



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ENVIRONMENT AND LAND COURT
MISCELLANEOUS APPLICATION NO. 5 OF 2013
IN THE MATTER OF NASSAU LIMITED, C. 1121413
IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA
AND
IN THE MATTER OF THE COMPANIES (HIGH COURT) RULES
AND
IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF INSPECTORS BY
COURT UNDER SECTION 165 AND 166 OF THE COMPANIES ACT.
BETWEEN
TASMAL LIMITED.....APPLICANT/SHAREHOLDERS
=VERSUS=
ROBERTO MARCI
REUGGERO SCIOMMERI
SHALIN CHITRANJAN GOR.....RESPONDENTS

RULING

1. The Applicant moved this court by way of a Miscellaneous Application dated 10th May, 2013.
2. certified the Application as urgent and granted the Applicant interim orders of injunction for a period of fourteen days.
3. When the matter came up for inter-partes hearing on 23rd May, 2013, both parties were not ready to proceed with the hearing of the Miscellaneous Application. The matter was adjourned to 24th June, 2013.
4. On 24th June, 2013, I inquired from the parties if the Environment and Land Court had jurisdiction to determine the dispute considering that the Miscellaneous Application was filed pursuant to the

provisions of the Companies Act, cap 486. The parties agreed to submit on the issue of whether this court has the jurisdiction to hear the matter or not. That is the issue which is the subject of this Ruling.

5. Mr. Kithi, counsel for the Applicant submitted that this court has jurisdiction to determine the dispute. Counsel submitted that the substantive order which the Applicant is seeking is for the appointment of an inspector by this court for purposes of looking into the affairs of a company known as Nassawa Ltd.
6. The Applicant's counsel submitted that in the Supporting Affidavit, the Applicant has deponed that Nassawa Limited owns a parcel of land along Mombasa-Malindi road where the company has developed the land and runs a resort known as "Blue Marlin Resort". Counsel referred the court to an indenture dated 14th June, 2006 which shows that Nassawa Limited is the registered proprietor of land Known as Portion Number 603 (original number M.6/22) Malindi.
7. The Applicant's counsel further submitted that the Applicant acquired 480 shares out of 1000 ordinary shares and therefore became one of the owners of the land and the developments thereon. According to counsel, there are proceeds which are generated by Blue Marlin Resort and which the Applicant has a beneficial interest in.
8. Counsel finally submitted that ownership of the land which is registered in the name of Nassawa Limited and the resort which is situated thereon cannot be established without establishing the shareholders of the Company. One of the duties that the Inspector who is supposed to be appointed by the court, it was submitted, is to unravel the transfer of shares of Nassawa Limited to people who are unknown to the Applicant, which act, by extension, amounts to alienation of the land owned by the company.
9. Mr. Matheka, counsel for the Respondent was of the view that the Environment and Land Court does not have jurisdiction to deal with the Miscellaneous Application before it because the Application does not raise the issue of proprietorship of land.
10. According to the Respondent's counsel, the Applicant is seeking to establish the legal and financial position of the company and not the shareholding of the company.
11. Counsel admitted that indeed the Applicant is one of the shareholders of the company and the dispute is between the directorship of the Applicant's company and not Nassawa Limited. According to counsel, the person who has sworn the Supporting Affidavit on behalf of the Applicant is not a director in the Applicant's Company and can therefore not be allowed to access the books of Nassawa Ltd.
12. The jurisdiction of the court has been defined to mean the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented before it in a formal way for its decision.
13. The limits of this authority are imposed by the Constitution or a statute. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. This is the kind of jurisdiction that the High Court had before the promulgation of the current Constitution.
14. The Environment and Land Court is established pursuant to the provisions of Article 162 (2) (b) of the Constitution. It is one of the Superior Courts alongside the Supreme Court, the Court of Appeal, the High Court and the Industrial Court.
15. According to the provisions of Article 162 (2) (b) of the Constitution, Parliament was mandated to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, thus the enactment of the Environment and Land Court Act No.19 of 2011.

16. The Jurisdiction of the court is found at Section 13(1) of the Environment and Land Court Act No. 19 of 2011 which is an exposition of the provisions of Article 162(2) (b), which is to determine disputes relating to the Environment and the use, occupation and ownership of land.
17. I have perused the Miscellaneous Application before me, and the substantive order that the Applicant is seeking is for the appointment of Abalulahid Aboo or such other competent inspector as the court may deem fit to inspect the affairs of Nassawa Limited and to report to the court thereon in respect to, inter alia, **“Transfer of shares and acquisition of membership to the company since registration.”**
18. There are other components which the Applicant wants the inspector to inspect and report to the court which includes all affairs of the company, position of the books of accounts, position in respect to the appointment of and removal of directors amongst other things. This particular prayer is supported by several grounds, but more importantly by ground number 17 which states as follows:
- “THAT the Article and Memorandum of Association have not been followed and indeed the transfer of shares has been done contrary to the provisions of paragraph 3 of the Articles of Association and the law. The Applicant was never contacted or informed of any transfer of shares nor did it sanction the same as required in law...”***
19. I have perused the Replying Affidavit filed by the 1st Respondent who has denied that Giancarlo Bottini, the person who has sworn the supporting affidavit on behalf of the Applicant, is a director of in the Applicant’s company and that the said Giancarlo Bottini has not filed the authority of the Applicant under seal.
20. It is therefore obvious, from both the Applicant's Supporting Affidavit and the 1st Respondents Replying Affidavit that the main issue that the court is supposed to decide is the shareholding of Nassawa Limited.
21. Once the Issue of the shareholding of Nassawa Limited has been decided by the court, the issue of who owns parcel of land portion number 603 (original number M.6/22) Malindi and by extension “Blue Marlin Resort” would have been determined, which in my view is the province of this court.
22. Where a dispute raises matters which falls within the jurisdiction of the High Court and the Environment and Land Court, any of the two courts should be able to adjudicate upon it and make a determination. The two courts have concurrent jurisdiction.
23. A suit cannot be “dismembered” by a party so that one limb is heard by this court and another limb by the High Court. That would amount to an absurdity and miscarriage of justice which was not what was intended by the Constitution.
24. It therefore does not matter that there are some aspects of Civil or Commercial issues on the one hand and ownership of land on the other hand in the current suit. The suit can either be heard by this court or the High Court.
25. In the circumstances and for the reasons I have given above, I find and hold that this court has the jurisdiction to hear this suit.

Dated and delivered in Malindi this 27th day of **June**, 2013

O. A. Angote

Judge