the suit properties. At this stage, the only objective of the court is to consider the evidence at a prima facie level and the standard of proof is less than that required to prove the substantive suit upon hearing viva voce evidence. In other words, the findings made now are not conclusive, and the court ought to be careful not to make a finding that will embarrass the fair trial of the action.

51. I have had opportunity to peruse the documents of ownership of the suit properties, presented by the Plaintiffs as well as the defendants in the three suits, which included certificates of title and official searches. As a property can only have one title document, it means that some of the title documents presented herein are not genuine. At this stage, with the limited material placed before court, the court cannot decide which title document is genuine and which one is not, as it does not have the advantage of having considered the full evidence. In my view, it is only the full trial that will separate the wheat from the tares.

52. Having said that, and considering that this court has an inherent power to preserve the integrity of the trial process and ensure that the subject matter in a suit is preserved pending determination of the suit, so as not to prejudice the rights of any of the parties therein, this court is inclined to make conservatory orders to protect the suit properties herein pending hearing of this suit and to expedite the trial thereof.

53. In the end, I make the following orders:

**a) That the preliminary objection dated 21<sup>st</sup> April 2021 be and is hereby dismissed with costs.**

**b) That Paul Masila Kimeu is granted leave of 14 days to file and serve the amended plaint.**

**c) That the consent orders made by this court on 4<sup>th</sup> March 2021 be and are hereby set aside.**

**d) That all the parties herein, their agents, servants and or proxies are ordered to keep off, and not to interfere in any manner whatsoever with, LR No. 12715/307 and LR No. 12715/308 and or any subdivisions arising therefrom, until this suit is heard and determined.**

e) That no party shall sell, charge, lease, subdivide, dispose, transfer or in any manner deal with LR No. 12715/307 and LR No. 12715/308 or any subdivisions arising therefrom, pending hearing and determination of this suit.

f) That the Officer Commanding Station, Mulolongo Police Station to ensure enforcement of the orders made herein.

g) All the parties are directed to file their respective consolidated, paginated bundles; which must include all their pleadings, witness statements, documents and any other material they wish to rely upon at the trial, within 30 days of this ruling.

h) This matter is listed for pretrial directions on 26<sup>th</sup> May 2022.

54. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 27<sup>TH</sup> DAY OF APRIL 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Ms Khaminwa, Mr. Malelu and Mr. Kandie for the 2<sup>nd</sup> Defendant

Mr. Amanywa for Plaintiff

Mr. Koyyoko for the 4<sup>th</sup> Defendant

Ms. Wanja for the 1<sup>st</sup> Defendant

Ms Josephine Misigo – Court Assistant