



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 52 OF 2021

CHRISPTOPHER MUTIEMBU MACHIMBO.....1ST PLAINTIFF

COSMAS WAFULA.....2ND PLAINTIFF

RICHARD KISEMBE.....3RD PLAINTIFF

RICHARD MASINDE.....4TH PLAINTIFF

VERSUS

THE COUNTY SURVEYOR, TRANS-NZOIA.....1ST DEFENDANT

JOHN BIKETI.....2ND DEFENDANT

MORRIS NGOME.....3RD DEFENDANT

STEPHEN ROTICH.....4TH DEFENDANT

JAMES MATEIKU.....5TH DEFENDANT

RULING

(On grant of an injunction, plaintiffs lacking *locus standi*, suit struck out with costs)

1. The Plaintiffs moved this Court by way of the application dated 15/10/2021 and filed on 18/10/2021. It was brought under Section 1 A, 1B, 3 and 63 (e) of the Civil Procedure Act and Order 40 Rule 1, 2, 3 of the Civil Procedure Rules and “all other enabling provisions of the law.” They prayed for the following specific orders:-

a. ...spent

b. That pending the hearing of this application *inter partes* and thereafter pending the hearing and determination of this application, there be a temporary interlocutory injunction restraining the Defendants whether by themselves, their agents, employees, servants or their representatives and whether by any persons acting on their behalf from entering, trespassing onto, sub-dividing, adjusting or marking boundaries, interfering with boundary features or survey marks, registering survey maps arising from any resurvey carried out, approving a survey plan or in any other manner interfering with individual plots demarcated and arising from re-survey of LR No. 2143/1 and 2143/5 - Lumboka Farm. (*sic*).

c. The interim orders be confirmed at the *inter parties* hearing hereof pending the hearing and determination of the suit herein.

d. Any other relief the court shall deem fit.

e. That costs be provided for.

2. The Application was premised on a number of grounds. One was that the County Surveyor had at the instance of the Defendants and made

several attempts to re-survey the land and the exercise was both illegal and unlawful. The other one was that the land had already been surveyed in the year **2000**, subdivision approval was made on **16/3/2020** and development or processing of titles had been approved. Further, the members had settled on their respective portions as per the initial survey plan and area list. Finally, they stated that the intended survey exercise was likely to lead to chaos and confusion.

3. The Application was supported by the affidavit of **Christopher Muteimbu Machimbo**. He swore and filed it on **15/10/2021** and **18/10/2021** respectively. In it, he reiterated the grounds of the Application and then annexed thereto several documents to prove the facts he deponed on. Among them was a letter of authority marked as **CMM 1**, to prove authority to swear the affidavit on behalf of the co-Plaintiffs. He also annexed and marked as **CMM2** a letter dated **10/3/2000** to show that the farm was surveyed. He attached also a copy of area list and marked it as **CMM3**. It was to show that a list of all farm members was prepared and signed and duly registered. Further, he annexed a letter dated **6/11/2015** and it marked as **CMM 4** in a bid to show that they applied for amendment of the area list which was done. Annexure **CMM 5** of the Affidavit was a consent for subdivision of the land. It was dated **14/5/2003**. Annexures **CMM 6 A, B** and **C** were receipts for payment of checking fees. He annexed also another copy of approval dated **16/3/2020** for sub-division of the land. It was from the Chief Officer, Housing and Urban Development. He marked it as **CMM 7**.

4. In addition, he deponed that in **August 2021**, the Applicants approached the County Surveyor to forward the documents for titling but he declined to do so and insisted that the land be re-surveyed. He annexed and marked as **CMM 8** a letter dated **23/8/2021** requesting so. Finally, he annexed photographs and marked them as **CMM 9 a, b** and **c**. They were to show the *status quo* on the land. It was that status quo that he was afraid that the Respondents would interfere with if not restrained. He was also apprehensive that their Respondents' actions would cause chaos and confusion. He prayed that their application be allowed.

The Response

5. The Application was opposed. On **9/11/2021** the **5th** Defendant filed a Replying Affidavit sworn on **8/11/2021**. He deponed that he was a Director of Lumboka Estate Limited (Ltd) (herein known as "the Company"). His further deposition was that the Company owned the suit property. He pointed out that the Plaintiffs lacked *locus standi* to present the suit together with the Application since they were not directors of the Company and that the directors had not authorized them to institute the suit on their behalf.

6. He stated that the First Applicant was a stranger and not an agent or official of the Company hence could not purport to have the authority of the Company to swear the Affidavit and institute the suit on its behalf. He denied in *toto* all the claims made by the Applicants.

7. He deponed further that the Company's intention was to subdivide and distribute it to all deserving persons. He rejected the Applicants' annexure **CMM3** terming it as a falsehood. He accused the **1st** Applicant of having sold his share to an excess of **7.2 acres** over and above the **40 acres** he was allocated. He annexed copies of sale agreements between the **1st** Plaintiff and purchasers of the said portion.

8. Further, he pointed out that the **3rd** Plaintiff was neither an official nor director of the Company and was not entitled to bring the suit. He stated that the **2nd** Plaintiff too was not a member of the Company but had bought one (1) acre from the **2nd** Defendant and therefore, he (1st Plaintiff) could only get his share from the **2nd** Defendant. He annexed a copy of the sale agreement between the two parties. He deponed further that the **4th** Plaintiff ceased being a member of the Company because he disposed the whole of his share which measured 6 acres. He annexed a copy of the sale agreement and a letter showing that the **4th** Defendant left the Company. Finally, the deponent annexed the Memorandum and Articles of Association for the Company to demonstrate that the Plaintiffs were not the Directors of the Company.

Applicants' Further affidavit.

9. In answer to the averments contained in the Replying Affidavit, the Plaintiffs filed a further affidavit on **6/12/2021** through Christopher Mutiembu Machimbo, the **1st** plaintiff. His response was that on **21/12/1971**, the Company purchased the suit land when he was the Secretary. He gave the names of the founding members as **Isaiah Masindano, Johnstone Khisa, Philip Wanyama, James Mateiko, Tom Musungu, Johnstone Juma, Silas Wekesa, Robert Makhanu** and **Dismas Namiti**. He stated that Johnson Khisa was the Chairman, Francis Masindano the Secretary and Jackson Simatwa (deceased) the treasurer.

10. He denied claims that he was an intermeddler in the affairs of the Company. He was categorical that he was involved in the Company business since time immemorial and therefore he was not a stranger to its affairs. He annexed a copy of the judgment marked as **CMM1** which according to him was evidence that he was the Chairman of the Company. He further clarified that the land was surveyed **20** years ago under the watch and approval of the **Directors** and the **Management Committee** then in office.

11. In regard to the membership of the **3rd** Plaintiff, he stated that the said individual was admitted as a member. He confirmed further that on **7/2/1999**, they conducted the election of directors and other office bearers. He then annexed a copy of Minutes confirming so as well as others for replacement of the Secretary of the Company.

12. He deponed that the objects of the Company were clearly stipulated in its Memorandum and that the Plaintiffs remain members of the farm to date. He pointed out that the **Company became defunct after subdivision process was done and claimed that its purpose was to purchase land and distribute the same among the members**. He then stated that by that, the company was *functus officio*. The Application was canvassed by way of written submissions by the parties.

Issues, Analysis and Determination

13. I have considered the application, the affidavits both in support and opposition to it, the annexures thereto, the submissions, as well as the law and authorities relied on. I also considered the Pleadings. Whereas many issues could have been considered, I am convinced that since the Defendants challenged the Plaintiff's *locus standi* to bring this suit, I would do well to consider the issue first since the success or

otherwise of it determines the direction of both the instant Application and suit. The issue of *locus standi* is a point of law which this Court is under the duty to determine first before any other. Thus, I frame the issue: **Whether the plaintiff has locus standi to bring the present suit.**

14. The point of departure here is that whereas the Respondents filed a Replying Affidavit in response to the Application, they raised what is considered a preliminary point of law or objection. A preliminary objection was defined in the case of **Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd. Civil Appeal No. 9 of 1969 (1969) EA 696** where the Court held that:

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

“A preliminary objection is in the nature of what used to be called demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or of what is sought is the exercise of judicial discretion.”

15. Also in the case of **Oraro v Mbaja [2005] 1 KLR 141** the court held as follows:

“...A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....” (Emphasis added).

16. In the case of **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, as follows:-

“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 -Vs- 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”.

17. Therefore, locus standi means the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard because of that. *Locus standi* is so important that in its absence, party has no basis to claim anything before the Court.

18. The defendants aver that the plaintiffs lack *locus standi* to institute the suit. The thrust of their argument is that the Defendants are not directors of the Company, that is to say, Lumboka Estate Limited. Based on that contention the Court had to peruse the pleadings filed to inform itself of whether it is true or false. I looked at the **Plaint**. Paragraph 4 gives the description of the Plaintiffs. They describe themselves as “farm committee members of Lumboka Farm commonly known as Lumboka Estate and own shares therein...” They fall short of revealing the existence of the entity they refer to as Lumboka Estate. However, the annexures they gave to the supporting affidavit show that entity as being **Lumboka Estate Limited**. These are annexures **CMM 2, CMM 3 CMM 4** of the Applicant’s Affidavit sworn on **15/10/2021** and Documents **1, 2 and 3** of the List of Documents dated **15/10/2021** and filed on **18/10/2021**. Again, while they did not disclose this fact at the beginning, they did so in the Further Affidavit sworn by the **1st Plaintiff** on **27/11/2021** and filed on **6/12/2021**. He did this in paragraphs **8** to which another annexure **CMM 1** is clear about it, paragraphs **9, 20,21, 24** and **29**, and annexures **CMM 2(a), (b) and (c), 3(b), (c) and 4(a)**. The Respondents on the other hand brought out this right from the **Defence** filed on **20/11/2021** at paragraphs **3, 4, 5, 6, 7, 8, 9** and **10**. Thus from the pleadings, it is not in dispute that the suit land belongs to a limited liability company.

