



Dhanjal v Dhanjal & another; Dhanjal Properties Limited (Interested Party) (Miscellaneous Application 2 of 2021) [2022] KEELC 14618 (KLR) (16 May 2022) (Ruling)

Neutral citation: [2022] KEELC 14618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
MISCELLANEOUS APPLICATION 2 OF 2021**

AE DENA, J

MAY 16, 2022

(FORMERLY MISCELLENOUS APPLICATION NO 82 OF 2020

MOMBASA)

BETWEEN

JOGINDER SINGH DHANJAL APPLICANT

AND

DALJIT SINGH DHANJAL 1ST RESPONDENT

REGISTRAR OF LANDS, KWALE 2ND RESPONDENT

AND

DHANJAL PROPERTIES LIMITED INTERESTED PARTY

RULING

1. The applicant Joginder Singh Dhanjal filed a notice of motion dated March 3, 2020 for rectification of the land register of Land Reference No Kwale/Galu Kinondo/670 by cancelling the title and all entries registered in favor the 1st respondent Daljit Singh Dhanjal who is his brother. The applicant also sought for an order that Dhanjal Properties Limited the interested party be registered as proprietor thereof. The application is based on the grounds on the face of it which are reiterated in the applicants supporting affidavit sworn on November 3, 2020. The applicant deposes that he is the administrator of the estate of his father Jaswant Singh Dhanjal, a director of the interested party and had together with his sister by transmission become the registered owners of the shares held by the deceased. That 1st respondent used to be administrator of their father's estate but the same was revoked due to impropriety. That the suit property was previously registered in the name of the interested party and thereafter acquired by the 1st respondent pursuant to a settlement agreement dated March 9, 2006 contrary to the specific agreements in the said settlement agreement. It is also stated that on October



- 13, 2016 the said agreement was declared null and void *ab initio* in Mombasa Succession Cause No 20 of 2006 following the applicant's motion. That subsequent appeal against this declaration to the Court of Appeal Msa Civil Appeal No 14 of 2017 and the Supreme Court were dismissed. The applicant in addition averred that in Winding up petition No 5 of 2014 the court faced with an application by the 1st respondent to strike out the petition on the basis of the nullification of the settlement agreement dismissed the said application and held that following the superior court decision as well the court of appeal the shareholding reverted to the position it stood prior to the settlement agreement.
2. The notice of motion is opposed by the 1st respondent who filed a replying affidavit under protest sworn on November 30, 2020. The respondent admits that the applicant and the sister are indeed administrators of the estate of their deceased father, that indeed the settlement agreement existed and was subsequently nullified by the court at the instigation of the applicant. That at the time of their father's death, the deceased held shares in the interested party with his four brothers. That after his father's death, he together with a cousin and his father's brothers and all the companies in which his father and his brothers held shares entered into the settlement agreement which provided properties were agreed to change hands. He states however that his siblings signed disclaimers which formed part of the agreement and that the shares were never transferred to date. The 1st respondent also stated that at all times the property was registered in the name of the interested party and therefore the applicant never owned the suit land neither did he have any beneficial interest. That the deceased estate was distributed to all the siblings. That the family court in reference to the estates interest in the listed companies including the interested party directed that in view of the confirmed grant the administrators proceed to expeditiously distribute the undisputed properties confining themselves to the property of the deceased to distinguish property owned by the deceased and those where he was shareholder. It is alleged that the administrators haven't complied to date and that the applicant cannot therefore claim registered ownership of the shares before distribution to beneficiaries. It is further stated that the interested party is a legal person who has capacity to institute proceedings to defend its interest and the applicant was thus a total stranger. Further that as joint administrator the applicant cannot also sue without the other Co Administrator.

Preliminary Objection

3. The 1st respondent then filed a notice of preliminary objection dated November 19, 2020 the subject of this ruling. The objections will become apparent later in the submissions herein.

Submissions

4. On March 2, 2021 the court directed that since the preliminary objection raised a question of jurisdiction the same should be disposed first and by way of written submissions. The Attorney General appears for the 2nd respondent but has not filed any documents in the matter or in respect of this preliminary objection though they have been attending court. There is no representation by the interested party despite service.

