



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 98 OF 2021

MACKINNON ROAD DOKATA RANCHING COMPANY LIMITED PLAINTIFF

VERSUS

MUKTAR SHEIKH MOHAMED..... 1ST DEFENDANT

HARET GABOW TAKOI2ND DEFENDANT

MUSDAF BISHAR YUSSUF.....3RD DEFENDANT

ROCKY CHUPHI4TH DEFENDANT

MWEZINANE CHUPHI5TH DEFENDANT

ABBAS CHUPHI 6TH DEFENDANT

NJEMO CHUPHI7TH DEFENDANT

KATANA CHUPHI8TH DEFENDANT

RULING

(Application for injunction; suit filed by a limited liability company claiming that the defendants have interfered with its land; defendants contending that suit improperly filed and that persons who have filed suit have no authority to do so; evidence showing that the plaintiff was registered by two subscribers who are now dead; no evidence of who the current members of the company are and whether there has been transmission of the shares of the original members; CR 12 of the company not indicating who its members are and how many shares such members hold; resolution to file suit purportedly passed by members in a General Meeting; doubtful if the plaintiff has members capable of passing resolution in a General Meeting; the authority to file suit also signed by persons who are not directors of the company; prima facie case cannot be said to have been established if there is doubt as to the veracity of the suit; application for injunction dismissed)

1. This suit was commenced through a plaint which was filed on 27 May 2021. In the plaint, the plaintiff, a limited liability company, avers to be the owner, since the year 1973, of a private commercial ranch registered as LR No. 14857 (CR No. 77) measuring 10,233.6 Hectares commonly known as Dokata Ranch. The plaintiff contends that in August/September/October 2020 or thereabouts, the defendants, without the plaintiff's permission, purported to lease out portions of the plaintiff's land. It is pleaded that this is a scheme to take over the plaintiff's land. In the suit, the plaintiff seeks orders of a declaration of ownership of the land; a declaration to nullify any transactions or leases entered by the defendants over the suit land; a mandatory injunction to compel the defendants to vacate the suit land; a permanent injunction to stop the defendants from further dealings in the property; general damages; and costs.

2. Together with the plaint, the plaintiff filed an application seeking orders of injunction to have the defendants stopped from entering, trespassing, grazing, moving livestock, occupying, erecting structures, or selling or dealing with the suit property, pending hearing and determination of this case. It is that application which is the subject of this ruling.

3. The supporting affidavit is sworn by Belewa Chuphi who has described himself as the Managing Director of the plaintiff. He has annexed an authority dated 2 January 2021 authorising him to swear affidavits on behalf of the plaintiff and authorising the filing of this suit. He has averred that the plaintiff is a limited liability company and the entity that owns the suit land. He has annexed a copy of the certificate of title. He has stated that the plaintiff has a well organised management structure with a management board headed by a Chairman and a Managing Director, who execute legally binding contracts on behalf of the company. He has deposed that on 12 August 2020, workers within the ranch

reported to his office of the presence of an unknown number of livestock comprising of over 500 camels and herders. Upon confrontation, they stated that they have authority to graze their camels within the ranch, pursuant to a purported contract signed with the management and/or owners of the ranch. He was taken aback because he was not aware of any such transaction and he proceeded to report the matter to Mackinnon Road Police Post. The police proceeded to the ranch and summoned the livestock owners who were the 2nd and 3rd defendants. They met in the presence of the police officers and they explained that they had paid money to the 4th, 5th and 6th defendants and other persons who represented themselves as officials and/or owners of the ranch, and that they had signed agreements and leases with them, giving them entry and grazing rights in the ranch. He has annexed the said leases. He avers that he explained to the 2nd and 3rd defendants that the 4th, 5th and 6th defendants had no authority to transact on behalf of the plaintiff. Sometimes in October 2020, another group, this time fronted by the 1st defendant also invaded the ranch and moved over 500 camels and other livestock into the ranch and also claimed grazing rights pursuant to a lease made between the 1st defendant and the 3rd, 4th, 5th and 6th defendants. The 1st defendant was confronted and he produced a copy of the lease which is annexed. He has deposed that a lease can only be created by parties with capacity to contract and that due diligence would have established that it is the plaintiff with title. He has deposed that the ranch is now in imminent danger of being overrun by the large herds of livestock introduced by the defendants, and unless injunctive orders are issued, the plaintiff stands to suffer immense loss and damage.

4. The defendants swore replying affidavits to oppose the motion.

5. On the part of the 1st defendant, he deposed that he entered into a valid agreement with the officials and/or members of the plaintiff and leased the land for a period of 6 months. He thus grazed his camels in the ranch. He contends that there exists a lawfully executed lease agreement which he annexed. He avers that the doctrine of estoppel applies in this case and he wonders why the plaintiff took so long before taking any action. He believes that the present suit is fuelled by a family feud and that he is an innocent party who should not be punished to feed the ego of a sect of the family. He avers that he acted upon the plaintiff's officials' representation that the property is his as lessee. The position of the 2nd and 3rd defendant is more or less the same. They deposed that they had been in the ranch for about a year without any disruption whatsoever and that the plaintiff's officials and/or members allowed them to graze and keep their herd in the ranch. They have annexed what they consider to be a lawfully executed agreement signed by them and persons they consider to be agents of the plaintiff company.

6. The 4th respondent (Rocky Chuphi) swore a replying affidavit where he deposed that Belewa Chuphi does not have the locus standi to represent the plaintiff company or swear affidavits on its behalf. He has deposed that the resolution to file suit, and which authorised Mr. Belewa to swear the affidavit, was passed by persons who are not members or directors of the plaintiff and is therefore null and void. He has stated that there is no evidence showing that the persons who passed the resolution were appointed directors and/or members of the plaintiff. He has referred to the Memorandum of Association which shows the directors and shareholders of the plaintiff to be Kauli Stungurube and Chuphi Ngala who are both deceased. He has disclosed that Belewa Chuphi, the 5th and 8th defendants (Mweziane Chuphi and Katana Chuphi) and himself, are sons of the late Chuphi Ngala (deceased). He has deposed that no grant of letters of administration has been taken out in respect of the estates of Kauli Stungurube and Chuphi Ngala. He has averred that Belewa Chuphi runs commercial ranching operations with more than 500 head of cattle and 600 goats without any colour of right or consent from the beneficiaries of the estate of their late father and uncle. He has contended that his mother, Mrs. Njira Chuphi, who is noted to have been among those who passed the resolution of 2 January 2021, is a stranger to such meeting and her name was included therein without her consent. The 5th respondent's (Mweziane Chuphi) affidavit is not much different from the one above. There is an averment that his mother, Mbeyu Chuphi, whose name is among those who passed the resolution, is a stranger to it. The 6th respondent's (Abbas Chuphi) affidavit is also drawn along the same lines. He avers that he, Belewa Chuphi, and the 5th, 7th and 8th respondents (Mweziane Chuphi, Njemo Chuphi and Katana Chuphi) are brothers and sons of the late Chuphi Ngala. He denies that his mother, Chinyavu Chuphi, attended the meeting of 2 January 2021 or authorised the resolution. The 7th respondent, Njemo Chuphi, swore a more or less similar affidavit. He adds that his mother, Kwekwe Chuphi is said to have been "absent with representation" at the meeting of 2 January 2021. He denies that Kwekwe was represented in the meeting by Chinyavu Chizigwa as noted. The 8th respondent (Katana Chuphi) also swore an affidavit that echoed the above. He also denies that his mother, Maria Chuphi, attended the general meeting of 2 January 2021 and that she is a stranger to such meeting.

7. In her submissions, Ms. Nduku, learned counsel for the plaintiff, inter alia submitted that there is no dispute that the plaintiff company is the owner of the suit property as evidenced by the annexed copy of title. She further submitted that there is no dispute that the 1st, 2nd and 3rd defendants have entered the land without authorisation of the plaintiff. She submitted that under Article 40 of the Constitution, the plaintiff is guaranteed proprietary rights over the ownership of the suit property. She submitted that the 4th to 6th respondents have not rebutted that they had no authority from the plaintiff to enter into any lease agreements and have not produced any resolution from the company authorising them to enter into the said leases. It was her position therefore that the lease agreements are devoid of validity. On the issue of authority to file suit, counsel referred me to the authority annexed. She submitted that her client has established a prima facie case and stands to suffer irreparable harm if the injunction is not granted. She referred me to a couple of past decided cases which I have considered.

8. For the respondents, Mr. Abdiaziz, learned counsel, submitted inter alia that the order of injunction is overtaken by events since the respondents have been in possession for more than one year. He submitted that if the respondents are prohibited from the suit land this will be an eviction and a mandatory order. He submitted that mandatory orders can only issue at an interlocutory stage in exceptional circumstances and he referred me to a number of authorities on this point. Counsel further submitted that the plaintiff has not established any loss that it may suffer and urged the court to issue an order of status quo ante until the case is heard. He submitted that the defendants have a strong defence of estoppel and that the case was irregularly filed since no proper resolution was passed.

9. I have considered all the above.

10. There is a threshold point that has been raised, that is, that this case is not properly filed on behalf of the plaintiff. I think I need to deal with that first, because if I am not so persuaded, then I cannot find that the plaintiff has established a prima facie case with a probability of success.

11. It is common ground that the plaintiff is a limited liability company. We need to recall that a limited liability company is a separate entity from its members, a fact that was emphasised in the case of *Salomon v Salomon & Co (1987) AC 22*. In his affidavit, Mr. Belewa annexed a copy of the CR 12 of the plaintiff. That CR 12 does not show who the members of the plaintiff company are and it is therefore not clear to me who the members of the plaintiff may be. Neither is the shareholding of the company disclosed and nobody knows which person holds what number of shares in the company. What the CR 12 shows is only the directors of the company as follows :- Idd Chuphi, Fatuma Chuphi, Chiwaya Chuphi, Alfred Ngalaa Chuphi, Magari Chuphi, and Francis Ngedzo Ngalaa.

12. A company can only act through its organs and/or authorised agents. The two main organs of a company are the General Meeting of members and the Board of Directors. The resolution that is said to have authorised this suit is under challenge and I need to scrutinise it. I can see that it was a resolution that was passed in an Annual General Meeting (AGM) on 2 January 2021. Those present are said to be Mr. Alfred Ngalaa Chuphi as Chairman; Mr. Chiwaya Chuphi as Managing Director; Idd Yusuf Chuphi as Director; Mrs. Fatuma Chuphi as Director; Mr. Abbas Ngalaa Ngedzo as Director. Others noted present as members are Mr. Hassan Chuphi Ngalaa, Mr. Omar Kaginya Chuphi, Mr. Mohamed Bati Chuphi, Mr. Julius Nyamawi Ngalaa, Mr. Margaret Belewa Mbodze (sic), Mr. David Kamanza Ngalaa, Mrs. Maria Chuphi, Mrs. Mbeyu Chuphi, Mrs. Njira Chuphi, Mrs. Chinyavu Chuphi, Mr. Hussein Chuphi Ngalaa, Mr. Katerya Chuphi Ngalaa, and Mr. Ngalaa Mbui. Those noted to be "absent with representation" are Francis Ngalaa Ngedzo represented by Abbas Beja Ngedzo; Kauli Tsungurube represented by Mwezine Kauli; Kamanza Ngalaa represented by Mwezine Kamanza; Kwekwe Chuphi represented by Chinyavu Chizigwa; Mwaka Chuphi represented by Joyce Mpemba; Chuphi Ngalaa represented by Mubarak Chuphi and Magari Chuphi, represented by Kanyazi Fatma. I am not aware of a provision in law prescribing a person to be "absent with representation" unless the person holds a proxy.

13. We need to remember that this was an AGM thus a meeting of the members of the company. Whatever is purported to have been passed was thus a resolution of members. I have already mentioned that the identity of the members of the company is not shown in the CR 12 and I am thus unable to tell who the members of the company are. I cannot therefore affirm that the resolution to file this suit was ever made by persons who are members of the company and who could constitute an AGM. The 4th – 8th respondents say that the original members of the company died and they have never been replaced. I think, given that contention, it behoved Mr. Belewa to demonstrate who the members of the company are, so that it can be discerned that there is actually a membership that is able to hold an AGM and pass resolutions binding the company. I have seen that the company appears to have directors, at least going by what is in the CR 12, but I wonder how a company can have directors when it has no members, for it is the members who appoint the directors.

14. I also question Mr. Belewa's status. In his affidavit, he deposes that he is the Managing Director. However, from the annexed minutes of 2 January 2021, the Managing Director is noted to be Mr. Chiwaya Chuphi and not Mr. Belewa.

15. Further, there is great doubt over the authority to file suit that was filed. I have looked it. It is dated 26 March 2021. It is said to be sealed with the common seal of the company and is signed by two persons. One is Belewa Chiwaya as director and Abbas Ngalaa Ngedzo as Director/Secretary. The CR 12 annexed does not have any director called Belewa Chiwaya. Neither does it have any director or secretary called Abbas Ngalaa Ngedzo. The secretary is noted to be Kennedy Elijah Murira. I wonder then, on what capacity, Belewa Chiwaya and Abbas Ngalaa Ngedzo signed the authority to file suit. There is nothing before me to demonstrate that they are members of the plaintiff company, or directors, or secretary. Prima facie therefore they have no capacity to bind the plaintiff company and no capacity to file suit on behalf of the plaintiff.

16. From the foregoing, I am persuaded to find that the defendants have demonstrated that there is serious doubt about the veracity of the entire suit and whether it was actually authorised by the plaintiff company. There can only be a prima facie case demonstrated if the court is persuaded that the case is correctly in court in the first instance and of this, as I have shown above, there is great suspicion. Given that position, I am unable to find that a prima facie case has been demonstrated, and having not demonstrated a prima facie case with a probability of success, I am unable to issue any order of injunction as sought in this application. The result is that the plaintiff will need to prove its case without the benefit of an order of injunction.

17. Off the cuff, I wonder whether the plaintiff company properly exists as prescribed by law. I have already pointed out the curious situation where the company appears to have directors but no members. It was mentioned by the defendants, and it has not been rebutted, that the original subscribers died and there has been no succession for purposes of transmitting the shares that they held. Several questions thus arise. Does the company rightfully exist and operate as provided by law? Has there been succession undertaken to transmit the shares of the original shareholders? Does the company have legally appointed members who are registered and recognized by the Registrar of Companies? If not, how then did the directors get appointed? There are many questions, but these can be canvassed separately by the persons interested in the company or subsequently within the main hearing of this suit. It goes without saying that when a company is not properly constituted and managed, its property can be open to abuse. It is therefore in the best interest of those affiliated to the plaintiff company to ensure that its house is put in order. My impression, and I may be wrong, is that what is panning out here is a sibling rivalry which emanates from a company that may not have streamlined its operations in accordance with the law. Whether I am wrong or not will certainly reveal itself at the hearing of the main suit when all parties will have a chance to fully present their evidence.

18. For the moment, the application for injunction is dismissed, for reason that I am not persuaded, at this point in time, that the person/s who have filed suit have the mandate of the plaintiff company to do so, of which I have given an elaborate explanation.

19. On costs of the application, if the plaintiff does not succeed in the main suit, the costs of this application will be paid personally by Belewa Chuphi. If the plaintiff succeeds, there will be no orders as to the costs of this application.

20. Orders accordingly.

DATED AND DELIVERED THIS 13TH DAY OF APRIL, 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA