



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 108 OF 2013

KILIFI TEACHERS ENTERPRISES LTD.....PLAINTIFF

=VERSUS=

- 1. SYLVESTER NJOGA MWANGOMBE**
- 2. JOSEPH CHAMLI**
- 3. SAMUEL NDEGE MWAGUNA**
- 4. HENRY KARISA MWADIME**
- 5. MALI MERCELINE KARANI T/A**

KILIFI TEACHERS ENTERPRISES.....DEFENDANTS

R U L I N G

Introduction

1. The Notice of Motion before me is dated 21st June 2013 and brought under Order 40 Rules 1, 2, 3(3) and 4 of the Civil Procedure Rules, 2010.
2. In the Application the Plaintiff is seeking for the following orders:
 - a. **THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue an injunction restraining the Defendants, jointly and severally, whether by themselves, their assigns, servants, and/or agents whosoever, from holding out or passing of as the Applicant, binding the Applicant by any act, contract Deed, or treaty whatsoever, interfering with the Plaintiff's quiet possession and enjoyment of its properties and assets in whatever form and wherever situated, including L.R NO.5054/266 KILIFI TOWNSHIP, collecting rent, income or other receivables accruing to the Applicant, interfering with the Applicants tenants, employees and/or agents, calling for meetings, or sending out communication in whatever form in the name of the Applicant, or in any way or manner holding out as the Applicant's servants, agents and/or officials.**
 - b. **THAT the costs of this Application be borne by the Respondents.**
3. The Application is supported by the Affidavit of Hedlam Jaji Mpunga, a director of the Plaintiff.

Plaintiff's/Applicant's case:

4. According to the Plaintiff's Director, the Plaintiff was incorporated as a limited liability company on 17th February 1984 and that on 15th February 2013, the Registrar of Companies confirmed the names of the directors of the Plaintiff's Company
5. It is the Plaintiff's assertion that it owns assets including land known as L.R . No. 5054/266 Kilifi Township and the buildings thereon.
6. The Plaintiff's director has deponed that in November 2012, the Defendants purported to lease out the Plaintiff's premises to third parties without due authorization; that on 28th May 2013, the Defendants in cahoots wrote to the Plaintiff's tenants and alleged that they are the bona fide directors of the Plaintiff and directed the said tenants to pay their monthly rent to the Defendants.
7. Consequently, the Plaintiff prays that the Defendants should be restrained from interfering with the Applicant's peaceful enjoyment and possession of the suit property.

Defendants'/Respondents' case

8. In the Replying Affidavit sworn on 12th August, 2013, the Defendants have stated that the deponent of the Plaintiff's affidavit, Hedlam Jaji Mpunga is not the current director of the Plaintiff; that the resolution annexed on the Plaintiff's affidavit has no basis in law because it was not authorized by the shareholders and the other directors and that the Plaintiff lacks the locus standi to institute these proceedings.
9. The Defendants admitted that the names of the people shown as directors in the certificate of search is true save that the term of the said directors lapsed in the year 2011; that the said directors have failed to hand over the office or hold elections as per the Company's Articles of Association and that on 16th July 2012, the 1st Defendant called for a meeting with a view of setting an election date but the then directors ignored the resolutions of the shareholders.
10. The Defendants case is that the Defendants and other shareholders subsequently appointed an interim committee to oversee the running of the Plaintiff's company pending the election of new directors and have since October 2012 taken over the running of the company.
11. The Defendants have further deponed that on 15th February, 2013, the interim committee conducted elections and the Defendants were elected to oversee the running of the Plaintiff's Company and that the monthly rent from the suit premises is always channeled to the Plaintiff's Company account and not to the Defendants.
12. The Defendants finally deponed that they are the duly elected office bearers of the Plaintiff's Company having assumed their duties on 15th February 2013 save for the formalization of the records at the Company registry.

Submissions

13. The Plaintiff's and the Defendants' advocates filed their written submissions on 4th October 2013 and 22nd October 2013 respectively.
14. The Plaintiff's advocate submitted that the Plaintiff being an artificial person can only make decisions, through the agency of its organs, that is, the board of directors or shareholders. Counsel relied on the case of **Self Cleaning Filter Syndicate Vs Cuningham (1906) Ch 34, to buttress her argument and Shaw and Sons (Selfard) Ltd Vs Shaw (1935) 2 KB 113.**
15. On the other hand, the Defendants' counsel submitted that although the Plaintiff has annexed a resolution passed on 8th April 2013 authorizing the institution of this suit, the minutes of the said meeting have not been annexed to the members who were present. Counsel relied on the case of **Re Portuguese Consolidated Copper Mines Ltd** (whose citation or a copy thereof was not given)
16. The Defendants' counsel submitted that deponent of the Supporting Affidavit is hiding under the veil of incorporation to solely pass decisions in the absence of the other Directors and Shareholders.

