



REPUBLIC OF KENYA



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Tawai Limited v Eldoret Express Limited & 3 others; Attorney General & 10 others (Interested Parties); Nyongesa (Third party) (Environment & Land Case 4 of 2022) [2022] KEELC 15079 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15079 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 4 OF 2022
FO NYAGAKA, J
NOVEMBER 24, 2022

BETWEEN

TAWAI LIMITED PLAINTIFF

AND

ELDORET EXPRESS LIMITED 1ST DEFENDANT

KAITET TEA ESTATES (1977) LIMITED 2ND DEFENDANT

BOOKE BOND KENYA LIMITED 3RD DEFENDANT

KENYA NATIONAL CAPITAL CORPORATION 4TH DEFENDANT

AND

ATTORNEY GENERAL INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

MARTIN WABUKE WASIKE (SHARE HOLDER) INTERESTED PARTY

JARED MUYMBA MUKALAMA (SHARE HOLDER) INTERESTED PARTY

GEORGE NATEMBEYA WELOBA (SHARE HOLDER) INTERESTED PARTY

PATRICK JUMA WALIKHE (SHARE HOLDER) INTERESTED PARTY

ESTEHR ONESMUS MWANJE (SHAREHOLDER) INTERESTED PARTY

ISAIAH BIKET WAMACHO (SHARE HOLDER) INTERESTED PARTY

JOHN MUFUMBA NASIKWA (SHARE HOLDER) INTERESTED PARTY

PAUL NAMASWA (SHARE HOLDER) INTERESTED PARTY

JANET IMO KHATETE (SHARE HOLDER) INTERESTED PARTY

AND



RULING

1. The instant suit was instituted on June 13, 2022 by way of a Plaint which was indicated as “Fast Track”. It sought among other reliefs that there be an order compelling the 1st Defendant and the Third Party herein, one Martin Nyongesa, to comply with Order 36 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010 by depositing in Court the original titles of parcels of land LR Nos 5707/1, 5707/2, 5707/3, 5707/4, 5707/5 and 5707/6 for verification; a declaration that the Plaintiff is the legal owner of the leasehold property LR Nos 5707/1-5 measuring a total of 764 acres and a portion of the parcel of land named LR No 5707/6 measuring approximately 647.75 acres; a redemption order compelling the 1st Defendant whether by itself, agents, servants, employees, assigns, associates and or any other persons claiming through its title to put into possession the Plaintiff; an order of eviction and costs of the suit. Notably, the Plaint was signed on May 31, 2022 by one Martin Wabuke Wasike, described as the Plaintiff/Applicant.
2. On July 12, 2022 the 1st Defendant filed a Notice of Preliminary Objection to the suit. It listed therein five points, namely: -
 1. That the Application is grossly misplaced, gravely misconceived, frivolous, vexatious, an abuse of the Court process and should therefore be struck out.
 2. That the Application is incompetent and an abuse of the court process in view of the Orders issued by Hon Mr Justice Chemitei on June 11, 2019 in Kitale Civil Case No 22 of 2018; Tawai Ltd v Nathaniel Wanjala Mubindi & 5 others.
 3. That in the orders of June 11, 2019, the Applicant, its Directors, Shareholders or any of its members, past or present were restrained from filing any suit on the subject matter herein against the 1st Defendant without leave of the Court. No leave was obtained by the Applicant before the filing of the current suit and this Application.
 4. That the Application is *res judicata*.
 5. That the application is therefore incompetent and should be struck out.
3. On July 5, 2022 the Plaintiff, Tawai Limited, appointed law firm to represent it in the suit. It then raised a preliminary objection dated July 4, 2022. It was premised on two points, to wit, (1) that the suit was filed without leave of the Court as per the earlier court orders, and (2) that the suit was filed without knowledge and consent of the directors of the Plaintiff.
4. On July 22, 2022 the ‘Plaintiff’, by way of being the signatory of the Plaint, the Witness Statement in support thereof and the List of Documents, and the deponent of the Verifying Affidavit, filed a response to the 1st Defendant’s Notice of Preliminary Objection. The document dated July 20, 2022, was titled “3rd Interested Party’s Statement of Grounds of Opposition to the 1st Defendant’s Notice of Preliminary Objection.” In it he stated that the application was not grossly misplaced, misconceived, frivolous, vexatious and an abuse of the process of the Court and disclosed no reasonable cause of action. He also stated that the application was not an abuse of the process of court and not against the orders issued in Kitale High Court in HCC No 22 of 2018 because he had moved the Kitale High Court in Misc Civil Application No 24 of 2022 seeking leave, and he annexed a copy of the application but no order of the High Court granting leave. Actually, the application was filed a day