1st Respondents Submissions

5. The 1st respondent filed submissions on October 12, 2021 in support of his preliminary objection. Referring to the principles set out in *Mukisa Biscuit Manufacturing Company Limited v West End Distributor Limited* [1969] EA 696 on the character of a preliminary objection it was submitted that the preliminary objection raised pure points of law since all the objections were a direct challenge to the courts jurisdiction to hear and determine the matter due to want of capacity on the part of the applicant and that the issue of capacity was capable of disposing a suit. It was also contended that jurisdiction is everything as well as the legal right to bring a suit and where one is challenged the



other is similarly challenged. Referring to the rule in *Foss vs of Harbottle* ‘that a wrong done to a company may be vindicated by the company alone’ it was contended that the applicant lacked locus since he was seeking the orders on behalf of the Interested Party which is a limited liability capable of suing and being sued in its own name unless with exceptions envisaged under the said rules. The cases of *Marriot Africa International Limited v Margaret Nyakinyua Murigu & 3 others; Ukombozi Holdings Ltd (Company)* [2020]eKLR and *Mary Wambui Munene vs Peter Gichuki Kingara & 2 others*, Supreme Court Petition No 7 of 2014 were relied upon.

6. Counsel emphasized that the applicant had not pleaded the said exceptions as formulated in *Joseph Munyoki Nzioka v Raindrops Limited and 3 others* (2019) eKLR. These are that to assert rights on behalf of a Limited Liability Company one must be a member of the company; Proceedings must be in respect of a cause of action vested in the company, Must seek leave to act on behalf of the Company, Proceedings must be for protection of the members against unfair prejudice brought under the *Companies Act* and Proceedings are in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default and breach of duty or breach of trust by a Director of the company. It was posited that the applicant also ought to have complied with procedure for filing derivative action under section 238 of the *Companies Act* which was one of the exceptions.
7. Additionally it was submitted that the applicant having pleaded filing the notice of motion herein as one of the administrators of the deceased father estate, as joint administrator the applicant cannot bring a competent claim under the *Law of Succession Act* chapter 160 of the laws of Kenya ,without the other Administrators and cited the holding in *Peter Kimani Nene vs Nation Newspapers Limited* (2021)eKLR where the court found that executors/administrators must act together to sue and do all things in the name of the estate and an applicant moving alone lacked capacity on their own name to prosecute a suit on behalf of the estate. Counsel pointed that the facts pleaded disclose that the prayers sought are for the benefit of the interested party and could be inferred and need not be ascertained. That the applicant did not plead as shareholder of the company but as administrator of the estate of one of the shareholders which estate is yet to have the shares transmitted to it. As such neither the applicant nor the estate have any right to assert.
This court was urged to strike out the motion.
8. As to costs it is submitted for the 1st respondent, that the same be borne by the applicant since the applicant with the benefit of Counsel and knowing he had no capacity brought the suit on behalf of the interested party. Counsel relied on *Priscilla Jesang Koech & 3 others* [2018] eKLR cited with approval in the *Marriot* case *supra* to buttress this point. Before the applicant filed the case, he ought to have ascertained he had capacity to sue.

The Applicants Submission

9. The applicant filed their submissions on November 15, 2021. Counsel for the applicant in a brief background of the matter pointed that the suit property was transferred to the 1st respondent fraudulently and it is this act that the applicant was seeking to rectify so that the administrators can have the impugned title rectified and restored into the names of the interested party.
10. Counsel contended that the issues framed in the 1st respondent submissions did not meet the requisite threshold to maintain a preliminary objection.
11. It was submitted that the submissions of the 1st respondent dealt with the character of the suit and were not aligned to the technical plea of lack of jurisdiction. That *locus standi* is an issue of fact. According to Counsel the plea that the applicant is not the only administrator is an issue of non-joinder of parties



and no suit should be defeated on this basis. Reliance was placed on *William Kiprono Towett & 1956 others v Farmland Aviation Ltd & 2 others* Nakuru Civil Appeal No 247 of 2021.

The applicant urged that the preliminary objection should be dismissed with costs.

Analysis and Final Determination

12. I have considered the notice of motion, the grounds of the preliminary objection herein and the submissions by counsel for and against it together with all the authorities cited. In my considered opinion the issue that commends itself for determination by this court is whether the preliminary objection should be sustained on the basis of the grounds raised by the 1st respondent.
13. To answer the above it is important to first determine if the objection herein has been properly raised as a pure point of law. The character of a preliminary objection has been litigated over time originating with the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributor Limited supra*. The Supreme Court also enumerated further in *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others*, Petition No 10 of 2013, [2014] eKLR [paragraph 31]: expressed itself as follows on preliminary objections;

“To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [1969] EA 696:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion’.” (Emphasis is mine).

