



REPUBLIC OF KENYA



KENYA LAW
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**Mukuha v Gakiwawa Enterprises Limited (Commercial Case E230 of 2023)
[2024] KEHC 6494 (KLR) (Commercial and Tax) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E230 OF 2023**

MN MWANGI, J

MAY 15, 2024

BETWEEN

NEWTON KAGIRA MUKUHA PLAINTIFF

AND

GAKIWAWA ENTERPRISES LIMITED DEFENDANT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 24th May, 2023 pursuant to the provisions of Articles 48, 50(1) and 159 of the Constitution of Kenya, Sections 1A & 1B of the Civil Procedure Act, Order 40 Rule 1(b), Order 51 Rules (1) & (3) & Order 14 (4) of the Civil Procedure Rules, 2010, and all other enabling provisions of the law seeking the following orders -
 - i. That this application be certified urgent and be heard ex parte in the first instance for purposes of prayer 2 and 4;
 - ii. That pending the hearing and determination of the present application, an order of injunction be and is hereby issued restraining the respondent whether by itself, employees, servants and/or agents or otherwise and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from distributing or disposing of the assets;
 - iii. That pending the hearing and determination of the present application, an order of injunction be and is hereby issued restraining the respondent whether by itself, employees, servants and/or agents or otherwise and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from advertising for sale, offering for sale, selling or transferring the assets;



- iv. That pending the hearing and determination of the application filed herein, the respondent be ordered to produce audited accounts of income derived from the assets which has been deposited in bank account number 01192199285300 held at Co-operative Bank of Kenya;
 - v. That pending the hearing and determination of this application this Honourable Court do issue an order compelling the Land Registrar(s) in the various Registries that the assets are situated to place a caveat on the assets;
 - vi. That pending the hearing and determination of this application the income derived from the assets be deposited in a fixed deposit interest earning bank account to be jointly opened by the applicant and respondent;
 - vii. That pending the hearing and determination such other or further orders as may be just be made to meet the ends of justice and to safeguard and protect the dignity of this Honourable Court; and
 - viii. That the costs of this Application abide the outcome.
2. The application is anchored on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Newton Kagira Mukuha, the plaintiff herein. In opposition thereto, the defendant filed a replying affidavit sworn by Jean Wambui Kagonia, the respondent's Legal Officer on 23rd November, 2023, and a Notice of Preliminary Objection dated 28th July, 2023 challenging this Court's jurisdiction to entertain, hear and/or determine the instant application on the following grounds –
- i. That the respondent is a stranger to the applicant and has no locus standi to institute this suit against the Company, thus granting the orders sought herein would totally prejudice the respondent to the extent that –
 - a. The applicant lacks any form of beneficial interest in the respondent's assets, as evidenced in the CR Form 13, where he neither holds any shares nor occupies any Directorial position. As such, he does not possess the legal standing to interfere with the respondent or how its Shareholders run the Company;
 - b. The respondent has no relationship with the applicant whatsoever and there is none that can be established from his supporting affidavit;
 - c. The respondent has been irregularly and/or wrongfully sued since the applicant is not the owner of subject properties and is only purporting to assert possession based on familial ties with the Directors of the respondent; and
 - d. The remedies sought by the applicant cannot lie against the respondent since the respondent is a stranger to the applicant.
 - ii. That this Honourable Court lacks the jurisdiction to hear and determine this application as it flies in the face of Clause 31 of the respondent's Articles of Association which requires disputes between the respondent and any of its members and/or assigns should be referred to arbitration;
 - iii. That in the circumstances, the applicant's application and the orders sought therein are considered a procedural and substantive legal nullity, being inherently bad in law, misconceived, and disclosing no reasonable cause of action against the respondent, thus rendering it fatally and incurably defective; and



- iv. That in any case, the application would be brought (sic) rightfully against Naivas Limited in which the applicant herein claims that he has an interest.
3. This Court gave directions for this application to be canvassed by way of written submissions. The defendant's submissions were filed on 25th January, 2024 by the law firm of Thuita Kiiru & Company Advocates. The plaintiff did not file any written submissions despite being given an opportunity to do so on two different occasions.
4. Ms. Kinyua, learned Counsel for the defendant submitted that the plaintiff has no beneficial interest in the defendant's assets as can be seen from the CR Form 13, since he neither holds any shares nor occupies any Directorial position in the defendant, and he does not possess the requisite locus standi to interfere with the defendant or how its Shareholders run the said Company. Counsel referred to Clause 31 of the defendant's Articles of Association and stated that it requires disputes between the defendant and any of its members and/or assigns to be referred to arbitration. Counsel relied on the case of *Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd* [1969] EA 696, where the Court defined what constitutes a valid Preliminary Objection.
5. Ms. Kinyua relied on the case of *Daykio Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] eKLR and stated that the plaintiff is a stranger to the defendant and has no form of beneficial interest in the defendant's assets, shares and/or properties, thus he has no locus standi to institute this suit and/or file any application against the defendant. She further stated that there are only two instances where a party can sue a company, either as a member of the said company, and/or as an outsider who has established a causal link and/or interest in the Company.
6. She relied on the definition of a "member" under Section 3 of the *Companies Act*, and the case of *Qi Zhen Cai v Qinwen He, Xiao Hong Yu & another* [2017] eKLR and contended that the plaintiff claims to have beneficial interest in the defendant's assets since its Directors are his close family members, however one cannot acquire interest beneficial or otherwise on the basis of being a close family member to the Directors and/or Shareholders. For this reason, he is clearly not a member of the defendant's company. Ms. Kinyua further cited the case of *Guo Dong v Multi Win Trading (E.A) Company Ltd & 6 others* [2015] eKLR and asserted that the plaintiff's name is not on the defendant's Register of members, and being a non-member, he cannot purport to obtain any orders against the defendant that would affect its operations. Counsel argued that in order for a non-member to sue a Company, there needs to be a causal link and/or interest between the Company and the plaintiff.
7. In referring to the plaintiff's claim, in a bid to establish a link with the defendant, Ms Kinyua submitted that there has been in a long-standing dispute regarding shareholding of Naivas Limited on the plaintiff's allegation that shares were discreetly transferred to the defendant with an intention of depriving him of his rightful shares of the assets. In view of the foregoing, Counsel argued that the plaintiff's claim, if any, would lie with Naivas Limited and not the defendant, but no evidence had been tendered by the plaintiff to show that the alleged assets were indeed transferred to the defendant by Naivas Limited. In submitting that the plaintiff's application should be struck out in view of the aforementioned submissions, Ms. Kinyua referred to the case of *Alfred Njau & others v City Council of Nairobi* [1982] KAR 229.
8. Ms. Kinyua cited the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and submitted that the issue of *locus standi* raises a pure point of law that touches on the jurisdiction of this Court. She cited the Court of Appeal case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 and stated that since the plaintiff has no relationship with the defendant, the remedies sought in this application against the defendant cannot lie. She contended that this Court lacks jurisdiction to entertain the application and the suit at large. Counsel submitted that



having demonstrated that the plaintiff's suit is incompetent in limine for want of locus standi which consequently strips this Court of the jurisdiction to hear and determine it, the plaintiff's suit and the instant application should be dismissed with costs to the defendant.

Analysis And Determination.

9. I have considered the application herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendant, its Notice of Preliminary Objection together with the written submissions by its Counsel. The issues that arise for determination are –
 - i. Whether the plaintiff has the requisite locus standi to institute this suit and the application herein;
 - ii. Whether an order of injunction should issue against the defendant; and
 - iii. Whether the defendant should be compelled to produce audited accounts of income derived from the assets deposited in bank account number 01192199285300 held at Co-operative Bank of Kenya;
 - iv. Whether the Land Registrar(s) in the various Registries that the assets are situated should be ordered to place a caveat on the said assets; and
 - v. Whether the income derived from the said assets should be deposited in a fixed deposit interest earning bank account to be jointly opened by the plaintiff and the defendant.
10. The plaintiff in his affidavit in support of the instant application deposed that the Directors of the defendant Company are his close family members who have over the years denied him his rightful share of investment in the defendant Company, hence he has a beneficial interest in the defendant's assets. He averred that he has been in a long-standing dispute with the respondent's Directors in regard to the shareholding of Naivas Limited, a family owned business that previously owned the assets in question.
11. He contended that in the event that the intended disposal and distribution of assets is allowed to proceed, there is real and imminent danger that he will suffer from the defendant's actions that entail fraud, and unjust enrichment. He contended that for the reasons given, he is entitled to the orders sought in this application as he stands to suffer irreparable loss and damage in the event the orders sought are not granted.
12. The defendant in its replying affidavit averred that it is a stranger to the plaintiff and that he has no locus standi to institute this suit and by extension, the instant application, thus granting the orders sought by him will greatly prejudice it. It averred that the defendant is neither a Director nor a Shareholder of the defendant Company as can be seen from the CR Form 13, thus it is clear that he has no beneficial interest in the defendant Company's assets.
13. The defendant asserted that it has been wrongly sued since the plaintiff is not the owner of the assets in question. It contended that this Court has no jurisdiction to entertain the application herein since Clause 31 of its Articles of Association provides for disputes between the defendant and any of its members and/or assigns should be resolved through arbitration. It averred that the proper party to be sued by the plaintiff in light of averments would be Naivas Limited.

Whether the plaintiff has the requisite locus standi to institute this suit and the application herein.
14. The defendant contended that since the plaintiff is neither a Director nor a Shareholder of the defendant Company, and he has not demonstrated any causal link and/or interest between him and



the defendant Company, he has no locus standi to institute any suit and/or file any application against the defendant. For this reason, this suit and the instant application should be struck out.

15. This Court is bound by the Court of Appeal's definition of the term *locus standi* as espoused in the case of *Njau v City Council of Nairobi*, KLR [1983] 625 which states that –

“Locus Standi literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus means that he has no right to appear or be heard in such and such proceedings”.

16. The plaintiff avers that, they have denied him his rightful share of investment in Naivas Limited and alleges that Directors of the said Company discreetly transferred shares, assets and properties to the defendant to keep him off his beneficial share.
17. On perusal of the plaint filed in this suit, it is evident from paragraphs 5 & 6 that this it is based on an alleged long-standing dispute between the plaintiff and Naivas Limited, whose Directors are similar to the defendant's Directors. At paragraph 6 of the plaint, the plaintiff avers that in the course of the said dispute, the assets in issue in this suit were surreptitiously transferred from Naivas Limited with the sole intention of depriving him of his rightful share of the said assets. As a result, the plaintiff is seeking this Court to stop the defendant from disposing of and/or distributing the said assets.
18. Although the plaintiff claims to have a beneficial interest in the assets of the defendant Company in view of the fact that the Directors of the said Company are his close family members, it is not disputed that the plaintiff is not a Director, a Shareholder or member of the defendant Company and Naivas Limited. Further, the defendant does not claim either a purchaser's interest and/or a vendor's interest in the defendant's assets and/by extension, the assets allegedly transferred by Naivas Limited to the defendant Company. All that the plaintiff asserts is that he is a close family member to the Directors of the defendant Company, thus he has a beneficial interest in the defendant's assets.
19. Having considered the averments made by the plaintiff vis a vis the response made by the defendant and the written submissions filed by its Counsel, the disclosed relationship between the plaintiff and the defendant's Directors is not one that authorizes him and or grants him the requisite locus standi to institute a suit against the defendant, such as the one before this Court. In order for the plaintiff to institute a suit and/or application, he must have a clear, tangible and demonstrable interest in the assets in question for his suit and/or application to be entertained by the Court. I therefore agree with Counsel for the defendant that the plaintiff does not possess the requisite locus standi to file this suit and the application herein against the defendant.
20. This Court finds that the plaintiff's suit and the instant application are fatally defective for want of *locus standi*. As a result, the application herein and the suit are struck out with costs to the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Imbugwa for the applicant

No appearance for the respondent



