



Busienei & 2 others v Kimorok Farm Limited & another (Environment & Land Case 943 of 2012) [2023] KEELC 16141 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 943 OF 2012**

**EO OBAGA, J
MARCH 2, 2023**

BETWEEN

**JEREMIAH BUSIENEI 1ST PLAINTIFF
JOSEPH KIPLAGAT 2ND PLAINTIFF
JOSEPH RONO 3RD PLAINTIFF**

AND

**KIMOROK FARM LIMITED 1ST DEFENDANT
PHILIP SEREM 2ND DEFENDANT**

RULING

Introduction

1. The Plaintiffs are shareholders of the 1st Defendant. The 1st Defendant was incorporated for the sole purpose of purchase of land which was to be subdivided and given to its shareholders. The company purchased land measuring about 1936 acres. when the process of subdivisions started, there arose serious disputes on the way the subdivision was being carried out.
2. The Plaintiffs were forced to file a suit against the company in which they sought orders of injunction restraining the Defendant from carrying out subdivision. Though the 2nd Defendant was not named as a party to the suit, the Plaintiffs nevertheless served him with summons to enter appearance.
3. The 2nd Defendant went ahead to file a memorandum of appearance under protest. He also filed a defence under protest. On December 19, 2012, the Plaintiffs filed a notice of motion in which they sought leave to amend the plaint and bring in the 2nd Defendant. This application was allowed vide ruling delivered on February 26, 2013.



4. The Plaintiffs further amended their plaint based on a notice of motion dated September 9, 2019. This application was allowed by consent on February 5, 2020. One of the prayers in the further amended plaint was that the court was to make an order that LR No. 1866/4 measuring over 1936 acres was to be surveyed and distributed in accordance with the shares held by each original shareholders and titles issued to them or their legal representatives.
5. As the Defendants wanted the land subdivided, a consent was recorded on the same day that is 5th February, 2020 compromising the suit save that the only remaining issue was for the court to determine whether the 2nd Defendant was properly sued or not.
6. On November 8, 2022, the court directed the parties to file written submissions in respect of the issue of whether the 2nd Defendant was properly sued or not. The Defendant filed written submissions on January 16, 2023. As at the time of writing this ruling on February 16, 2023, the Plaintiffs had not filed their submissions and if any were filed, then they are not in the court file.
7. I have considered the submissions by the 2nd Defendant and the pleadings in this file. The only issue for determination is whether the 2nd Defendant was properly sued or not and if so whether he is entitled to costs of the suit.
8. It is important to note that in the original plaint filed on August 10, 2011, the 2nd Defendant was named as a Defendant. It is only the 1st Defendant which was not named as a sole Defendant. Despite the 2nd Defendant having not been named, the Plaintiffs went ahead to serve him with summons to enter appearance.
9. The 2nd Defendant was forced to enter an appearance and file defence under protest. The Plaintiffs went ahead to file an application to have him joined as a second Defendant. Despite the 2nd Defendant strenuously opposing his joinder into the suit, the court allowed the amendment and the 2nd Defendant was formally brought in as a second Defendant. He thereafter filed a defence to the amended plaint on 8th April, 2013.
10. From the affidavits and statements filed by the Plaintiffs, the Plaintiffs argue that it is the 2nd Defendant who provoked them into making an application to join him as a Defendant in the suit. They argue that the 2nd Defendant had carried himself out as secretary of the 1st Defendant company and had gone ahead to sign some documents in his capacity as a secretary of the 1st Defendant. They further stated that he had signed an arbitration agreement on behalf of the 1st Defendant as its secretary when he was not.
11. When there were attempts to subdivide the land, there arose serious disputes among the directors of the 1st Defendants and shareholders. The provincial administration was forced to come in. The area District Commissioner appointed a task force which was to assist in the process of subdivision. The 2nd Defendant was one of the members of the Task Force. He was neither the secretary nor the Chairman of the Task Force.
12. The 2nd Defendant contends that he was sued and the suit against him was discriminatory in that out of about 10 members of the Task Force, he was the only one picked out as a Defendant.
13. I have looked at the pleadings. The 2nd Defendant was neither a director nor a secretary of the 1st Defendant. There is no relief claimed against him independent of the relief claimed against the 1st Defendant. The Plaintiffs dragged the 2nd Defendant into this suit. They cannot claim that he is the one who invited himself into the suit by filing appearance in protest and a defence forcing them to bring him on board.



14. The 2nd Defendant protested his inclusion in the suit but the Plaintiffs were determined to bring him in. In the ruling allowing joinder of the 2nd Defendant, Justice Munyao was categorical that if it turned out that the Plaintiffs had no case against the 1st Defendant he would be entitled to costs.
15. In the instant case, it is clear that there was no cause of action against the 2nd Defendant. The Plaintiffs cannot simply claim that they sued him as he carried himself out as secretary of the 1st Defendant. The Plaintiffs' ought to have carried out a search from the companies Registry to ascertain whether he was secretary or not. They did not do this. A search carried out by his lawyers shows that he was neither a secretary nor a director of the 1st Defendant. I therefore find that the suit against the 2nd Defendant was misplaced. He should not have been sued. I therefore find that the 2nd Defendant is entitled to the costs of the suit filed against him.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET on this 2ND day of MARCH, 2023.

E. O. OBAGA

JUDGE