before the instant suit. He stated that the Application was not res judicata hence it was competent and meritorious. He also stated that this Court had jurisdiction to hear the instant suit.

5. The 1st Defendant filed written submissions, which I must state, that they were in reference to the Application dated May 31, 2022. Therefore, this Court will not take them into account as it considers the Preliminary Objections herein. Needless to say, that since submissions are not evidence or pleadings, the Court can always ignore them, without any harm, if they are either irrelevant or not raising any arguments worth consideration.

Issue, Analysis and Determination

6. As I start the determination of these objections, I must state also that I was at pains to understand exactly the entire mind of the person or party who brought this sought, in so far as he/she drew the pleadings in a manner I would sum up as unintelligible, incompetent, and unacceptable both in law and practice. I say so because in the first place, the ‘Plaintiff’ who was said to be Tawai Limited was not the one which signed the Pleadings in form of the Plaint. It was signed by an individual by name, Martin Wabuke Wasike, and he called himself “The Plaintiff/Applicant”. In the first place, a Plaint ought not to be drawn as such, meaning that it is both an Application and a Plaint. In pleadings, to name a few, it is either there is a Plaintiff, in which case his initial pleading will be drawn indicating “Plaint”, or an Applicant (in regard to Applications and Originating Summons), in which case his pleading will be drawn indicating as “Applicant”. Secondly, the party - the Plaintiff - sued three Defendants, together with two (2) Interested Parties whose names were given. At the same time, he included Nine (9) other individuals whom he kept referring to as “Shareholder” but all of the nine he combined into one set and referred to them all as “3rd Third Party”. He also then included another person as “Third Party”. Moreover, there was no conjunction as between the Defendants and so called Interested Parties, and Third Party.
7. Worth noting also is that in all these steps or pleadings, the Plaintiff did not obtain leave of the Court to enjoin persons as Interested Parties or Third Party. It should be clear, and always recalled, that there are laid down procedures of joining Interested Parties and Third Parties to suits or the like. They are mandatory and should be followed. One does not wake up one morning and decide on who to sue as who or what without following the law.
8. Again, and one would find the reason why the heading to this Ruling is as may appear to be faulty, as I stated above, the ‘Plaintiff’ singled out nine (9) parties each of whom he referred to as “Shareholder” and sued them as 3rd Interested Party. Since this Court could not amend the pleadings of the party, it repeated the position “3rd Interested Party” from the said 3rd Interested Party to the 11th. The title looks untidy and strange but that was how it was drawn.
9. Worse, about the drawing of the Plaintiff’s pleadings, was that he only gave the descriptions of himself, as “an adult of sound mind his address of service for the purpose of this suit...” He then described the Four Defendants as public companies while he did for the interested parties as persons whose interest is likely to be adversely affected hence they answer accordingly and the Third Party as a former Director of Tawai Limited. He did not plead cause of action against the purported Interested Parties and Third Party or the basis of joining them in the suit. But in the end he prayed for reliefs not touching them and also that he (Plaintiff) was the sole owner of the parcels of land in issue. These pleadings not only confused issues but were not precise as to guide the Court to make head or tail of the Claim herein were it to go to merits.
10. That aside, I have given deep consideration of the Preliminary Objections and the applicable law, both statutory and case law. I am of the view that only two issues arise here for determination:



