



Solai Ruiyobei Farm Ltd v Cherutich & another (Environment and Land Case E052 of 2022) [2024] KEELC 484 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEELC 484 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE E052 OF 2022
MAO ODENY, J
FEBRUARY 7, 2024**

BETWEEN

SOLAI RUIYOBEI FARM LTD PLAINTIFF

AND

KIPKOECH CHEBET CHERUTICH 1ST DEFENDANT

JACKSON TUITOEK 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 13th June 2023 by the Defendant/Applicants seeking the following orders:
 - a. That the suit herein be struck out as the directors listed in the CR 12 dated 7th August 2020 annexed to the plaint have no locus standi to institute, prosecute and/or to continue with the suit herein.
 - b. That costs of this application and suit be provided for by Richardson Kipkoech Bundotich.
2. The application was supported by the annexed affidavit of Steve Odhiambo Opar counsel for the defendants where he deponed that the plaintiff commenced the present proceedings vide the plaint dated 23rd September, 2022 and that the defendants filed a preliminary objection dated 6th December, 2022 which was dismissed by the court.
3. Counsel deponed that the CR 12 that had been annexed to the Plaint was subject to challenge before Nakuru High Court Civil Application No. E026 of 2022 for allegedly being obtained fraudulently by a Mr. Richardson Kipkoech Bundotich. Further that the High Court cancelled the CR 12 dated 7th August 2020 and ordered for fresh elections of new directors.



4. It is counsel's evidence that in light of the said ruling, Mr. Richardson Kipkoech Bundotich and the other directors listed in the CR 12 dated 7th August 2020 lacked the capacity to pass the resolution to approve the institution of the present proceedings.
5. Richardson Kipkoech Bundotich filed a replying affidavit sworn on 3rd November, 2023 and deponed that he is a director of the plaintiff and duly authorized to swear the affidavit. That the quashing of the CR 12 dated 7th August 2020 and the order for fresh elections of new directors came after the suit had already been instituted.
6. He also deposed that the effect of the said ruling cannot act retrospectively as the plaintiff is a limited liability company that has perpetual succession and cannot act in a vacuum. That upon compliance with the said order, the incoming directors may opt to continue with the prosecution of the present suit.
7. He further deponed that the court in its ruling delivered on 22nd March 2023 directed compliance by filing the requisite minutes which were done acknowledging that the suit was properly before court.

Defendants' Submissions

8. Counsel identified the issue for determination as to whether the directors listed in the CR 12 dated 7th August 2020 have the *locus standi* to prosecute this suit and relied on the case of *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR as was cited in *Christopher Mutiembu Machimbo & 3 Others v County Surveyor, Transzoia & 4 others* [2022] which he stated that it is a right to appear before a court.
9. Mr. Opar therefore submitted that the CR12 having been cancelled, the Plaintiff has no locus standi to file this case and urged the court to strike out the case with costs.

Plaintiff's Submissions

10. Counsel submitted on whether its directors lack the locus standi to sustain the present suit and stated that the plaintiff's Board of directors in the minutes dated 8th August, 2020 authorized the plaintiff's counsel to institute the present proceedings after the defendants took the title deeds for land parcel No. LR 20229/1 IR 67258.
11. Counsel admitted that after the present suit was filed, proceedings were commenced in Nakuru High Court Case No. E026 of 2022 where orders were issued on 16th March 2023 that directed the election of new directors.
12. Mr. Mukira relied on the cases of *Leo Investment Ltd v Trident Insurance Company Ltd* [2014] eKLR, *Eye Company (K) Limited v Erastus Rotich t/a Vision Express* [2021] eKLR and reiterated that the present suit was commenced with the proper authority by the board of directors and the decision alluded to by the defendants was made after the suit had already been instituted and

Analysis and Determination

13. The issue for determination is whether the Plaintiff has the *locus standi* to institute this suit and if not whether the suit should be struck out.
14. The defendants alleged that the directors listed in the CR 12 dated 7th August 2020 annexed to the plaint have no locus standi to prosecute the present suit because the said CR 12 was set aside by the High Court vide a ruling dated 16th March 2023 delivered in Nakuru HCC No. E026 of 2022 between *Cheruiyot Arap Changwony & another v Registrar of Companies & 10 others*.



15. The court in the case of *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR held as follows:

“Locus-standi signified a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a Court of law. That was the holding in *BV Narayana Reddy –v- State of Kamataka Air* (1985) Kan 99, 106 (The *Constitution of India*, ARD 226). I adopt the same as a correct proposition of the law and I so hold.”

16. Locus standi means the right of a party to appear and be heard by a court of law. In the present matter, it is not disputed that at the time of institution of the present case on 29th September 2022 the directors of the plaintiff had the authority to file the suit per the CR 12. The CR 12 was set aside on 16th March, 2023 after the suit had been filed.

17. The plaintiff submitted that quashing of the CR-12 came after the institution of the suit and the said order cannot therefore act retrospectively. It was the plaintiff’s argument that it is a limited liability company with perpetual succession and it cannot operate in a vacuum

18. In the Indian Supreme Court case *Sree Sankaracharya University v Dr. Manu and Another* on 16 May, 2023 held that:

“Therefore, permitting retrospective application of the said order would result in withdrawing vested rights of lecturers who had a PhD at the time of their recruitment and who were placed in the selection grade before 29th March 2001 with four plus two advance increments,”

19. Retrospective application of the law or orders can only be permitted in certain circumstances where the same will not affect the rights of parties. In the Supreme Court case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR the court held that:the *Constitution* to determine whether it permits retrospective application of any of its provisions, a court of law must pay due regard to the language of the *Constitution*. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of the *Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately acquired before the commencement of the *Constitution*.”

“ At the onset, it is important to note that a Constitution is not necessarily subject to the same principles against retrospectivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting

20. The S K Macharia case (supra) dealt with the importation of retrospectivity which would in effect deny an individual of a right which he or she had acquired before an order was made. This can be applied to this case to emphasize that this case was filed before the order of the High court was made on the CR12 status. The court also gave directions on elections of new directors taking into account that the company could not operate in a vacuum. It follows that the respondent had locus standi at the of filing this suit as that right cannot be divested of the right to sue and ventilate the grievance before the court.



21. In the case of *Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another* [2021] eKLR cited with approval the case of *The Co-Operative Merchant Bank Ltd. v George Fredrick Wékesa* (Civil Appeal No. 54 of 1999) where the Court of Appeal held as follows:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

22. Similarly, in the Court of Appeal case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR held as follows:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

23. Courts should be slow at striking out cases, which has the effect of locking out litigants from the seat of justice. This should only be done in glaring cases of abuse of court processes and other scenarios provided for under the law and procedure. I notice that the Applicant filed a preliminary objection to strike out this suit, which was dismissed. This is a second attempt to dismiss this suit without hearing of the issues at hand.

24. I find that the application lacks merit and is therefore dismissed with costs to the Respondent. Respondent to ensure that they have complied with the court order on the election of new directors if they have not already done so. The matter to be heard and determined on merit.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 7TH DAY OF FEBRUARY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

