



REPUBLIC OF KENYA



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Zahir & 2 others v Mwachiunge & 2 others; Alavi (Suing on his own behalf and on behalf of the Estate of Mohamed Farouk Alavi) (Interested Party) (Environment & Land Case E059 of 2022) [2023] KEELC 16372 (KLR) (6 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16372 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E059 OF 2022
LL NAIKUNI, J
FEBRUARY 6, 2023

BETWEEN

TARIQ MOHAMMED ZAHIR 1ST PLAINTIFF
HALEENA ZAHIR ALAVI 2ND PLAINTIFF
HANNAN ZAHIR ALAVI 3RD PLAINTIFF

AND

SALIM YUSUF MWACHIUNGE 1ST DEFENDANT
ZAINAB HADULA KOFA 2ND DEFENDANT
MICHAEL MULWA T/A SWIFTWAY AUCTIONEERS 3RD DEFENDANT

AND

DR MOHAMED ZAHIR ALAVI (SUING ON HIS OWN BEHALF
AND ON BEHALF OF THE ESTATE OF MOHAMED FAROUK
ALAVI) INTERESTED PARTY

RULING

I. Introduction

1. This ruling is based on the Notice of Preliminary Objection dated June 28, 2022 by the 1st and 3rd Defendants. They raised the following four (4) grounds of objection: -
 - a. That the Plaintiffs suit and claim against the 1st and 2nd Defendants is incompetent and incurably defective. The Plaintiffs suit and/or motion does not disclose a cause of action against the 1st and 3rd Defendants and should be dismissed.



- b. The Plaintiffs have no locus or legal standing to institute the suit against the 1st and 3rd Defendants. The Plaintiffs suit against the 1st and 3rd Defendants is a nullity ab initio and should be dismissed.
- c. The Plaintiffs suit filed against the 1st and 3rd Defendants is an abuse of the Court process and should be dismissed.
- d. The Honourable Court cannot issue an order of injunction as sought in the Notice of Motion dated May 31, 2022 against the 1st and 3rd Defendants. The Notice of Motion should be dismissed in its entirety in the first place.

II. Submissions

2. When this matter came up for directions on July 28, 2022, the parties agreed to canvass the said preliminary objection by way of written submissions. Pursuant those directions given by the Court, the parties filed their submissions by the time the court withdrew to write this ruling.

A. The Written submission 1ST & 3RD Defendants

3. On September 27, 2022, the Law firm of Messrs Asige Keverenge & Anyanzwa Advocates for the Defendants filed their written submissions dated September 23, 2022. The Learned Counsel submitted in support of the Preliminary Objection filed by the 1st and 3rd Defendants dated June 28, 2022.
4. The Learned Counsel submitted that the Plaintiffs have no legal capacity or locus standi to institute this suit against the 1st and 3rd Defendants. The Plaintiffs have no legal right in the suit property being title Mombasa/Block XI/271 is not their property and not registered in their names. The Plaintiffs have no legal right in the suit property which entitles them to institute and prosecute this suit.
5. The Learned Counsel submitted that Mohamed Zahir Alavi is named both as an Interested Party and 4th Defendant. The joinder is incurably defective and renders the suit incompetent. Without a legal interest in the suit property that is vested in the Plaintiffs, the suit does not disclose a cause or reasonable cause of action the Plaintiffs can maintain and prosecute against the 1st and 3rd Defendants.
6. The Learned Counsel submitted that in further submission the court cannot grant any of the orders sought in the suit when the plaint clearly discloses that the Plaintiffs have no legal interest and neither are they the owners of the suit property. The suit is not only incompetent but also an abuse of the Court process.
7. The Learned counsel also submitted that in regards to the Plaintiffs Notice of Motion dated May 31, 2022 which is merely a replica of that is contained in the plaint. In the entire notice of Motion, no mention is made of the 1st and 3rd Defendants and no reliefs are sought against the 1st and 3rd Defendants. Accordingly, the motion dated May 31, 2022 and served upon the 1st and 3rd Defendants should be dismissed against them with costs.