- a. Are the Preliminary Objections merited?
 - b. Which orders to issue and who bears the costs of the objections
11. Sequentially, here is the determination.
- a. Whether the Objections are merited.
12. I begin by analyzing what amounts to a Preliminary Objection. A Preliminary Objection was succinctly defined in the seminal case of *Mukisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd* (1969) EA 696. The Court stated therein as follows:
- “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 had to be ascertained or if what is sought is the exercise of judicial discretion.”
13. Therefore, a Preliminary Objection should be as clear as possible, and discernible from pleadings. It should not involve a dissection or consideration of facts. The Court of Appeal, in *Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya* [2017] eKLR has held that: “We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was in issue We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned.” What their Lordships are stating in their decision is that one must state with precision the point of law he or she is raising against another so that both the court and that other party are aware of the match before him or her.
14. Also, in *Bashir Haji Abdullabi v Adan Mohammed Noor & 3 Others* [2004] eKLR, the same Court stated as follows:
- “We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”
15. At the same time, Musinga J (as he then was), in *Susan Wairimu Ndiangui v Pauline W Thuo & Another*[2005] eKLR held that “a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”



16. It goes without saying then that as I set to determine the two objections herein, I need to consider whether or not they raise only points of law. Regarding the Objections by 1st Defendant, it is my view that the only points of law that is raised therein are whether or not that the instant suit was filed with leave of the Court, and if it is *res judicata*.
17. In regard to the Plaintiff's contention, the only issue of law is whether leave of Court was sought before filing the suit. The point on whether knowledge and consent of the Directors (which I understand to mean the authority directors of a company grant by way of a resolution, as required by law) was sought or not is a matter of fact which can only require evidence to be adduced therein. In any event, the Courts have held that where a suit is filed without the written authority of Directors, that may be filed before the suit is heard. Thus, as things stand, the point is not ripe for argument as a point of law, and it cannot pass as such. In that regard refer to the cases of *Watamu Sailfish Limited v Emmanuel Charo Tinga & 2 others* [2021] eKLR; *Ndung'u Mugoya & 473 Others V Stephen Wang'ombe & 9 Others* [2005] eKLR and *East African Safari Air Limited Versus Anthony Ambaka Kegode* (2011) eKLR.
18. In my view the parties failed to raise an important point of law, which I must determine here also. It is whether a pleading that is not signed by the party or one signed by a stranger is a pleading worth of the Court to consider.
19. Having stated as I above, the issue before me is whether this suit was filed with leave of the Court. The arguments stem from the orders which were made on June 11, 2019 by Hon Justice Chemitei in Kitale High Court Civil Case No 22 of 2018 between *Tawai Limited and Nathanael Wanjala Muindi and 5 Others*. In the order, his Lordship directed, among others, as follows, "2. That pending further directions of this Court, no Director present or past or member or shareholder or purchaser of the suit parcel of land (given as LR No 5707/R) should file any suit, application or claim relating to the Plaintiff company without first obtaining the Leave of this Court". In answer to the above issue, the 'Plaintiff' who turned himself to be the 3rd Interested party answered that he had filed an application in Kitale High Court seeking leave of the Court. He annexed the copy of that application to his answer/reply.
20. Clearly, there was no leave granted to the 'Plaintiff' to file the instant suit. He admitted that he was aware, as much. I repeat, the 'Plaintiff' knew well that leave of the Court was needed before filing the instant suit. That is why he set forth to seek it through Kitale High Court Misc Civil Application No 24 of 2022 filed in that Court on July 21, 2022. For this reason, I find that Preliminary Objection is merited and it succeeds.
21. Since I have found that the Preliminary Objection succeeds, I do not need to analyse the other point as to whether or not the suit is *res judicata*. However, I need to discuss briefly the strange pleading in form of a Plaint which is the foundation of the suit before me and the Reply by the "3rd Interested Party".
22. The Plaintiff was known as Tawai Limited. The description of who the Plaintiff was, as I have indicated above, was that it was "an adult male of sound mind...". I have no knowledge of male and female companies and if companies have sound minds or not. All I know is that companies are artificial persons in the eyes of the law as was enunciated in the seminal case of *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22. Even then the party who brought this suit signed off the Plaint as "Martin Wafula Wasike". It therefore is clear that the Plaintiff is not the one that signed the pleadings. There is nowhere it is pleaded or shown that the said Martin Wafula Wasike is an agent of the Plaintiff and by what authority he would act for the Plaintiff in person. He is not a lawyer or a duly appointed holder of a power of attorney as to represent the Plaintiff. Even then, the Plaint should have been drawn to read as much and clearly.



