



**Sumac Development Co Ltd v Kigathi & another (Civil Suit
348 of 2013) [2023] KEHC 20543 (KLR) (Civ) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 348 OF 2013

CW MEOLI, J

JULY 14, 2023

BETWEEN

SUMAC DEVELOPMENT CO LTD PLAINTIFF

AND

GEORGE MUNYUI KIGATHI 1ST DEFENDANT

JENNIFER NGINA KIGATHI 2ND DEFENDANT

RULING

1. Sumac Development Co. Ltd, (hereafter the Plaintiff) filed this suit on 27.08.2013 against George Munyui Kigathi and Jennifer Ngina Kigathi (hereafter the 1st and 2nd Defendant/Defendants). The plaint was amended on 02.05.2015 and further amended on 31.01.2019. The claim is for the sum of Kshs. 7,007,910/-; general damages; costs and interest at the bank rates until payment in full.
2. It was averred that the on 29.01.2009 at the Defendants' instance and request, the Plaintiff and the Defendants entered into a sale agreement in respect of the land parcel known as LR. No. Nairobi/Block 209/13310 (hereafter suit property) for a consideration of Kshs. 6,700,000/- which was paid to the Defendants; whereupon the transfer was duly executed and the Plaintiff received the completion documents. That upon lodging the transfer documents, the Plaintiff incurred further charges of Kshs. 307,910/-.
3. That sometime in the year 2011 the Plaintiff was notified by the government that the suit property forms part of a parcel of land acquired by the government in 1957 for construction of the Southern Bypass road from Embakasi to Kibera which fact must have been known to the Defendants and therefore the fact that they did not have any legal title over the suit property capable of being passed to the Plaintiff. It was averred that the Defendants failed to give good title, vacant and quiet possession to



- the Plaintiff hence the claim for the refund of the consideration price of Kshs. 6,700,000/- plus costs of the transfer of the property of Kshs. 307,910/-, with interest at bank rates.
4. The Defendant filed statement of defence on 24.10.2013 denying the key averments in the plaint and in the alternative pleaded that they were not aware of any purported compulsory acquisition of the suit property in 1957 by the government and that if such acquisition, compulsory or otherwise, was made, it was unlawful.
 5. The Defendant thereafter proceeded to file a notice of preliminary objection (P.O) dated 01.12.2022. Based on grounds that the court lacks the jurisdiction to entertain, hear and or determine this matter. Because the subject matter of the suit is the land parcel LR No. Nairobi/Block 209/13310 and jurisdiction lies with the Environment & Land Court and that the institution of the suit in this court offends Article 162 (2)(b) of the Constitution of Kenya and the suit is therefore nullity *ab initio*.
 6. Further that the suit is incompetent as the Plaintiff being a corporate body ought to have produced a written sealed authorization, to Duncan Mwaniki, the deponent, to swear the verifying affidavit on behalf of the Plaintiff in consonance with Order 4(1)(4) of the Civil Procedure Rules; that the Plaintiff's suit is a legal nullity to the extent that there is no company resolution authorizing the institution of the suit for and on behalf of the Plaintiff rendering the Plaintiff's suit fatally and incurably defective; that the whole suit is ill conceived, fatally defective and incompetent and should be struck out and or dismissed with costs to the Defendants.
 7. The P.O was canvassed by way of written submissions. On the part of the Defendants, counsel anchored his submissions on the definition and scope of a preliminary objection as defined in Black's Law Dictionary and in the decisions in Zipporah Njoki Kangara v Rock and Pure Limited & 3 Others [2021] eKLR and BWM v JMC [2018] eKLR. Addressing the question of jurisdiction, while calling to aid the of-cited decision in Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] eKLR, and several recent decisions including Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR, and Wamathu Gichoya v Mary Wainoi Magu [2015] eKLR, alongside the provisions of Article 162 (2)(b) of the Constitution of Kenya & the Land Act, counsel asserted that a court bereft of the competent jurisdiction cannot purport to entertain a matter as jurisdiction is donated by statute or the Constitution.
 8. He asserted that the instant suit relates to land and therefore jurisdiction lies with the Environment and Land Court (ELC) and that any argument that may be advanced by the Plaintiff that the suit relates to the refund of the purchase price is moot since the title of the suit property now vests in the name of the Plaintiff and only the ELC that can determine and or cancel the said. It was further submitted a suit filed in the wrong court is cannot be transferred to another court with jurisdiction.
 9. Concerning want of authorization to file suit, it was submitted that the Plaintiff's suit is incompetent in law there being no evidence that Duncan Mwaniki was authorized to swear the verifying affidavit on behalf of the Plaintiff. That the suit against the Defendants is therefore unsustainable for want of a competent verifying affidavit. The case of Josphat Nyabuto Mogoko & Funan Construction & General Merchants Co. Ltd v K-Rep Bank Limited [2016] eKLR and the provisions of Order 4 Rule (1)(4) were cited in that regard. The court was urged to uphold the P.O.
 10. The Plaintiff's counsel, in responding to the Defendants' objection regarding jurisdiction, asserted that the suit essentially seeks a refund on the purchase price in respect of the suit property and that the Defendants' objection is an attempt to scuttle the proceedings before this court. That the Defendants having admitted the jurisdiction of this court in their defence statement cannot turn around to dispute the same. On the issue of the Plaintiff's authorization of the deponent of the verifying affidavit it was summarily submitted that it has not been disputed that the said deponent, Duncan Mwaniki was a