B. Written Submissions by the Plaintiffs

8. On August 19, 2022, the Law firm of Messrs Mutisya Mwanzia & Ondeng Co Advocates for the Plaintiffs filed their written submissions dated August 19, 2022. The Learned Counsel submitted that before the Court was a Notice of Preliminary Objection seeking to strike out the Notice of Motion dated May 31, 2022 and the suit herein. The said Notice of Preliminary Objection raises four (4) issues as follows:



- a. The Plaintiffs suit and claim against the 1st and 2nd Defendants are incompetent and incurably defective. The Plaintiffs suit and/or motion did not disclose a cause of action against the 1st and 3rd Defendants and should be dismissed.
 - b. The Plaintiffs had no locus or legal standing to institute the suit against the 1st and 3rd Defendants. The Plaintiffs suit against the 1st and 3rd Defendants were a nullity ab initio and should be dismissed.
 - c. The Plaintiffs suit filed against the 1st and 3rd Defendants was an abuse of the Court process and should be dismissed.
 - d. The Honorable Court could not issue an order of injunction as sought in the Notice of Motion application dated May 31, 2022 against the 1st and 3rd Defendants. The Notice of Motion application should be dismissed in its entirety in the first place.
9. The Learned Counsel submitted that the issues for determination under the said Notice of Preliminary objection dated June 28, 2022 were as follows:
- a. Whether the Notice of Preliminary objection met the threshold set in the case:- '*Mukisa Biscuits Manufacturing Co Limited – Versus - West End Distributors (1969) EA 696* at page 700. (Grounds 1, 3 and 4 of the Notice of Preliminary Objection).
 - b. Whether the Notice of Preliminary objection was merited. (Ground 2 of the Notice of Preliminary Objection).
10. The Learned Counsel submitted on the issue of whether the Notice of Preliminary objection met the threshold set in '*Mukisa Biscuits Manufacturing Co Limited (Supra)* as was explained well in the stated case a preliminary case was stated to mean:
- ' So far as I'm aware, 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.'
11. Further, Sir Charles Newbold P added as follows at page 701:
- ' 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.'
12. The Learned Counsel submitted that the above being the description of a preliminary objection, it was not in doubt that a preliminary objection raised a pure point of law, which is argued in the assumption that all facts pleaded by the other side are correct. However, it could not be raised if any facts had to be ascertained from elsewhere or if the court was called upon to exercise judicial discretion. The argument



they had made above was informed by the decision in the case:- '*Quick Enterprise Limited – Versus - Kenya Railways Corporation, Kisumu HCCC No 22 of 1999* where the court held that:-

' When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertain the facts from elsewhere apart from looking at the pleadings.'

13. The Learned Counsel submitted that for the Honorable Court to determine whether the suit discloses any cause of action against the 1st and 3rd Defendants: whether the suit was an abuse of the Court process; and whether orders of injunction could not be issued against the 1st and 3rd Defendants, they submitted that the Court has to ascertain facts and probe evidence in the same. Such an issue could not therefore be properly raised through a Notice of preliminary objection.

14. The Learned Counsel submitted that in their humble view, the Respondent did not pay attention to the decision in the case of: '*Kandara Residence Association & Another – Versus - Ananas Holdings Limited & 4 Others; Director of Survey & 3 Others (Interested Parties) [2020] eKLR* where the court held as follows:-

' The question as to whether a suit discloses a reasonable cause of action is not a question to be determined by way of a preliminary objection, since the same is a question of fact and evidence that can only be ascertained through the perusal of the evidence and pleadings on records.'

15. It was the Learned Counsel's submission that further on the issue of whether the suit was an abuse of the process of the court, the court of appeal in '*Muchanga Investment Limited – Versus - Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No 25 of 2002 (2009) eKLR 229*, stated as follows:-

' The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive.'

