



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
Civil Suit 80 of 2009

DAVIS WAFULA NAKITARE)
POLLY NOYCE NAKITARE).....PLAINTIFF.
DELATA CRESCENT CAMPS AND SAFARIS LTD.

VERSUS

AGRI. DEVELOPMENT CORPORATION.....DEFENDANT.

R U L I N G .

By a chamber summons dated 28th May, 2009, pursuant to the provisions of order XXXIX Rules 1, 2 and 3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, the applicant seeks orders.

1. This honourable court be pleased to certify this matter to be of utmost urgency and service hereof be dispensed with in the first instance.
2. This honourable court be pleased to issue a temporary injunction restraining the Defendant either by itself it's agents servants or anyone acting on it's behalf from entering into occupying working felling trees, destroying the fence on or in any manner whatsoever interfering with and/or trespassing on the 1st plaintiff's parcel of land best known as L.R. 58371 and/or L.R. No. 1948/12 pending the hearing and determination of this application inter partes.
3. This honourable court be pleased to issue a temporary order restraining the Defendant either by itself, it's agents, servants or anyone acting on it's behalf from entering into occupying, working on, felling trees, destroying the fence on or in any manner whatsoever interfering with and/or trespassing on the 1st Plaintiff piece of land best known as L.R. 58371 and/or LR. 1948/12 pending the hearing and determination of the main suit.
4. The costs of this application be provided for.

The application is based on the grounds:-

- (a) That the 1st plaintiff is the registered proprietor and the 2nd plaintiff the beneficial owner of land parcel known as L.R. 5871 and/or LR 1948/12.

- (b) That the plaintiffs operate and owns an animal sanctuary on the piece of land under reference whose fence is perpetually being destroyed by the defendant.
- (c) That the defendant has without any lawful justification whatsoever through it's agent servants and/or employees trespassed into the 1st plaintiff's land and occupied it and has started cutting trees and has further embarked on destroying the fence enclosing the animal sanctuary and constantly engaged in acts of destruction on the suit premises, under reference.
- (d) Unless this Honourable court restrains the defendant from further trespassing on the 1st plaintiffs' parcel of land the plaintiffs stand to suffer irreparable loss and damage which cannot be compensated in damages in that:-
 - (i) The plaintiffs' trees which have been nurtured and managed for over 60 years and of exceptionally great economic value and which covers about an acre of land stands to be depleted and diminished.
 - (ii) The plaintiffs face the danger of losing their wildlive on the animal sanctuary and also faces imminent danger of litigation by the members of community around the suit premises as a result of human -animal conflict.
 - (iii) The plaintiffs' right to won property is a fundamental right under the constitution of Kenya and the same is guaranteed by law.
 - (iv) The plaintiffs' absolute rights of ownership of property and business are indefeasible.
- (e) The balance of convenience tilts in favour of plaintiffs as their proprietorship rights are inalienable save to the extent and manner prescribed by law yet the defendant has no legal right whatsoever to cause destruction to the suit premises.
- (f) The plaintiffs have no other remedy other than to seek the intervention of this honourable court.
- (g) It is therefore fair and just that orders sought herein be granted in the interest of justice.

The application is predicated upon the annexed affidavit of Davis Wafula Nakitare and Polly Noyce Nakitare sworn on the 28th day of May, 2009.

The application was resisted by a replying affidavit of Beatrice Kosgei, the Corporation secretary of Agricultural Development Corporation sworn on the 10th day of June, 2009.

When the application came up for hearing on the 15th day of June, 2009, Mr. Kiarie for the respondent/defendant raised a preliminary objection *in limine* and pursuant to the Notice thereof dated 10th June, 2009 in the following grounds.

1. That the joint suit is misconceived and bad in law, in that the suit has been filed in the name of the 3rd plaintiff, a limited liability company, without a resolution passed in a meeting of the company or in a board of directors meeting.
2. That it is not possible to separate the reliefs sought as between the three plaintiffs.
3. That the plaint and the verifying affidavit failed to disclose the existence of Kitale H.C.C.C No. 73/2002 (Captain Davies Nakitare vs. Agricultural Development Corporation)

In order to understand the background of the preliminary objection, I find it necessary to reproduce the pertinent

aspects of the pleadings – the plaintiff defence and reply to defence.

In the plaintiff it is pleaded at:-

- (1) **Paragraph 3.** It is pleaded that the 3rd plaintiff is a company duly incorporated in the Republic of Kenya and inter-alia manager and operates a wildlife sanctuary at Endebess, Kitale.
- (2) **At paragraph 4,** it is pleaded that the defendant is a state corporation.
- (3) **At paragraph 5,** it is pleaded that the plaintiffs have grown, managed and nurtured trees on about one acre of land parcel LR. 58371 and/or 1948/12 as can be identified by the beacons on the ground on the side abating the road and the said trees have been under the management of the plaintiff at all material times.
- (4) **At paragraph 6,** it is pleaded that on diverse dates in December, 2008 the defendant through its agents and/or employee trespassed and/or unlawfully, forcefully and without any colour of right or merit and without the plaintiffs permission entered into and purported to physically occupy and work on the suit premises thus occasioning the plaintiff's irreparable loss and damage alluded to under paragraph 7, 8 and 9 herein.
- (5) **At paragraph 7,** the damage and particularized and quantified in the sum of Ksh. 89,175,000/=.
- (6) **At paragraph 8,** further loss and damage are particularize and quantified at Ksh. 180,000/=.
- (7) **At paragraph 9** further loss is particularized and quantified at Ksh. 1,687,500/=.
- (8) **At paragraph 10** the claimant averred that the acts of destruction enumerated under paragraphs 6, 7, 8 have occasioned great loss and damages for which the plaintiff is entitled to damage.

By a defence dated 9th June, 2009, the defendant pleaded thus:

1. **At paragraph 3** the plaintiff pleaded that the plaintiffs suit is misconceived and bad in law for being filed in a manner that violates the mandatory provisions of the companies Act, and a preliminary objection shall be raised *in limine* praying that the suit be struck out with cost.
2. **At paragraph 4** it is pleaded that the 1st plaintiff is but the registered owner of the land comprised in LR. 1945/12, the defendants on the other hand is the registered owner of land comprised in LR. 2989/1/R and in between L.R. No. 1948/9/3 and 2959/1/R is a 120 feet wide Road Reserve comprised in L.R. No. 1948/3 and the same is Government Land.
3. **At paragraph 5,** it is pleaded that the trees pleaded in paragraph 5 of the plaintiff had been standing on LR 1948/12 belonging to the plaintiffs, and that the said trees at all material times belonged to the defendant, and they were managed and taken care of by the defendant.
4. **At paragraph 6,** it is pleaded that the averments in paragraph 5 of the plaintiff and vehemently denied and the plaintiff put to strict proof thereof.
5. **At paragraph 7** it is pleaded that it is the defence contention that the 1st plaintiff w.e.f. 1985 started claiming the ownership of the trees blending on L.R. 2959/1/R and that the present suit is barred by the Limitation of Actions Act, and a preliminary objection shall be raised *in limine* praying that the suit be struck out with costs.
6. **At paragraph 8** it is pleaded that (Captain Davies Nakitare vs. ADC) the 1st plaintiff was seeking a declaration that the extent of L.R. 1948/12 was beyond the public road, as well as an injunction

restraining the defendant from passing on the 1st plaintiffs L.R. No. 1945/12. The suit was contested and the same was dismissed on 22nd June, 2007.

7. **At paragraph 9** it is pleaded that “in view of that contents of paragraph 8 herein, it is the defence case that the filing of the present suit amounts to flagrant abuse of the due process and an objection shall be raised *in limine* praying that the suit be struck out with costs.”
8. **At paragraph 10**, it is pleaded that the said trees were cut down by the purchasers(s) as opposed to the agents or servants of the defendant.
9. **Paragraph 11, 12 and 13** are general demands of the damages claimed.

By a reply defence dated 13th June, 2009, the defendant joined issues with the defendants defence and reiterated the contents of the plaint.

- (1) **At paragraph 2** the defendant pleads that the plaint and the suit complies with the mandatory provisions of the Companies Act in that:-
 - (a) A resolution authorizing the filing of the suit was passed on 21st day of May, 2009 before the suit was filed.
 - (b) The suit was commenced in compliance with the memorandum and Articles of Association of the company.
 - (c) The issue can only be raised by an insider of the 3rd plaintiff and not the defendant.
 - (d) A preliminary objection cannot be entertained *in limine* in so far as it relates to matters of evidence and the plaintiff will crave for leave of court to file affidavit evidencing compliance.
 - (e) That in any event the court has discretion to allow the passing and filing of resolution to rectify the proceedings in court if the position was that no such resolution was passed.
- (2) **At paragraph 3** of the defence, the plaintiff concedes that the 1st plaintiff is the registered owner of L.R. No. 1948/12 while the defendant owns L.R. 2989/1/R. There is a public road, to wit Kitale Mt. Elgon/West and the said road cuts across the 1st plaintiff's parcel of land and that the above two parcels border each other. The defendant denies that the road alluded to above is the one separating the two parcels.
- (3) **At paragraph 4** that the trees pleaded in paragraph 5 of the plaint have at all material time been standing on L.R. No. 1948/12 and not L.R. No. 2989/1/R as alleged and that the same have been managed and taken care of by the plaintiff.
- (4) **At paragraph 5** of his defence the plaintiff denies the averments in paragraph 7 of the defence. The plaintiff avers that the said trees have been standing on L.R. No. 1948/12 belonging to the 1st plaintiff hence a preliminary objection *in limine* on the issue of limitation cannot lie.
- (5) **At paragraph 6** the 2nd and 3rd plaintiffs avers that they are strangers to the contents of paragraph 8 and 9 of the defence. In answer to the same they aver:
 - (a) That they were not parties to the suit.
 - (b) Whereas the current suit, is with regard to trespass relating to December, 2008, the earlier suit is with regard to trespass acts in November, 2001. The two causes of action are separate and distinct.
 - (c) While the current suit is with regard to destruction of trees on the disputed parcel in 2008, the other suit is with regard to the fencing of the disputed parcel.
 - (d) The current suit is also based on the claim of destruction of the fence on the opposite side of the road of the disputed part of the land in 2008 which fence encloses an animal sanctuary as well.

- (e) The current claim also regards exit and or killing of animals from the parcel adjacent but opposite the road from where the trees were cut in 2008.
- (f) In any event, Kitale HCC No.73/2007 was not heard and determined on merit. It was dismissed for want of prosecution pursuant to a notice issued by the court.
- (g) The causes of action and issues raised in the two suits are fundamentally different.
- (h) Default if any can be caused by amendment.
- (i) In answer to paragraphs 10,11,12,13 and 14 of the defence the plaintiff reiterated the contents of paragraphs 5,6,7,8 and 9 of the plaint.
- (j) As paragraph 8 the plaintiff maintains that they are entitled to the orders sought.
- (k) At paragraph 9, the plaintiff maintains that the reliefs sought are severable hence the whole claim cannot be struck out in the event the suit against the 3rd plaintiff is held to be bad in law.

By a notice of preliminary objection dated 10th June, 2009 the defendant sought the striking out of the entire suit on the grounds:

- (1) That the joint suit is misconceived and bad in law, in that the suit has been filed in the name of the 3rd plaintiff, a limited liability company, without a resolution passed in a meeting of the company or in a board of directors meeting.
- (2) That it is not possible to separate the reliefs sought as between the three plaintiffs.
- (3) That the plaint and the verifying affidavits have failed to disclose the existence of the Kitale HCCC No.73/2007 (Captain Davies Nakitare Vs Agricultural Development Corporation).

A preliminary objection consists of a point (s) of law which has been pleaded or which arises by clear implications out of pleadings, and which if argued as a preliminary point may dispose of the suit. This was the dicta of **LAW J.A in MUKISA BISCUIT MANUFACTURING CO. LT –vs- WESTEND DISTRIBUTORS LTD & ANOTHER (1969) E.A. 696**. I take the position that this is a correct proposition of law.

In the same vein. I equally hasten to quote the dicta of **SIR CHARLES NEWBOLD in MUKISA BISCUITS MANUFACTURING CO LTD –vs- WEST END DISTRIBUTORS LTD (Supra) at page 710**.

“The second issue relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objections. 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 as pleaded by the other side are correct.

It cannot be raised if any facts have to be ascertained or if what is sought is the exercise of judicial discretion. The improper

raising of points by way of a preliminary objection does nothing but unnecessarily increases costs and on occasion confuse issues. This improper practice must be Stopped...”

On the basis of the pleadings herein, my task is to decide whether any of the three limbs of the preliminary objection is/are sound in law having regard to the issues raised.

The first point which falls to be decided is whether the joint suit is misconceived and bad in law, in that the suit has been filed in the name of the 3rd plaintiff, a limited liability company, without a resolution passed in the meeting of the company, or in a board of directors meeting.

It is non settled law that a company is not the agent of its members and a member as such is not an agent of the company. For the second plaintiff to have the requisite capacity to represent the company, there is need for a resolution of its members at a general meeting or its agents. Where there is in existence a board of directors or shareholders and members of the company the court should order for a board meeting with a view to ascertaining the corporate character in respect of the matter complained of, whether it has been supported by a majority or minority of the shareholders. If supported by a minority of shareholders, the suit becomes **ultra-vires**.

The resolution of the company, in my considered view ought to be filed with the plaint. Put in another way, it should precede the filing of the action. In respect of this suit, there is no annexure attached to the plaint that at the time the plaintiff's suit was filed, the plaintiff had authority to file the suit by reason of absence of the resolution of the first plaintiff company. In the premises the suit was **void ab inito** and/or **ultra-vires**. It flows from that illegality that any subsequent steps taken in the matter is tainted with that illegality and in furtherance thereof. In the foregoing circumstances, I find and hold that the suit so far as it relates to the 3rd plaintiff is bad in law. Accordingly I strike out the claim of the 3rd plaintiff with costs to the defendant.

Having struck out the 3rd plaintiff's claim the next issue which falls to be decided is whether the 1st and 2nd defendants suit is maintainable in law in absence of the 3rd plaintiff. Put in another way, is the cause of action of the three plaintiffs severable?

On the pleadings, it is clear to me that the 1st and 2nd plaintiffs are the registered owner and beneficial owners respectively of land parcel known as L.R.58371 and L.R. No.1948/12. The third plaintiff owns and manages animal sanctuary. The claim regarding or touching the 1st and 2nd defendants is captured in paragraphs 6,7 and 8. The claim regarding or touching the 3rd plaintiff on the other hand is captured at paragraph 9. In my considered view the cause of action of the 1st and 2nd plaintiffs are severable from that of the 3rd plaintiff. The reliefs sought by the 1st and 2nd defendants are equally severable from that of the 3rd defendant.

In sum, the suit a regards the 1st and 2nd plaintiffs is severable from the suit as regards the 3rd plaintiff. There will only be need for amendment of the plaint on application at any stage of the proceedings..

Last but not least the point which falls to be decided is whether the plaint and verifying affidavit has failed to disclose the existence of Kitale HCCC No.73/2007 (Captain Davies Nakitare Vs Agricultural Development Corporation.)

The plaint at the one hand at paragraph 13 avers:-

**“There is no other suit pending and neither has/
have been any previous proceedings respecting
the parties herein with the same subject matter”.**

The defence, on the other hand at paragraph 6(f) avers:

**“That in any event Kitale HCCC No.73/2007
was not heard and determined on merit as the
same was dismissed for want of prosecution
pursuant to a notice issued by the court”.**

In the premises, it is clear to me that in 2007 there was a suit No.73/2007 between **Captain Davies Nakitare –Vs- Agricultural Development Corporation** regarding acts of trespass but the 2nd and 3rd defendants were not parties to the said suit. The cause of action in suit No.73/2007 was with regard to trespass acts of November 2001 and the fencing of the disputed parcel. In effect the suit of the 2nd and 3rd plaintiff is severable from the suit of the 3rd plaintiff. Any defect, if any, can be cured by amendments. But that is not the end of the matter.

Order VII Rule 2 provides as follows:

“ The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint”

Accordingly, the plaintiffs were under an obligation to disclose the existence of Kitale High Court Civil Case No.73/2007. Order VII is not couched in mandatory language. The operative word is **may**. Accordingly, I grant the plaintiff leave to amend the plaint to inter-alia include an admission that in the year 2007 the 1st plaintiff filed a suit against the defendant but the same was dismissed for want of prosecution at the prompting of the court suo-moto (see **JOSEPHAT KIPCHIRCHIR SIGARAI VS. GOTAB SANIK ENTERPRISES LTD & 4 OTHERS (C.A.) CIVIL APPEAL NO. 98/2003**).

I equally direct the appellant to swear a verifying affidavit complying the provisions of order VII Rule 1 (2) of the Civil Procedure Rules and filed the same in court.

The preliminary points of law succeed in part to that extent. It is so ordered.

Dated and delivered at Kitale this 16th day of December, 2009.

**N.R.O. OMBIJA.
JUDGE.**

Mr. Njoroge for Alwanga for plaintiff.

Mr. Kiarie for Defendants.