



**Noor v Kisilu & another (Environment & Land Case
E379 of 2024) [2025] KEELC 3774 (KLR) (13 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3774 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E379 OF 2024
JA MOGENI & AM COCKAR, JJ
MAY 13, 2025**

BETWEEN

JIBRIEL MOHAMED JAMA NOOR PLAINTIFF

AND

ALFORNSE MBITHI KISILU 1ST DEFENDANT

BUILD AND DELIVER LTD 2ND DEFENDANT

RULING

1. This Ruling concern the Notice of Motion Application dated 18/09/2024 filed by the Plaintiff for the Court’s determination. The Plaintiff seeks inter alia conservatory orders against the 1st and 2nd Defendants. Before the Application was heard the 1st Defendant filed a Preliminary Objection dated 4/10/2024 challenging the locus standi of the Plaintiff to institute both the suit and the Application.
2. The Plaintiff seeks the following orders:
 - a. Spent
 - b. That Conservatory orders do issue restraining the 1st Defendant and or the Defendants from executing a lease of Apartment number 801A standing on parcel of land title number LR 209/380/6 Nairobi and or presenting a lease of Apartment number 801A standing on parcel of land title number LR 209/380/6 Nairobi any document for the registration of thereof in favour of the 1st Defendant as proprietor as Lessee of Apartment number 801A standing on parcel of land title number LR 209/380/6 Nairobi and restraining the Defendant or any of them selling transferring, leasing, charging or howsoever creating any encumbrance over pledging the title of property land Reference number LR 209/380/6 Nairobi in favour of the 1st Defendant or his nominee pending hearing and determination of the Plaintiff’s suit herein



- c. The Honorable Court be pleased to make any other orders within its inherent jurisdiction for the ends of justice
 - d. Costs occasioned by the Application be awarded to the Plaintiff
3. The Application is based on grounds (a) to (o) on the face of the Application and Supporting Affidavit of even date sworn by Jibriel Mohamed Jama Noor, the Plaintiff. He averred that the instant suit arises from breach of a contractual Sale Agreement. That the 1st Defendant agreed to sell to the 2nd Defendant the Plaintiff's leasehold title to ownership of Apartment Number 801A standing on Land Reference number LR 209/380/6 Nairobi at an agreed price of Kesh 15,000,000 which was to be paid via a deposit of Kesh 4,300,000 on execution of the agreement.
 4. The balance of Kesh 10,700,000 was to be paid through the financiers of the Defendants or alternatively by the Defendants' financier's Advocates undertaking. This was to be done within 90 days of execution of the said agreement as security. Failure to honor the conditions meant that since the agreement obliged the Plaintiff to give the Defendant possession of Apartment Number 801A then a 21 days' notice demanding payment to the Plaintiff of Kesh 100,000 per month and the contract would be rescinded.
 5. That having assumed possession of the said apartment on 18/10/2022 to the date of rescission on 26/05/2024 and having failed to honor the timelines for payment of the deposit and balance of the purchase price, the aggregated sum of Ksh 1,825,000 is also owed for the monthly rent. The Plaintiff avers that the action of the Defendant for refusal to secure payment of the bulk purchase price of the Apartment is a fundamental breach of a condition precedent which entitled the Plaintiff to rescind the said agreement after expiry of the 21 days' notice as provided in Clause 7.1 and 7.2 of the agreement. Plus the letter to the Defendant from the Plaintiff's Advocate dated 5/05/2024.
 6. The 1st Defendant filed a Replying Affidavit sworn by Alforse Mbithi dated 17/10/2024 stating that he had filed a suit against the Plaintiff dated 28/08/2024 whose subject matter is the Apartment 801A erected on LR number LR 209/380/6 Nairobi. Together with the Plaint he also filed an Application seeking temporary injunctive orders against the Defendants (Plaintiff) and the Court via the Order dated 30/09/2024 issued interlocutory orders pending inter partes hearing of the Application.
 7. The averments by the 1st Defendant were not responded to nor controverted by the Plaintiff.
 8. At the same time the 1st Defendant filed a Preliminary Objection where he raised the ground of locus standi stating that the Plaintiff did not have locus in respect to filing the suit and Application.
 9. The Plaintiff did not file any response to the Preliminary Objection and therefore it is uncontroverted.
 10. Directions were taken and parties agreed to canvass the Application by way of written submissions.
 11. My perusal of all the documents filed did not yield any submissions filed by the Plaintiff at the time of writing this Ruling. The 1st Defendant did file their submissions through the firm of Iseme Kamau & Co Advocates dated 24/10/2024 highlighting the background of the case and drew one issue for determination on the part of the Preliminary Objection and three issues for determination on the part of the Notice of Motion Application dated 18/09/2024. I have carefully read and considered all the issues raised which are thoroughly researched and the case law referred to is also relevant to the issues in the two Applications.



Analysis and Determination.

12. As a Preliminary Objection is capable of disposing a matter preliminarily the Court finds it prudent to first determine if the said Notice of Preliminary Objection is merited. In the event the Preliminary Objection is upheld, then there would be no need to determine the Notice of Motion Application by the Plaintiff.
13. Is the issue raised by the 1st Defendant capable of being referred to as a Preliminary Objection? The locus classicus on Preliminary Objection is the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 where the Court described a Preliminary Objection to mean:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
14. 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).
15. In the case of Law Society of Kenya v 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 v 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.”
16. 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.
17. The 1st Defendant avers that the Plaintiff lack locus standi to institute the suit. This is because according to the 1st Defendant, the Plaintiff is not a Director in 2nd Defendant’s Company, Build and Deliver Ltd. To support this averment the 1st Defendant has annexed a copy of CR 12 dated 3/10/2024 and marked as AMK-4 and indeed the Plaintiff’s name does not appear in the list of Directors. Thus from the pleadings, it is not in dispute that the suit land belongs to a Limited Liability Company. The Plaintiff



has also stated this fact at paragraph 2 of his Supporting Affidavit sworn on 18/09/2024. It is therefore an undisputed fact.

18. This being the case, it follows that the Limited Liability Company being a legal person can sue and be sued in its own name. The Court of Appeal in the case of *Amin Akberali Manji & 2 Others v Altaf Abdulrasul Dadani & Another* [2015] eKLR stated on the issue of locus in relation to a Limited Liability Company that:-

“... The centuries-old case of *Salomon v 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 v 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 v 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.”

19. Essentially, two principles were established in this case that is the “proper Plaintiff principle” and “the majority principle”. In the first principle, any 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. That therefore means any action by minority Shareholders is barred.
20. The Court in Kenya has also cited the Foss case in several cases such as the cases of *Rai and Others v Rai and Others* [2002] 2 EA 537 and *Grace Wanjiru Munyinyi & Another v Gedion Waweru Githunguri & 5 Others* [2011] eKLR .
21. 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. In the instant suit the Plaintiff claims to be a Director of the 2nd Defendant Company which entered into a contract with the 1st Defendant on sale of its property. The Plaintiff is not a party to the Sale Agreement. His claim is stemming from the fact that he states he is a Director but has not provided any documents to lend credence to this claim. Even if he was a Director then a Company resolution should have been filed in Court to show that the Company allowed him to sue on its behalf.
23. 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.”



24. To the extent that the Plaintiff acknowledges the existence of the Company and that it was the one that owns the suit land in question, and further that, it entered into a Sale Agreement with the 1st Defendant and not the Plaintiff, then the Plaintiff had no claim in the agreement. For that reason, the Plaintiff lacks locus standi to institute the suit. The objection raised by the 1st Defendant has merit, it is allowed and the suit is hereby struck out. For avoidance of doubt, the Application dated October 18, 2024 is also struck out.
25. Costs follow the event. This suit is and has been struck out. The Plaintiff shall bear the costs arising therefrom.
26. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF MAY 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

In the presence of:

Plaintiff – Absent

Mr. Karuti for the 1st Defendant

2nd Defendant - Absent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