16. The Learned Counsel submitted that for the court to determine whether a suit was an abuse of the court process, the court would have to ascertain the facts hence the issue could not be raised through a preliminary objection. Lastly on the issue of whether of injunction could issue against the 1st and 3rd Defendants, still the court would have to evaluate the facts to determine whether 'a prima facie case' has been made, the issue of irreparable loss, and the balance of convenient. Accordingly, that called for the ascertainment of facts. They must however put out that the Notice of Motion application dated May 31, 2022 was only brought against the 2nd Defendant hence the issue is mute.

17. The Learned Counsel submitted that given the forgoing holdings, they believe that they were right in submitting that the grounds 1, 3 and 4 of the Notice of Preliminary objection raised by the 1st and 3rd Defendants did not meet the threshold set in the case of: '*Mukisa Biscuits Manufacturing Co Limited (supra)*.

18. The Learned Counsel submitted on the issue of whether the Notice of preliminary objection was merited (Ground 2 of the Notice of Preliminary objection) that the term 'locus standi' has been defined



in several cases. In the case '*Law Society of Kenya – Versus - Commissioner of Lands & 2 others [2001] eKLR*', the Court held that:-

' Locus standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in court of law.'

19. The Learned Counsel also relied on the case of '*Alfred Njau and Others – Versus - City Council of Nairobi (1982) KAR 229*', the court also held that:-

' The term locus standi means a right to appear in court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings'.

20. The Learned Counsel submitted that from the foregoing decisions, the issue which the Court had to determine was whether the Plaintiffs had sufficient interest in the suit property so as to entitle the Court to hear them. The Plaintiffs interest in the suit property was crystalized in the settlement agreement between Mohamed Zahir Mohamed, Madiha Alwy Halifa and Mohamed Farouk Alavi. The agreements stated, 'the husband and the wife shall be beneficial owners of the first and second floor flat erected on land parcel no MOMBASA/BLOCK XI/271 the husband and the wife shall hold the said property in trust for their children namely:-

- a. TA – 14 years old son
- b. HA – 12 years
- c. HAA – 12 years'

21. The Learned Counsel submitted that until they attained the ages of 24 years, the husband, wife and father would execute all necessary agreements, debt, transfer, conveyance and other documents to effect the transfer of all the said parcels of property including but not limited to giving consents if required.

22. The Learned Counsel's contention was that it was the above agreement that contained the interest of the Plaintiffs in the suit property which the Plaintiffs sought to enforce in the current suit. In their view, the Plaintiffs could not be said to lack locus standi to institute the current suit. On May 6, 2022 the Plaintiffs and the Interested Party were evicted by the Defendants with the assistance of Makupa Police Station through an alleged eviction order issued in the case of:- 'Mombasa Chief Magistrate's Court Civil Suit No 710 of 2017; Salim Yusuf Mwachiunde – Versus - Madiha Alwy Khalifa. The Plaintiffs and the Interested Party's properties were thrown outside by the Defendants. He held that most of the medical appliances were destroyed during the eviction exercise while other items were destroyed by the rains.

23. The Learned Counsel averred that neither the Interested Party nor the Plaintiffs were served with the pleadings in the case of:- 'Mombasa Chief Magistrate's Court Civil Suit No 710 of 2017; Salim Yusuf Mwachiunde – Versus - Madiha Alwy Khalifa and Chief Magistrate's Court Misc Civil Application No 5 of 2021; Zainabu Hadula Kofa – Versus - Madiha Alwy Khalifa and neither the estate of Mohamed Farouk Alavi nor were the Plaintiffs and the Interested Party made a party in the said case.

24. The Learned Counsel argued that that the Plaintiffs had therefore a right in law to challenge the manner in which they were evicted under the provision of Article 47 of the *Constitution* of Kenya, 2010. The Courts had been consistent on the importance of observing the rules of natural justice and in particular hearing a person who was likely to be adversely affected by the decision before the decision was made.



In the case of:- '*Onyango – Versus - Attorney General [1989 – 1989] EA 456*, Nyarangi JA asserted at Page 460:

' A decision in breach of the rules of nature justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.'