19. I will at this point pause to discuss what a Company is. In simple terms, a limited liability company is a legal person having separate existence from its shareholders. It can sue and be sued in its own name. Once a company is incorporated it exist as a legal person from that date of incorporation; it can acquire its own property, and has rights and liabilities separate from those of its members. Simply put, it is a juristic person. This was enunciated in the seminal case of **Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22**.

20. In **Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another [2015] eKLR** the Court of Appeal discussed at length the issue of *locus* in relation to a limited liability company. It held thus:-

“..... The centuries-old case of Salomon vs. Salomon Company Limited [1895-99] All ER 33 laid that principle to rest. There is also no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to the company, is the company itself. Again, that was established over 160 years ago in Foss vs. Harbottle [1843] 67 ER 189 (the Foss case), popularly referred to in company law as “the rule in Foss v. Harbottle” (the rule). The rule was restated by Jenkins L. J. in the case of

Edwards vs. Halliwell [1950] All ER 1064 as follows:-

“The rule in Foss-v-Harbottle, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the

company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue.”

In essence the rule established two principles. The first is the “*proper plaintiff principle*” and the second is “*the majority principle*”. Through the former, a wrong done to the company may be vindicated by the company alone. On the second principle, if the alleged wrong can be confirmed or ratified by a simple majority then a shareholder is barred from bringing an action. The principal effect in the rule is to bar actions by minority shareholders.

This Court and others in this country have indeed cited and followed the Foss case and others which came after it, as good law. The cases of Rai and Others vs. Rai and Others [2002] 2 EA 537 and Grace Wanjiru Munyinyi & Another vs. Gedion Waweru Githunguri & 5 others [2011] eKLR were cited before us to confirm that the rule in Foss case still stands in Kenya. In a recent case, Arthi Highway Developers Ltd vs. Westend Butchery Ltd & 6 Others Civil appeal No. 246 of 2013 this Court followed the summing up of the rule by Lord Denning M.R in Moir vs. Wallerstainer [1975] 1 All ER 849 at pg 857, thus:-

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. (Emphasis mine by underlining). Such is the rule in Foss V. Harbottle [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue.”

21. From the cases cited above, it is without a doubt that a company has the legal capacity to sue and be sued on its own name and capacity as an artificial, legal person. A company comprises of directors who are empowered to conduct the business of the company on its behalf as authorized under the company’s seal. In a situation where the company intends to institute a suit, a resolution has to be made to that effect. One or more directors may be authorized to plead on behalf of the company. The authorization must be in writing.

22. The present suit has been instituted by the Plaintiffs who refer themselves as the Committee members of Lumboka Farm. The case as I have understood it from the pleadings is that it stems from a misunderstanding between the members of the Company on the survey and subdivision of the suit land being **LR No. 2143/1/5** which belongs to Lumboka Estate Limited. The First Plaintiff stated that he was elected the Chairman of the Company and the other plaintiffs were members. They had no capacity to sue in their own individual capacities since the land in dispute was in the name of an incorporated company which has its own distinct legal standing separate from the members. Their role, if it would be proved that they were directors of the company or representatives duly authorized, was to swear affidavits and pleadings on behalf of the company upon authorization. **Order 4 Rule 4** of the **Civil Procedure Rules** dictates so. It provides as follows:

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

23. The Plaintiffs denied the existence of the Company, arguing that it ceased to exist from the time it completed the mission of acquiring land and subdividing it to members. I do not agree with the respondents. The correct position is that a limited liability company only ceases to exist upon winding up. In the instant case, there was no evidence of winding up. As it were, Lumboka Estate Limited is in existence. Therefore, still holds the status of an independent legal entity separate from its owners. There was no evidence to prove that the company ceased to operate. To the extent that the Plaintiffs acknowledge the existence of the company from the **1970s** and that it was the one that bought the suit land in question, and further that, to them, it only ceased to exist by virtue of ‘distribution’ of the land to shareholders, I find that the plaintiffs purported to institute this suit in their own capacity but on behalf of an entity which had the right to do so. For that reason, they lack *locus standi* to institute the suit. The objection raised by the Defendants has merit, it is allowed and the suit is hereby struck out. For avoidance of doubt, the Application dated **15/10/2021** is also struck out.

b) What orders should issue and who bears the costs of the suit

24. Costs follow the event. This suit is and has been struck out. The Plaintiff’s shall bear the costs arising therefrom.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 3RD DAY OF MARCH, 2022

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.