managing director and an officer of the Plaintiff hence authorized to depose. The court was therefore urged to dismiss the preliminary objection.

11. The court has considered the rival submissions by the parties and the record herein. The Defendants' P.O as canvassed is two pronged; it challenges this court's jurisdiction to entertain the suit by dint of Article 162(2)(b) of the Constitution and the competency of the Plaintiff's suit on account of want of compliance with the provisions of Order 4(1)(4) of the Civil Procedure Rules of the verifying affidavit deposed by Duncan Mwaniki.
12. As to the nature of a preliminary objection, the law is settled. In *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, Law J. A. stated:"

"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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

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, or occasion, confuse the issues, and this improper practice should stop.

13. In the case of *Oraro v Mbaja* [2005] KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating that: -

"A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by 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."

See also *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR.

14. In *Mulemi v Angwenye & Another* (Civil Appeal 170 of 2016) [2021] KECA 214 the same court further distilled the definition of a preliminary objection as elucidated in *Mukisa Biscuits* (supra) by stating as follows: -

- "i) It must be a pure point of law;
- ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
- iii) If argued as a pure point of law, it may dispose of the suit;



- iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court’s discretion”.
15. The court proposes to first deal with the jurisdiction question. The Defendants contend that this court lacks the jurisdiction to entertain the suit due to the nature of the subject matter and or dispute in question. The locus classicus on the question of jurisdiction is the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi, JA (as he then was) famously stated:
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
16. Further, it was held in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, that a court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. A court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The High Court draws its original jurisdiction to entertain disputes from Article 165 (3) of the *Constitution* and statute. A cursory review of the plaint herein reveals that the Plaintiff’s claim against the Defendants arises from a sale agreement in respect of land parcel LR. No. Nairobi/Block 209/13310, in respect of which the Plaintiff contends the Defendants fraudulently enticed them while knowing that they lacked the capacity to transfer a good title. On account of the foregoing the Plaintiff is seeking refund of the purchase price and the costs attendant to the transfer.
17. The reliefs sought inter alia in the plaint as against the Defendants are; -
- “(i) The 1st and 2nd Defendant be ordered to pay to the Plaintiff Kshs. 7,007,910/-
- (ii) General Damages
- (iii) Costs and Interest at bank rate from the date of payment of (i) & (ii) above till payment in full.
- (iv)” (sic)
18. Article 162(2) (b) of the *Constitution* states that; -
- “(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (a) a) employment and labour relations; and
- (b) b) the environment and the use and occupation of, and title to, land.