25. The Learned Counsel submitted further that the 1st and 3rd Defendants could not therefore argue that the Plaintiffs lacked the locus standi to institute the current proceedings seeking, among other reliefs, general damages for violation of the Plaintiffs right under the provision of Article 47 of the Constitution of Kenya, 2010 by being evicted from the suit property without any notice being served upon them. Further, arising from the settlement agreement, the Plaintiffs have a right to the suit property and therefore entitled in law to question the unlawful manner in which the 1st and 3rd Defendants transferred the same to the 2nd Defendant.
26. The Learned Counsel relied on the decision in the case of:- '*Naftali Nyangena Ogesi – Versus - David Ogega Omwonywa & 2 Others [2020] eKLR*, where the Court stated as follows:-

' The dispute herein clearly revolves around the estate of Ondieki Matara- deceased. At the time of his death the suit property was still registered in his name. Both the Plaintiff and the Defendant claim that the deceased was in the process of transferring a portion of his land to them before he died. Apart from challenging the validity of the land sale agreement between the Plaintiff and the deceased, the 1st and 2nd Defendants submitted that the Plaintiff lacks the locus standi to institute this suit as he did not obtain an ad litem grant. However, there is no legal requirement for a purchaser who is claiming a portion of the property belonging to a deceased person to take out letters of administration. The more fundamental issue is for anyone who is suing or being sued in respect of the estate of a deceased person to have grant of letters of administration as this is what gives him the legal capacity to implement any orders made either in his favour or against him.'
27. The Learned Counsel opined that Plaintiffs sought to enforce the settlement Agreement so that in effect the transfer of the suit property from the name of Mohamed Farouk Alavi to the 2nd Defendant was cancelled and the property was then retransferred to Mohamed Farouk Alavi then to the Plaintiffs and further, general damages for unlawful eviction. The Plaintiffs did not need to obtain letters of administrations to enable them seek the enforcement of the Settlement Agreement. As held in the case of:- '*Naftali Ogesi Case supra*, the Plaintiffs have enjoined Dr Mohamed Zahir Alavi who has the letters of administration ad-litem as a party for purposes of enforcing any orders against the estate of the deceased. The Plaintiffs were therefore properly before the Court and bearing in mind the issues involved in the suit, particularly, the fact that the Plaintiffs had been evicted from their own house. They urged the Court to issue directions that would ensure this suit was heard and determined on a very most urgent basis. They believed that they had demonstrated enough that the Notice of Preliminary Objection dated June 28, 2022 was not merited and urged the Court to dismiss the same with costs.

III. Analysis and Determination

28. The Honorable Court has carefully read and considered the Preliminary Objection raised, the grounds of opposition, the cited authorities, the rival submissions filed as well as the relevant provisions of the Constitution of Kenya, 2010 and Statutes. In order to arrive at an informed, reasonable and just decision, the Honorable Court has framed the following three (3) main issues for its determination. These are:-



- a. Whether the objection raised the Defendant in the Notice of Preliminary Objection dated June 28, 2021 has met the threshold based on law and Precedent.
- b. If the answer to (a) above is in the affirmative, whether the Preliminary Objection raised is merited.
- c. Who will meet the Costs of the objection?

ISSUE No. a). Whether the objection raised the Defendant in the Notice of Preliminary Objection dated June 28, 2021 has met the threshold based on law and Precedent.

29. According to the Black Law Dictionary a Preliminary Objection is defined as being:

' In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.'

30. In the case of:- Mukisa Biscuits (supra), the Court of Appeal defined a Preliminary Objection as follows;

' So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and if 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.'

31. In the case of:- '*Republic – Versus - Eldoret Water & Sanitation Company Limited Ex - parte Booker Onyango & 2 Others (2007) eKLR*, the Court stated that an Objector cannot introduce any factual dispute or controversy and must stick to pure points of law.