14. Counsel for the applicant urged that the 1st respondents submissions consisted issues of facts and the character of the pleadings. That some were so serious and ought to be tested and proved in evidence. On the other had the applicant urged that all the objections raised were on points of law that deprived the applicant of locus which leads to calling lack of jurisdiction of this court. Though in my view the main issue is jurisdiction several objections have been raised all allegedly having the effect of denying this court the power to adjudicate the application. I’m therefore forced to look at each one of them and by elimination see which of the objections will meet the threshold set herein.
15. Firstly, it is submitted that applicant lacks locus because they have filed the motion seeking orders on behalf of a limited liability company which is capable of suing and being sued in its own name and without pleading the exceptions stated in law that would exempt him from this requirement. The applicant states that locus standi is an issue of fact and not law. How then will this court arrive at the finding that the orders are being sought on behalf of the limited liability company. This should be apparent from the pleadings. My understanding is that there should be no contest on the issues pleaded and they should be assumed they are correct. The applicant at paragraph 1 of the supporting affidavit sworn on November 3, 2020 states; -

“I am the applicant herein, a shareholder and member of the interested party...I am one of the administrators and or personal representatives of the Estate of the Estate of the Late Jaswant Singh Dhanjal. My sister Sukwant Kaur Kundi is my co-administrator.



From the outset I note the applicant is allegedly pleading first as a shareholder and member of the interested party and secondly as one of the administrators of the deceased father's estate. It is noteworthy that the latter is not in dispute and is agreed upon by the parties. However, it is clear from the pleadings and submissions that the applicants shareholding and membership to the interested party has been contested by the 1st respondent who states that the ownership of the shares remain as it was before the death of the deceased among other submissions. Infact the register of membership seems to be in issue. Whether or not he is seeking the orders on his own behalf or on behalf of the interested party cannot be ascertained at a preliminary stage clearly there is a contest as he believes he is member and shareholder of the Interested party. The matter then has to be interrogated by this court and this is by hearing the parties. From precedent it is clear the moment there is a contest and the issue or facts have to be ascertained then the point ceases to be a pure point of law. This point therefore fails as a pure point of law. Having made this finding it follows that the other grounds based on the rule in *Foss vs Harbottle* fall by the wayside because they are linked to this point."

16. Then there is the ground that the applicant having been appointed as a joint administrator of the deceased estate together with his sister, he cannot under the *Law of Succession Act* bring a suit on behalf of the estate unless acting jointly with the Co – administrator. The question I asked myself is whether from the pleadings it is clear that this is a succession case? I resorted to the final prayers of the notice of motion in this regard and the provisions under which the application was brought before this court. The orders sought in the notice of motion application reads follows; -

"That this honorable court be pleased to grant orders that the 2nd respondent do rectify the land register of Land Reference No Kwale/Galu Kinondo/670 by cancelling the title issued to the 1st respondent together with all entries relating to the registration of the said titles in favor the 1st respondent and register the Interested party as the sole and absolute proprietor of Land Reference No Kwale/Galu Kinondo/670."

17. Counsel for the 1st respondent pointed that the facts pleaded disclose that the above prayers are for the benefit of the interested party and could be inferred and need not be ascertained. To me the orders prima facie do not point to a suit on behalf of the estate of the deceased. Infact as earlier observed the applicant deposed that he is member and shareholder of the Interested party. Moreover, in my view the interested party is not the deceased and does not form part of the deceased estate as an entity. Clearly there is a contest here which can only be resolved by appraisal of the evidence. In addition, the notice of motion is filed under the provisions of the *Land Act*, the *Land Registration Act* and if it is being contested that the provisions are defective then both parties must convince this court on their positions. This cannot pass as a pure point of law.
18. The upshot of the foregoing is that the preliminary objection must fail and costs shall be in the cause.
19. The delivery of this ruling has delayed and I feel obligated to explain the same. Initially the date for this ruling was erroneously fixed by the court on January 18, 2022 since the date was during the court vacation. This court prepared a draft ruling in the month of February and instructed that the matter be given a date for delivery of the said ruling. The file was placed before me on May 10, 2022 when it was explained to me that all along the file had been misplaced in the registry. Since I had not revisited the draft, I deferred the ruling to May 11, 2022 but then got engaged in the hearing in ELC 159 of 2021 and had to defer the ruling to May 16, 2022.

DELIVERED AND DATED AT KWALE THIS 16TH DAY OF MAY, 2022



A.E. DENA

JUDGE

Ruling delivered via email.

Mr. Denis Mwakina- Court Assistant.