Analysis and findings:

17. The parties in this suit are the company and directors thereof as Plaintiff suing other disputed directors or shareholders as Defendants.
18. As was held in the celebrated case of **Foss Vs Horbottle (1843) 2 Hare 461**, to redress any wrong done to a company, the action should be brought by a company itself. In the case of **Bugerere Coffee Growers Limited Vs Seboduke & Another (1970) EA 147**, it was held that when companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or the Board of Directors' meeting.
19. It is common knowledge that directors of a company have their fiduciary duties to the company. A company can only take decisions through the agency of its organs, that is, the board of directors or the general meetings of its shareholders. For the court to determine which of these two organs can legally take decisions on behalf of the company, the court will have to look at the Company's Articles of Association.
20. In the case of **Automatic Self-C leasing Filter Syndicate Vs Caninghame (1906) Ch.34, C.A.**, it was held that where a Company's powers of management are, by the Articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers. Unfortunately, none of the parties in this case annexed a copy of the Plaintiff's Articles of Association.
21. In the absence of a copy of the Articles of Association of the Plaintiff, I shall entirely rely on the provisions of the Companies Act for the purposes of establishing if indeed the Plaintiff, and more specifically Mr. Hedlam Jaji Mpunga, the purported Director of the Plaintiff has established a prima facie case with chances of success.
22. Article 80 of Table A of the First Schedule of the Companies Act, Cap 486 provides as follows:

“The business of the company.....”

23. It is clear from the readings of Article 80 of Table A of the First Schedule of the Companies Act, Cap 486 that all the businesses of the company are to be managed by the directors of a company which include passing of resolutions to institute suits on behalf of the company. As was held in the case of **Quine & Axtents Limited Vs Salmon (1909) Ac 442 HL**, where the provision of Article 80 of the Companies Act is adopted, the general meeting cannot interfere with a decision of the board of directors unless they are acting contrary to the provisions of the Companies Act or the Company's Article of Association. In the case of **Shaw Vs Sons (Salford) Ltd Vs Shaw (1035) 2 K. B 113, CA**, Lord Justice Creer held at page 134 as follows:

“If the powers of management are vested in the directors, they and they alone can exercise these powers.”

24. The Defendants have admitted in their Replying Affidavit that as far as the records held by the Registrar of Companies are concerned, the Mr. Jaji, together with the other directors indicated in certificate of search are still the directors of the Plaintiff although their term came to an end in the year 2011. Consequently, it was argued, the said directors remain mere “paper directors.”
25. The Defendants have not informed the court why they did not file a list of new directors that were purportedly elected by the shareholders on 15th February 2013 with the Registrar of Companies. Until the officials elected by the shareholders of the Plaintiff as shown in the letter dated 20th February, 2013 are registered as directors by the Registrar of Companies, such a list will just remain as such, a list.
26. In any event, the Respondents have not shown that the Plaintiff's Article of Association allows them to run the affairs of the Plaintiff just because they were elected by the shareholders and that it was not necessary for them to be registered by the Registrar of Companies as the elected directors.
27. It is not even clear on what basis the Defendants were of the view that the term of the directors indicated in the certificate of search came to an end in the year 2011 thus their replacement.
28. In view of my sentiments above, and the fact that the directors in the certificate of search have not filed an affidavit stating that they are no longer directors, and that the deponent of the Supporting Affidavit did not obtain their consent to swear the affidavit on behalf of the Plaintiff, I find and hold that the Plaintiff has established a prima facie case with chances of success. The Plaintiff is also likely to suffer irreparable loss if the affairs of the Plaintiff are conducted by the Defendants

pending the hearing of the suit.

29. For the reasons I have given above, I allow the Plaintiff's Application dated 21st June, 2013 as prayed.

Dated and Delivered in Malindi this **19th** day of **December**, 2013

O. A. Angote

Judge