32. I have further relied on the decision of *Attorney General & Another – Versus - Andrew Mwaura Gitbinji & another [2016] eKLR*:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

33. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. From the most of them of the issues and facts of contention in this objection are to be adduced during a full trial. For instance, the Defendant contends that the Plaintiffs suit and claim



against the 1st and 3rd Defendants is incompetent and incurably defective and does not disclose a cause of action against the 1st and 3rd Defendants and should be dismissed.

34. Therefore, a Preliminary Objection can only be premised on undisputed facts, must raise pure points of law and cannot be raised where facts have to be ascertained or where the Court is asked to exercise judicial discretion. For a Preliminary Objection to be maintained, the pure points of law raised must sprout from the pleadings. In the case of '*Avtar Singh Bhamra & Ano – Versus - Oriental Commercial Bank HCC No 53 of 2004*', the Court stated as follows;

' A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.'

35. The 1st and 3rd Defendants stated in their preliminary objection that the Plaintiffs have no locus standi to institute the suit against them. That due to the lack of the said capacity the suit is null and void ab initio and should be dismissed. In the case of the '*Law Society of Kenya – Versus - Commissioner of Lands & Others, Nakuru High Court Civil Case No 464 of 2000*', the Court held that:-

' Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law'. Further in the case of *Alfred Njau and Others – Versus - City Council of Nairobi (1982) KAR 229*, the Court also held that:-

'The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings'.

36. It is therefore evident that 'Locus Standi' is the right to appear and be heard in Court or other proceedings and literally, it means 'a place of standing'. Therefore, if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this court was to find that the Plaintiffs have no locus standi, then they cannot be heard and that point alone may dispose of the suit. In the case of '*Quick Enterprises Limited – Versus - Kenya Railways Corporation, Kisumu High Court Civil Case No 22 of 1999*', the Court held that: -

' Where preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone'.

37. Having now considered the objections raised by the Defendant, the Court finds that lack of locus standi can dispose of the matter preliminarily without having to resort to ascertaining of facts. The Preliminary Objection raised by the Defendant fits the description of Preliminary Objection as stated in the *Mukisa Biscuit case (Supra)*.

38. While the Court has already held and found that the issue of 'Locus Standi' is a Preliminary Objection rightly raised, in this instant suit, the Defendant has averred that the Plaintiffs having filed this suit have no interest whatsoever over the suit property as they have not produced any documentation that shows any interest they may have over the suit property and have not shown any reason why the owner of the suit property could not file the suit by themselves.

ISSUE No b). Whether the Defendant is entitled to the relief sought

39. Under this sub heading, the Honorable Court takes notice to the fact that the Plaintiffs is claiming beneficial interest over the land having been the children of the deceased and claiming the suit property now that they are of legal age. The suit property had been held in trust for them when their parent



passed on. That means therefore that the issue as to whether or not the Plaintiffs have any proprietary interest over the suit property has to be ascertained through evidence. The Court would be required to interrogate evidence produced before it and ascertain the facts in order to come into that conclusion. The Plaintiffs have filed into this court letters of administration to the estate of the deceased who would have been the rightful person to file this suit and their parent. See the case of [Presbyterian Foundation & Another vs East Africa Partnership Ltd & Another](#)[2012] eKLR:

' The fourth issue is that the 2nd Plaintiff has no proprietary interests in the subject properties and is hence not entitled to the orders under Order 40 of the Civil Procedure Rules. That may be so. However, that determination can only be made at the hearing of the application as it goes to the merit of the application itself. Since I cannot make any conclusive findings with respect to the 2nd Plaintiff's position vis-à-vis the 1st plaintiff, I cannot say that the 1st Plaintiff's suit is non-existent. It is further submitted that since the Church has registered officials and the 1st defendant has directors, a suit on their behalf can only be brought by the said agents. That submission is largely correct since a suit which is brought without the blessing of the said entities is a non-starter. Whereas the Church is not a party to this suit and therefore the issue of its filing suit does not arise, with respect to the 1st plaintiff, whether or not it sanctioned the filing of the suit is a matter of evidence. If the suit was filed without the 1st Plaintiff's authorization, that would be something else. However, that is not an issue that, properly speaking, can be the subject of a preliminary objection.

