



REPUBLIC OF KENYA



**Ndunde Investment Ltd v Dadet (Civil Case 434 of 2014)
[2024] KEHC 12544 (KLR) (At Nairobi) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
AT NAIROBI
CIVIL CASE 434 OF 2014
A MABEYA, J
OCTOBER 18, 2024**

BETWEEN

NDUNDE INVESTMENT LTD PLAINTIFF

AND

EUGINIE MUTHONI DADET DEFENDANT

RULING

1. Before Court is an application dated 18/10/2023 by David Mbugua Mwangi. The application sought a multiplicity of orders. It sought, inter-alia, that this matter be consolidated with HCCC No 11 of 2019; that the accounts of Isaac Gichia Mbugua and Joseph Mbai Mbugua as well as those of Ndungu Njoroge & Kwach Advocates be frozen.
2. That the firm for Ndungu Njoroge Kwach advocates, Isaac Ndungu Gichia and Joseph Mbai Mbugua be held in contempt and a fine of Kshs. 50,000/= be imposed for wasting court's time. That the said firm be compelled to provide title deeds and all sale agreements of the plaintiff company and that Central Bank of Kenya do provide a list of accounts held by Ndunde Investment and Isaac Ndungu Gichia.
3. The applicant also sought that the matters touching on the use and occupation of land be referred to the Environment and Land Court. That the Court disbars Ndungu Njoroge and Kwach and Caroline Munyasia advocates.
4. The grounds for the application were that the applicant is one of the directors of the plaintiff. That his co-directors, in collusion with the firm of Ndungu Njoroge & Kwach, have embezzled and misappropriated the company funds. That Ndungu Njoroge and Eliud Nganga are the administrators of his late father's estate vide Succession cause no 1835/2011.



5. That he and his daughter were disinherited in the process. That the defendant in this case is his sister in law. Lastly, that the plaintiff company was fraudulently wound up vide orders of the court issued in Nairobi HCCC 11/ 2019 by Okwany J whom he had applied for recusal.
6. He contended that he did not appoint the firm of Ndungu Njoroge & Kwach advocates to file this suit. That his younger brothers filed the suit without his knowledge and that his sister passed on and had been disinherited. That his health is also at risk and he has never benefited from the sale and proceeds of the plaintiff's assets. That his case should be consolidated with this suit to avoid waste of courts time.
7. The plaintiff opposed the application vide grounds of opposition and a replying affidavit of Joseph Mbai Mbugua sworn on 21/12/2023. It contended that the supporting affidavit had not been commissioned and that the applicant had not filed a notice to act in person prior to filing the application.
8. That the court cannot interfere with issues that are pending before other courts, the Succession Court and those being handled by the National Police Service. Further, that the issues raised in the application have not been pleaded in both suits and/or are not common and the parties are different.
9. That there is no firm in the name of Ndungu Njoroge & Kwach. That the advocates were rightly pursuing this matter as they were properly appointed by two directors and according to the Memorandum and Articles. That this Court has no jurisdiction to disbar or strike out the licence of an advocate or Lawfirm.
10. That the statements against the plaintiffs are defamatory and have not been given audience on the issues raised. That Eliud Nganga ceased to be the administrator of the estate of the late Mbugua Mwangi and letters of administration were not necessary in filing the current suit.
11. That this application like other suits filed by the applicant is intended to settle scores on succession and distribution of proceeds in succession matters involving his siblings.
12. The defendant's response was that the plaintiff company was wound up as per consent order recorded on 23/11/2020 in Nairobi High Court case No. HCCC 11 of 2019. That the plaintiff ceased to exist and the parties representing the plaintiff do not have locus standi. Further, that this application and the suit cannot be prosecuted. That the winding up order is similar to liquidation and that the plaintiff is no longer capable to run its affairs, this includes the directors of the plaintiff whose authority was terminated upon adoption of the winding up consent as an order of the court.
13. That the application has been filed by a person who lacks locus standi and should be struck out. The application does not raise a reasonable cause of action, it is ambiguous and the orders cannot be granted. It also not based on any provision of law.
14. That the suits cannot be consolidated since Nairobi HCCC 19/2019 which concerns an internal dispute in the company while this suit is filed against 3rd parties. Further, that the grievances against former directors should be litigated in another forum. Lastly that costs in the defendant's application should be catered from the assets of the company or paid by the directors where assets have been distributed.
15. I have considered the parties' averments and the submissions on record. As stated at the beginning of this ruling, the application seeks a multiplicity of orders. It raises several issues, to wit, whether the applicant has locus to make the application, whether the suits can be consolidated, whether the application offends the provisions of Order 9 and Statutory Oaths and Declarations Act, whether there is jurisdiction to grant the orders sought and whether there is contempt proved.



16. On the applicant's capacity to file the application in this suit and failing to file a notice to act in person, the provisions of Order 9 rule 8 provide that where a party in a suit is represented by counsel and intends to act in person, such party shall file a notice to act in person. In the present case, the plaintiff is not a party to the suit and has never been represented by Counsel in this matter.
17. Firstly, I think the applicant do not have locus to agitate the application before Court. He should have first applied to be joined as an interested party before he could agitate the prayers he seeks in the present application. He is a mere shareholder and director of the plaintiff. The plaintiff has the right to litigate in its own name.
18. Secondly, having not been party to the proceedings and having had no counsel in the matter, I do not think that he needed to file any notice of intention to act in person as suggested by the plaintiff. That objection is rejected.
19. On the veracity and legality of the supporting affidavit, it is clear that the same was not commissioned. The provisions of the law require that affidavits be commissioned before a Commissioner for Oaths. That the jurat must be signed in accordance with the law. Under section 5 and 8 of the Oaths and Statutory Declaration Act provides that an affidavit must state the place and date the oath is taken and it should be in the presence of a Magistrate or Commissioner for Oaths.
20. In *Z-U-DG v SJK-U (2021) eKLR* cited in *Otieno & Anor vs. IEBC & 2 Others* Petition E002 of 2022 [2022] KEHC 10054 (KLR), it was held: -

“An affidavit is a statement made on oath. It is the jurat which elevates a written statement to the status of an Affidavit. Without a jurat and in absence of commissioning by a Commissioner of Oaths, a Magistrate or a Notary Public, the statement remains a mere unsworn written document and does not have the legal value of an Affidavit.”
21. In this regard, to the extent that the supporting affidavit was not properly commissioned, it renders the same defective together with the annexures thereto and of no effect.
22. This suit was filed in 2014. The CR 12 for the year 2023 shows that the applicant and his brothers were directors of the plaintiff at all material times. In *Bugerere Coffee Growers Limited vs. Sebaduka & Another* [1970] EA 147 it was held that when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors meeting.
23. In the present case, it is not in dispute that the firm of Ndungu Njoroge & Kwach Advocates was properly appointed by the majority of the directors of the plaintiff. The applicant's contention is that he was not aware of this suit and he did not participate in the appointment of the plaintiff's advocates on record. In my view that contention do not affect the advocates capacity to file and represent the company.
24. Further, the issues relating to misconduct, fraud, misrepresentation or dissatisfaction in the manner the advocate has handled the suit, that is the preserve of the Advocates Complaints and Disciplinary Commission and not this Court.
25. On contempt, an application for contempt of court takes the nature of quasi-criminal proceedings and precede violation or disobedience of a court order. The applicant did not refer the court to any such order that had been violated by the directors and the advocates. In my view therefore, the prayer for contempt was misconceived.



26. Lastly, the applicant prays that certain issues in this case be transferred to the Environment and Land Court. Having found that the applicant is not a party to the suit, he cannot purport to seek substantive prayers before being enjoined. This also applies to the prayer for consolidation with the other suit. The other suit concerns internal affairs of the plaintiff while the present suit is as against a 3rd party.

27. The upshot is that the application has no merit and is struck out with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE

