



REPUBLIC OF KENYA



KENYA LAW

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**Fwamba v Walubengo & 6 others (Environment & Land Case
74 of 2019) [2022] KEELC 12671 (KLR) (27 April 2022) (Ruling)**

*Peter Wekesa Fwamba (Derivatively on behalf of Trans Nzoia Investment
Company Limited) v Ronald Sawenja Walubengo & 6 others [2022] eKLR*

Neutral citation: [2022] KEELC 12671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 74 OF 2019**

FO NYAGAKA, J

APRIL 27, 2022

BETWEEN

**PETER WEKESA FWAMBA (DERIVATIVELY ON BEHALF OF TRANS NZOIA
INVESTMENT COMPANY LIMITED PLAINTIFF**

AND

RONALD SAWENJA WALUBENGO 1ST DEFENDANT

PAUL SIMIYU WEKESA 2ND DEFENDANT

GEORGE IMBERA LUDISI 3RD DEFENDANT

KALORI ISOSO 4TH DEFENDANT

MUNDEBE INVESTMENT COMPANY LIMITED 5TH DEFENDANT

VIPUL RATILAL DODHIA 6TH DEFENDANT

CHERANGANI INVESTMENTS COMPANY LIMITED 7TH DEFENDANT

RULING

1. This matter was certified ready for hearing on November 11, 2020. In that fashion, the plaintiff presented viva voce evidence in support of the suit. After the close of the plaintiff's case, the 6th and 7th defendants filed a preliminary objection on January 18, 2022. It sought a finding that the suit be struck out for the following reasons reproduced verbatim:

“That this honorable court does not have jurisdiction to entertain this suit as it is not a land dispute but a commercial dispute relating to the management of the affairs of the affected



party Trans Nzoia Investments Company Limited and alleged breach of fiduciary duty by the directors of the affected party Trans Nzoia Investments Company Limited.”

2. Consequently on January 18, 2022, the court directed parties to canvass the preliminary objection by way of written submissions.

The Submissions

The adverse parties filed their respective submissions. The 3rd and 4th defendants did not oppose or support the preliminary objection. They therefore did not file submissions.

The 6th and 7th Defendants’ Submissions

3. In their joint submissions dated February 16, 2022 and filed on the same day, the 6th and 7th defendants submitted that the nature of the claim particularized in the Plaintiff is a derivative action. The plaintiff instituted the suit as a member of Trans Nzoia Investment Company Limited. They contended that the plaintiff sought reliefs to reverse decisions made at the Company as he alleged mismanagement of affairs and breach of fiduciary duties on the part of the 1st to 4th defendants. They propositioned that this dispute ought to be determined in the High Court and not the present court. They argued that a court cannot donate itself jurisdiction as the same is conferred upon it by the Constitution or statute.
4. Since the claim is in the nature of a derivative action, the 6th and 7th defendants directed this court to section 238 (2) of the [Companies Act](#) 2015 stating that the said claim may be brought under part XI of the Act or in accordance with an order of the court. They further relied on section 239 (1) of the [Companies Act](#) to argue that any claim instituted under part XI of the [Act](#) by member must be done at the High Court as defined in section 3 of the same [Act](#). They added that section 13 of the [Environment and Land Court Act](#) 2011 did not extend adjudication of derivative claims. Consequently, they urged this court to down its tools. They fortified their submissions by relying on the locus classicus authority of [Owners of the Motor Vehicle “Lillian S” v Caltex Oil \(Kenya\) Limited](#) [1989] eKLR.

The plaintiff’s Submissions

5. In opposition to the preliminary objection, the plaintiff submitted that he applied for leave to continue the present suit before this court vide a motion on notice dated December 17, 2019. The 6th and 7th defendants responded by filing grounds of opposition and a replying affidavit all dated February 25, 2020. He posited that the said defendants ought to have raised these present issues then and are thus now estopped.
6. For these reasons, the plaintiff urged this court to dismiss their preliminary objection as constructive *res judicata*. He relied on section 239 of the [Companies Act](#) 2015 to substantiate that his claim was well founded in the law as leave was granted by this court’s in its ruling of October 1, 2020. Furthermore, he cited the case of ELC No 1400 of 2013; [Purdenzio Nicholas Gaitara v Patrick Kariuki Muiruri and 2 others](#) where the court in this matter determined a derivative suit. The plaintiff argued the 6th and 7th defendants raised the preliminary objection with unclean hands consequently abusing the process of the court. They relied on the case of [Greenhalgh v Mallard CA](#) (1947) 2 ALL ER 255 to underpin their argument.
7. On section 3 of the [Companies Act](#) 2015, the plaintiff contended no other court has been specified in part XI of the [Companies Act](#) 2015 and that it must be understood that the High Court has the sole jurisdiction to entertain suits such as this one.



8. The plaintiff further submitted that section 13 (2) (e) of the *Environment and Land Court Act* provides that this court can hear and determine any other dispute relating to environment and land. Thus, this court is clothed with jurisdiction to hear and determine the present dispute. He advanced that the real issue in dispute is title to property irrespective of the failures by the other directors in discharging their duties. In conclusion, he beseeched this court to dismiss the preliminary objection with costs.
9. I have considered the preliminary objection filed by the 6th and 7th defendants. I have also considered the respective written submissions by parties. It is not gainsaid that the substratum of the issue circumnavigates around a derivative action. The provisions of the *Companies Act* are also not in dispute. On the one hand, however, the 6th and 7th defendants maintained that the High Court is the only court vested with jurisdiction to hear and determine the same. They buttressed their submissions with the provisions couched under Part XI, that is section 238 (1), (2) and (3) and section 239 (1) and section 3 of the *Companies Act* 2015. They maintain that these provisions are to be seen in light of section 13 of the *Environment and Land Court Act* which does not grant this court jurisdiction to hear and determine disputes arising out of a derivative action. The plaintiff conversely maintained that a derivative action is not under exclusivity in the High Court. He further put forward that this court granted the plaintiff leave to proceed with the suit in its ruling of October 1, 2020. I shall now proceed to determine the issue as hereunder:

Analysis and Determination

10. The definition of a preliminary objection has been well settled in our jurisdiction. The learned judges in *Mukisa Biscuit Manufacturing Co Ltd V West End Distributors Ltd* (1969) EA 696 defined what constituent elements must be entrenched in a Preliminary objection to be sustained as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”
11. It is not in disputes that this, just like any other, court is a creature of statute. Following the plebiscite in 2010, the Constitution established the present court under article 162 (2) (b). Consequently, the *Environment and Land Court Act* was enacted and under its preamble “to give effect to article 162(2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers”.

Therefore what is imperative is that the present dispute must fall within the ambit and jurisdiction of this court espoused in section 13 of the *Environment and Land Court Act* if it has to survive the onslaught made against it by way of preliminary objection. It behooves me to remind parties that jurisdiction is everything. I need not reinvent the wisdom enunciated in the Court of Appeal decision of the *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR that without jurisdiction, I must and will down my tools.
12. The crux of the preliminary objection lies in the nature of the suit that arises out of a derivative action. Both parties consonantly albeit in different ways concurred that section 239 (1) of the *Companies*



Act must be complied with in furtherance of the provisions of section 238 (2) (b) of the Companies Act. Section 238 (2) contends that a derivative action must be brought by a member of a company in accordance with an order of the Court in proceedings for protection of members against unfair prejudice. Section 239 (1) requires parties to apply for permission before court. Of scrutiny before this court is that while the 6th and 7th defendants propound that the plaintiff failed to comply with the said provision, the plaintiff asserts that he indeed complied.

13. I have interrogated the plaintiff's Application dated December 17, 2019. Under prayer two (2), the plaintiff asked this court to grant him leave to continue a derivative action on behalf of Trans Nzoia Investment Company Limited. The 6th and 7th defendants vehemently opposed the Application. They raised several grounds challenging the Application. I need not reproduce the same. My learned brother judge ultimately delivered a ruling on this issue on October 1, 2020. For clarity, I will reproduce in part the substance of the ruling touching on the present issue thus:

“Upon carefully considering the issues, the application before me and the substantive suit and being persuaded by the above decision, I am satisfied that the applicant has established a prima facie case sufficient to be granted leave to bring a derivative action. The notice of motion dated December 17, 2019 is therefore granted in terms of prayer no 2.... This matter shall be mentioned on November 2, 2020 to ascertain compliance by the parties and to issue a hearing date for the main suit.”

14. As rightly pointed out by the plaintiff, the 6th and 7th defendants participated in the application. They were averse to the continuation of this suit as a derivative action. The court heard both parties and when it retired, rendered its decision on the matter. In fact, further directions were issued on its hearing and disposal. It thus appears that the 6th and 7th defendants want this court to sit on its own appeal and relitigate an issue that was determined by this court. If they were dissatisfied with the decision of this court, they had all avenues possible to vindicate their prayers. Again, a careful analysis of the pleadings herein show that the plaintiff seeks reliefs touching on how various parcels of land presumably owned by the affected party of whom the plaintiff and other people are said to be members, may have been lawfully or unlawfully subdivided and transferred. Land and environment are the core issues of the jurisdiction of this court. The court cannot turn a blind eye to what is alleged to have been done affecting the resource that falls under the jurisdiction of this court squarely. For these reasons, I find that this issue was meritoriously dealt with by my brother judge. I see no need to state any further.

Orders and Disposition

15. Consequently, the only order that can emanate from the analysis above is that the preliminary objection is unfounded. It lacks merit and is hereby dismissed with costs to the plaintiff.
16. This matter shall be mentioned on May 31, 2022 for purposes of fixing a date for defence hearing.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 27TH DAY OF APRIL, 2022

HON DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE LAW COURTS

