



Stichting Rabo Bank Foundation v Ava Chem Limited & another (Commercial Case E374 of 2022) [2024] KEHC 9931 (KLR) (Commercial and Tax) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9931 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E374 OF 2022
JWW MONG'ARE, J
JULY 25, 2024**

BETWEEN

STICHTING RABO BANK FOUNDATION PLAINTIFF

AND

AVA CHEM LIMITED 1ST DEFENDANT

CHRISTOPHER IRUNGU MWANGI 2ND DEFENDANT

RULING

1. By a Financial support agreement dated 3rd October, 2016 the Plaintiff advanced the 1st Respondent/defendant a sum of USD 180,116.00/= with the 2nd Defendant executing a personal guarantee on 9th October, 2017 to secure the amount advanced by the Plaintiff. thereafter a deed of surety was executed on 17th October. 2018.
2. The 1st Defendant defaulted in repayment of the sum due and subsequently, the Plaintiff approached the court by of Plaint dated 14th September, 2022 seeking judgment against the defendant jointly for the sum of USD 230,868.51 the outstanding loan amount plus costs and interest.
3. The Defendants filed a defence on 8th November, 2022 which was amended on 22nd December, 2022. The Defendant admitted the loan but challenged the legal capacity of the Plaintiff to institute the suit.
4. Thereafter, the Plaintiff filed the Notice of Motion application dated 13th December, 2022. The Plaintiff seeks that judgment on admission be entered against the defendants jointly for the sum of USD 230,868.51 plus accrued costs. The application is supported by the undated affidavit of Lidwien Schils the duly authorized attorney of the Plaintiff. it is averred that the Defendants have admitted the indebtedness and have failed to repay the loan amount.



5. The Defendants opposed the motion by way of a Replying affidavit sworn by Christopher Irungu Mwangi on 2nd February 2023 and a Notice of Preliminary Objection dated 24th May 2023. The Defendants contend that the Plaintiff is not a juristic person capable of instituting and maintaining the suit on account that the Plaintiff is not registered in Kenya the Company Act.
6. The application and the Notice of Preliminary Objection, were canvassed together and parties filed written submissions and thereafter counsel appeared before the court for highlighting.
7. I have considered the application, the Preliminary objection, the affidavits in support and against, the parties' submissions in support of their respective arguments as well as the cited authorities. The issues for determination are as follows:-
 - i. whether the Plaintiff is a jurist person with the locus standi to bring the instant suit?
 - ii. whether the court should enter Summary judgment as prayed.
8. The objection raised by the Defendants is on the locus standi of the plaintiff to file the instant suit. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, cited in the parties' submissions, the predecessor to the Court of Appeal observed as follows: -

“...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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”
9. The court's attention is drawn to Section 974 of the Company Act on foreign companies and the requirement for them to be registered in Kenya to retain legal status.
10. In the case of *Law Society of Kenya ...Vs... Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 In 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 ..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”.
11. From the record, the Plaintiff describe itself as a limited liability company incorporated in the Netherlands with its principal office at Croeselaan 18,3521 Utrecht in the Netherlands. The Plaintiff contend that it did not conduct business in Kenya, it argues that the Financial support agreement was signed in the Netherlands and the Plaintiff did not in any way conduct business in Kenya.
12. It is not in dispute that the Plaintiff is a foreign company. The Law in Kenya requires that a foreign company be registered under Section 974 of the *Companies Act*, to enable it to acquire the locus standi. A non-existent person is incapable of maintaining a cause of action. The plaintiff has not adduced any materials before the court as proof it is registered in Kenya. On the material placed before this Court, I find that the plaintiff lacks the locus standi to bring the instant suit.



13. Having found that the plaintiff lacks the locus standi to bring the instant suit, it follows that the suit stands dismissed and the orders of summary judgment cannot be issued.
14. The result is that the Notice of Preliminary Objection dated 24th May 2023 is merited. The upshot is that the Plaintiff's suit and the Notice of Motion dated 13th December 2022 are struck out for want of locus standi.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 25th DAY of JULY, 2024.

.....

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Wanyonyi H/B for Tito for the Plaintiff.
2. Mr. Munene H/B for Momanyi for the Respondent.
3. Amos - Court Assistant