19. Section 13 (1) & (2) of the *Environment and Land Court Act* which is the statute envisaged in sub-article 2 (b) above provides that: -

- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162 (2) (b) of the *Constitution*, the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.

20. Reviewing the pleadings herein, it is apparent that at the heart of the dispute before this court is the sale agreement that was executed on or about 29.01.2009. It is the said agreement that sets out the rights and obligations of the respective parties. And the Plaintiff’s claim is pegged on the sale agreement to the extent that the Plaintiff alleges fraud against the Defendants for failure to give good title, vacant and quiet possession of suit the property pursuant to the terms of the contract.

21. Thus, the crux of the dispute herein relates not to disposition of interest in the suit property but rather to alleged fraud and or breach of contract. The reliefs sought by the Defendants include the refund of monies paid to the Defendants as purchase price and processing of the transfer, and damages on account of fraud. No specific relief has been sought in respect of disposition of interest in the suit property as would fall within the purview of the Environment and Land Court.

22. The dominant issue arising here being a question of contract, other peripheral issues cannot, without more, take away the jurisdiction of this court. By way of analogy, the court is guided by the decision of the Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR. There, the court applied the test of the dominant issue in determining which court, between the Land and Environment Court and the High Court had the jurisdiction to entertain a dispute arising from a charge executed in favour of a bank.

23. The Court stated inter alia that: -

“In *Paramount Bank Limited v Vaqui Syed Qamara & another* [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further



followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the *Employment and Labour Relations Court Act*, the court could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.”

While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution, Section 13 of the ELC Act and Section 150 of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the *Constitution* provides inter alia, that;

1. subject to clause (5), the High Court shall have-
 - a. unlimited original jurisdiction in criminal and civil matters.

For the above reasons, the appellant’s objection on jurisdiction was rightly dismissed.”
(Emphasis added).

24. Similarly, in this case, the court is not convinced that the Defendants’ objection on jurisdiction is well taken and the court finds, on the contrary, that it is clothed with the necessary jurisdiction to entertain the instant suit.

25. As concerns the competency of the suit *Black’s Law Dictionary*, Tenth Edition defines locus standi as: “...the right to bring an action or to be heard in a given forum.” The Court of Appeal in *James Teko Lopoyetum v Rose Kasuku Watia & 4 Others* [2021] eKLR reiterated its decision in *Alfred Njau & 5 others v City Council of Nairobi* [1983] eKLR where it held:

“The term locus standi means a right to appear in Court and, conversely, as is stated in *Jowitt’s Dictionary of English Law*, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such a proceeding.”

See also;- *Sheila Nkatha Muthee v Alphonse Mwangemi Munga & Another* [2016] eKLR where it was held that:

“*Locus standi* is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue renders the suit incompetent.”

26. In the plaint, the Plaintiff is described as a “Limited liability company duly registered”. Thus, it is a body corporate with perpetual succession and a common seal, with the power to sue and be sued in its own corporate name. Further, the verifying affidavit accompanying the plaint as sworn by Duncan Mwaniki states in the first paragraph that: --

- “1. That I am the managing director of the Plaintiff company and duly authorized to swear this affidavit.”



27. The suit was filed in 2013 when the then *Companies Act* Cap 486, now repealed by the *Companies Act* 2015, was in force. The former Act had provided at Section 181 (now Section 133 of the new Act) that: -

“The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.”

28. The Defendants’ objection relates to the authority of Dancun Mwaniki to swear the verifying affidavit and or absence of authorization by way of a company resolution to institute proceedings. As concerns the latter limb, the decision in *Bugerere Coffee Growers Ltd v Ssebaduka & Another* [1970] EA 147 was often cited in the past in support of similar objections. However, more recently in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR the Court of Appeal of Kenya adopted the decision of the Ugandan Supreme Court in *United Assurance Co. Ltd v Attorney General*: SCCA NO.1 of 1998 where the latter court determined that the dicta in *Bugerere Coffee Growers Ltd (supra)* was bad law.

29. The words of the Court of Appeal (Kenya) in the Arthi Highway case deserve replication in extenso: -

“

“42. Lord Denning MR in his characteristic literary style summed up the law in *Moir v. Wallersteiner* [1975] 1 ALL ER 849atp. 857, as follows:

“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 wrong doer, the company itself is the one person to sue for the damage. 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”.

43. As we understand it, the argument is rather that the Directors appearing in the Company Register at the time were Musa and Mwau who, in law, were the ones entitled to pass a resolution for institution of the suit but there was no evidence of any resolution. However, as the trial court observed, correctly in our view, the suit was in part about who the rightful shareholders/directors of West End were. Those who asserted they were the rightful shareholders/Directors and who the alleged fraud was committed against West End, gave instructions for the filing of the suit in the name of the Company. They testified that they did so, and the Advocate testified that he accepted those instructions. In the end, the original directors were vindicated on this since the fraudsters never showed up to dispute their right to the shareholding and directorship of the company. The submission made that the two fraudsters were capable of passing a lawful resolution for filing suit in the name of West End, in our view, offends common sense and is not tenable.

44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere Coffee Growers Ltd v Sebaduka & Anor* (1970) 1 EA 147. The court in that case held: -



“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 and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

45. To their credit, the appellant’s Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is *Tatu Naiga & Emporium v Virjee Brothers Ltd* Civil Appeal No 8 of 2000.

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General*: SCCA NO.1 of 1998. The latter case restated the law as follows: -

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The decision has since been applied in Kenyan courts, for example, in *Fubeco China Fushun v Naiposha Company Limited & 11 others* [2014] eKLR.

..... For the above reasons we find no merit in the procedural challenge and accordingly reject that ground of appeal”.

30. Upon assertions by Duncan Mwaniki on oath regarding his capacity and authority to file suit, the evidentiary burden shifted on the Defendants to tender evidence to the contrary. The Defendants having failed to pick up the gauntlet in the instant matter, that objection must fail.

31. As concerning the former limb, Order 4 Rule 1(4) of the [Civil Procedure Rules](#) provides that; -

“(4) 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.”

32. Thus, an officer of a company duly authorized under the seal of the company may swear the verifying affidavit. Further Order 9 Rule 2 of the [Civil Procedure Rules](#), provides that a person acting or swearing any affidavit on behalf of a body corporate should demonstrate that he is duly authorized to so act on behalf of the body corporate.

33. The Court of Appeal in [Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu](#) [2019] eKLR while addressing itself to the foregoing issues held that: -

“The question we have to determine is; who is a ‘duly authorized’ officer” This question was answered in *Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another* [2015] eKLR as follows:



“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized.”

Here is a person, who on oath stated that he is duly authorized and in the absence of evidence to counter or contradict him, it cannot fall for the Judge to rule otherwise. It is obvious that whether or not the deponent was an authorized agent is a matter to be decided on evidence and none has been adduced by the respondent.

In *Spire Bank Limited v Land Registrar & 2 others* [2019] eKLR the court in discussing Order 4 Rule 1(4) Stated as follows:

“It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

34. The relevant paragraph of Duncan Mwaniki’s affidavit earlier reproduced herein contains an express deposition regarding his authorization by the Plaintiff. In the circumstances, the court is not persuaded by the Defendant’s objection to his authority, or indeed any of the other grounds in the Defendants’ preliminary objection dated 01.12.22. The same must fail in its entirety and is dismissed with costs to the Plaintiff.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr.Ngani

For the Defendants: Mr. Njenga

C/A: Carol