Had this objection been raised by way of a formal application supported by an affidavit, that would have been a different story since the plaintiff would have had an opportunity to explain the discrepancies raised whose failure would have possibly led to a finding in favour of the defendants. In the result it is my view and I so hold that the issues raised in the notice of preliminary objection dated June 28, 2012 do not meet the threshold for Preliminary Objections. The same are accordingly dismissed with costs to the Plaintiffs.'

40. Taking into account the above findings of this Honorable Court, this court finds that since the Plaintiffs suit is based on who has interest over the suit property, making a determination at this stage of the said raised objection as to whether or not they hold such interest over the suit property will be draconian. It would mean the Plaintiffs suit having been determined via a Preliminary Objection. It would mean that the Court would not have had an opportunity to ventilate on the issues that would have been raised by the Plaintiffs during a full trial as is dictated upon by the principles of natural Justice, Equity and Conscience and fair hearing founded under the provision of Article 10 (2) (b), 25 (c), 47, 50 (1) & (2) and 159 (1) & (2) of the [Constitution](#) of Kenya, 2010.
41. Further it is the Court's holding that the instant issue while it goes to the Jurisdiction of this Court, as anchored in the provision of Article 162 (2) (b) of the [Constitution](#) of Kenya, 2010, Sections 3 and 13 of the [Environment & Land Court Act](#), 19 of 2011, 101 of the [Land Registration Act](#), No 3 of 2012 and Section 150 of the [Land Act](#), No 6 of 2012, certain facts must be emphatically ascertained. Therefore, the issue at hand cannot be determined via a Preliminary Objection, as the Court will have to take up empirical evidence to determine the same.



42. Additionally, I fully agree with my Honorable Colleague in the case of '*Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga – Versus - Eliud Timothy Mwamunga & Sagalla Ranchers Limited [2017] eKLR*, where the Court held that:-

' Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.

Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application'.

For these very reasons, the Preliminary Objection raised by the 1st and 3rd Defendants must fail on arrival. There is need to pave way for the full hearing of the case and determination on its merit.

ISSUE No c). Who will bear the Costs of the application

43. It is now well established that issue of costs is at the discretion of the Court. Costs means the award that is granted to any party at the conclusion of the legal action, proceedings and process of any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap 21 holds that costs follow the events. By events it means the results of the said legal action, proceedings or process. (See the Supreme Court Case of *Jasbir Singh Rai & 3 Others – Versus- Tarlochan Singh Rai (2014) eKLR*; *Rosemary Wairumu Munene – Versus- Ihururu Diary Farmers Co-operative Society (2014) eKLR*
44. In the instant case the outcome of the filed the Preliminary is that it has no legal basis and hence fails. For that reason, the 1st and 3rd Defendants have to bear the costs of the said objection.

VI. Conclusion & Disposition

45. Upon conducting a detailed analysis to the framed issues herein, the Honorable Court arrives at the following findings:-
- a.
- THAT the Notice of Preliminary Objection dated June 28, 2022, by the 1st and 3rd Defendants be and is not merited and the same is hereby dismissed.
- b.
- THAT for the sake of expediency, this suit should be heard and determined within the next One Hundred and Eighty (180) days from the date of the delivery of this Ruling commencing from July 20, 2023. There should be a mention on May 4, 2023 for purposes of holding a Pre – Trial Conference as provided for under Order 11 of the *Civil Procedure Rules, 2010* and further directions thereof.
- c.
- THAT costs be awarded to the Plaintiff.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIEVERED, SIGNED AND DATED AT MOMBASA THIS 6th DAY OF FEBRUARY, 2023.



HON. JUSTICE (MR.) L. L. NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT AT MOMBASA

In the presence of:

- a. M/s. Yumna, Court Assistant.
- b. M/s. Gatimo holding brief for the Plaintiff.
- c. No appearance for the Defendant