23. The document before me inform of a Plaintiff is one what would be equated to a mere piece of paper filed in the Court because it is not signed by the party it purports to emanate from. Without the signatures of the directors the seal of the company the document is not signed and or authenticated or 'owned' by the company. An unsigned pleading is worthless before the Court. As was held by Ringera J in *Regina Kavenya Mutuku & 3 Others v United Insurance Company Ltd* Nairobi Milimani HCC No 1994/2000 [2002] 1 KLR 250,
- “An unsigned pleading had no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity.”
24. And the Court of Appeal in CA Nairobi Nos 13 & 19 of 2001 consolidated *Vipin Maganlal Shah Alulkumar Maganlal Shah vs Investments & Mortgage Bank Ltd & 2 Others* [2001] held that “Where a pleading is not signed the same would be struck out rather than being dismissed.....”.
25. Similarly, in *Nairobi City County Government v Kenya Revenue Authority & another* [2017] eKLR, the learned judge held that:
- “I am unable to accept as being validly on record such a substantive pleading as statutory statement in Judicial Review proceedings, which pleading is not signed by either the applicant or its advocate on record and therefore I have no hesitation in declaring the unsigned statutory statement on record a nullity for want of signature or ownership or authentication thereof.”
26. In the instant case, Martin Wabuke Wafula signed the Plaintiff but in purported authentication of the Plaintiff who was Tawai Limited, a separate entity from him. A pleading signed by an unauthorized stranger is no better document than one that is not signed by a party or its representative. It is no lesser a nullity than one that is declared to be a nullity. It ought to be struck out with scorn.
27. Unsurprisingly, since the suit was brought by a stranger but who drew the Plaintiff as if it was of the Plaintiff and on its behalf, the real Plaintiff acted by appointing its own lawyers. They filed a Notice of Appointment of Advocates and filed a Preliminary Objection dated July 4, 2022. Thus, here is a Plaintiff which renounces all pleadings purported to be filed on its behalf. The loud question is: who then filed the instant suit? He must bear the costs of the suit. This Court pities the said party, which is being dragged to Court by a stranger, who purports to make it lay a claim. But anyhow, since the Plaintiff has distanced itself from the Plaintiff and documents, it is clear as noon day that it did not file the suit, it did not sign the Plaintiff, it did not support anything put forth as its own actions or authorship in this matter except the Notice of Appointment of Advocates and the Preliminary Objection, to its own suit. To that extent, the entire suit is fit for striking out. Actually, the Plaintiff did not need to wait for the determination of its Preliminary Objection. It had every right, having taken over the pleadings and representation, to withdraw the entire suit under Order 25 Rule 1 of the *Civil Procedure Rules, 2010*. Since it did not do so, I must determine the Preliminary Objections herein.
28. However, having found that the preliminary objections identified succeeded, I dismiss the plaintiff's suit with costs to be borne personally by the individual indicated and signed as the one who instituted the claim. To be clear, the costs of the instant suit shall be borne by the said signatory, Martin Wabuke Wafula.
29. It is so ordered.



**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS
24TH DAY OF NOVEMBER, 2022.**

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE

