



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. E011 OF 2021

IN THE MATTER OF NDEWA HOLDINGS LIMITED

AND

IN THE MATTER OF COMPANIES ACT, 2015, LAWS OF KENYA

AND

IN THE MATTER OF A DERIVATIVE ACTION BY PAUL NDERI WARUI, FENANCIO MARINE NDERI,

MICHAEL MAINA NGUYO, ANTONY NDERITU KARIU, PHILLIP MAINA KINGORI,

MESHACK WANJOHI RUKWARO, JOSEPH WARUTERE WACHIRA, PETER MURAGE NDERI,

DAVID WANGOMBE MURIITHI, SILAS MWANIKI GITHI, STEPHEN KARIUKI NDEGWA,

LAWRENCE MACHARIA NJIGUA

PAUL NDERI WARUI & 12 OTHERS.....1ST PLAINTIFF
FENANCIO MARINE NDERI.....2ND PLAINTIFF
MICHAEL MAINA NGUYO.....3RD PLAINTIFF
ANTONY NDERITU KARIU.....4TH PLAINTIFF
PHILLIP MAINA KINGORI.....5TH PLAINTIFF
MESHACK WANJOHI RUKWARO.....6TH PLAINTIFF
JOSEPH WARUTERE WACHIRA.....7TH PLAINTIFF
PETER MURAGE NDERI.....8TH PLAINTIFF
DAVID WANGOMBE MURIITHI.....9TH PLAINTIFF
SILAS MWANIKI GITHI.....10TH PLAINTIFF
STEPHEN KARIUKI NDEGWA.....11TH PLAINTIFF
LAWRENCE MACHARIA NJIGUA.....12TH PLAINTIFF
NDEWA HOLDINGS LIMITED.....13TH PLAINTIFF

VERSUS

CHRYSOGON WANG'ONDU NDUHIU.....1ST DEFENDANT

WILSON NDUNGU MUTAHL.....2ND DEFENDANT

JERSEY DEVELOPERS LIMITED.....3RD DEFENDANT

PAUL BABU KAMURA.....4TH DEFENDANT

RULING

1. By plaint dated 25th March, 2021 the Plaintiffs sought the following reliefs against the Defendants:

- (a) A declaration that the sale and transfer of all those parcels of land known as IR NO. 203537 – 203570 is illegal for having been conducted by the 1st and 2nd Defendants in breach of trust and directors fiduciary duty to shareholders of the 13th Plaintiff company and is therefore null and void.
- (b) An order for cancellation of 3rd Defendant's registration as proprietor of all those parcels of land known as IR NO. 203527 – 203570 and restoration of the 13th Plaintiff's name as the proprietor thereof.
- (c) An order directing the 1st and 2nd Defendants to surrender and deposit into court, titles for a portion of 233 acres out of the original land parcel bought by the 13th Plaintiff company from Sosian Limited failing to which execution to issue against them.
- (d) Costs of the suit plus interest thereon at court rates.
- (e) Any other or better relief deemed fit by the honourable court.

2. The Plaintiffs pleaded that they were all shareholders of the 13th Defendant (*the company*) which had acquired **LR. NO. 8033/A (I.R. NO. 10181)** measuring approximately 1000 acres for the benefit of its members. It was further pleaded that the 1st and 2nd Defendants had purportedly sold 757 acres out of the suit property to the 3rd Defendant without the consent of the members. It was contended that the sale was vitiated by fraud and breach of trust on the part of the company's directors particulars whereof were pleaded in paragraph 18 of the plaint.

3. The record shows that the 1st – 4th Defendants (*the Defendants*) entered appearance to the suit on 15th May, 2021 and filed a preliminary objection challenging the jurisdiction of the court to entertain the suit. The Defendant's notice of preliminary objection dated 17th May, 2021 raised the following objections:

- (a) That the court lacked jurisdiction to entertain the suit.
- (b) That the suit was a derivative action which falls within the jurisdiction of the Commercial and Tax Division of the High Court.
- (c) *That* the suit ought to be dismissed since it cannot be transferred to a competent court.

4. When the matter was listed for directions, it was directed that the Defendant's preliminary objection shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange written submissions. The record shows that the Defendants filed theirs on 8th July, 2021 whereas the Plaintiffs' filed theirs on 27th September, 2021.

5. The court has considered the Defendant's notice of preliminary objection as well as the submissions of the parties thereon. The main question for determination is whether or not there is merit in the preliminary objection.

6. The Defendants contended that the Plaintiffs' claim is of a commercial nature which ought to have been filed before the High Court for adjudication. It was submitted that the Plaintiffs' claim was basically a claim for breach of trust on the part of the directors of the company hence it was a derivative action within the meaning of **Section 238 and 239 of the Companies Act**. The Defendants further submitted that the instant suit did not fall within the provision of **Section 13 of the Environment and Land Court Act** which confined the court's jurisdiction to matters relating to land and the environment.

7. The Plaintiffs, on the other hand, contended that the objections by the Defendants did not constitute preliminary objections as known to law. It was submitted that the objections raised were not anchored on pure points of law and that some factual matters required to be established before the issues raised can be conclusively adjudicated upon.

8. The Plaintiffs further submitted that their claim was not of a commercial nature and that it was a claim based upon fraudulent dealings with land by directors of the company. It was contended that the reliefs sought in the plaint for cancellation of titles and transfers of land can only be granted by the Environment and Land Court and not the High Court. It was further contended that **Section 2 of the Land Registration Act, 2012** defined the "court" as the **Environment and Land Court** established under the **Environment and Land Court**

Act.

9. **Section 13 (2) of the Environment and Land Court Act, 2011** stipulates as follows:

“ 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, chooses in action or other instruments granting any enforceable interests in land.

(e) any other dispute relating to environment and land.

10. As indicated in paragraph 1 of the ruling, the Plaintiffs are seeking various reliefs in relation to the parcels of land which are said to have been irregularly and fraudulently alienated by the 1st and 2nd Defendants. The mere fact that the properties were initially owned by the company does not necessarily remove the case from the preview of **Section 13 of the Environment and Land Court Act** and make it a commercial dispute. The law recognizes that even limited companies are capable of holding land which can be the subject of legal disputes. The court is of the opinion that a suit claiming a declaration that the sale and transfer of the various suit properties was illegal and an order for cancellation of the 3rd Defendant’s title squarely falls within **Section 13 (2) (e) of the Environment and Land Court Act** as “any other dispute” relating to land.

11. The upshot of the foregoing is that the court is not satisfied that the Defendants’ preliminary objection is well founded. The issue of transfer of suit is moot since the Plaintiffs did not apply for transfer of suit. Accordingly, the Defendants’ notice of preliminary objection dated 17th May, 2021 is hereby overruled in its entirety. Costs shall **be in the cause**.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 18TH DAY OF NOVEMBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Ndegwa holding brief for Mr. Gakuhi Chege for the Plaintiffs

No appearance for the Defendants

CA - Carol

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Y. M. ANGIMA

JUDGE