



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. CASE NO. 168 OF 2018

HADIKO COMPANY LIMITED.....1ST PLAINTIFF

HADIJA SAID.....2ND PLAINTIFF

VERSUS

I & M BANK LIMITED.....1ST DEFENDANT

JONATHAN KIMUTAI KOSKEI.....2ND DEFENDANT

GARAM INVESTMENTS.....3RD DEFENDANT

VICTOR BARASA ODHIAMBO.....4TH DEFENDANT

LAND REGISTRAR KAJIADO.....5TH DEFENDANT

HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

Introduction:

This Ruling is in relation to a Notice of Preliminary Objection dated 22nd February, 2021 which is based on the following grounds:-

- a) That the Plaintiff lacks locus standi.**
- b) That this Honourable Court lacks jurisdiction.**

In response to the Preliminary Objection, the Plaintiffs' Advocate deposed that the said Preliminary Objection was vague, malicious and a non-starter since it did not disclose issues of law but fact. Further, that the 2nd Defendant had not disclosed which law had been infringed upon by the Plaintiff.

It is the Plaintiffs' contention that the said Preliminary Objection was *res judicata* since the issues of jurisdiction were dealt with in Civil Suit No. 270 of 2016 of High Court Milimani Commercial, between the same parties herein, the subject matter being the suit property and a consent order adopted to that effect. Further, the 2nd Defendant only remedy lay in an appeal of that decision. The Plaintiffs depose that the Preliminary Objection was filed in bad faith to undermine the jurisdiction of this Honourable Court while flaunting the Civil Procedure Rules in regards to service since it was not served to the other parties on time. Further, that it had been brought before this court during trial as the 2nd Defendant had been a party to this suit since inception and was insincere having gone through pre-trial proceedings only to raise a Preliminary Objection during the hearing. The Plaintiff deposed that the Court has jurisdiction to deal with this matter as the subject matter involved Land as prescribed in the Land Act 2012, Land Registration Act, 2012 and Articles 70 and 165 of the Constitution of Kenya 2010. Further, by virtue of the fact that the 2nd Defendant claimed ownership of the suit property, filed his Defence and witness statements, he indeed submitted himself to the jurisdiction of this court hence the Preliminary Objection was overtaken by events and should be dismissed with costs.

The Preliminary Objection was canvassed by way of written submissions which were filed by both the 2nd Defendant and Plaintiffs.

Analysis and Determination

Upon consideration of the Notice of Preliminary Objection, Reply to the said Objection as well as rivalling submissions, the only issue for determination is whether the Plaintiff has *locus standi* to institute this suit and if this court has jurisdiction to deal with it.

The 2nd Defendant in his submissions contended that this Court did not have jurisdiction to deal with this matter. He insisted that the nature of the dispute in the first instance related to the formation, management, control and running of internal affairs of the company which was outside the purview of this court. He further submitted that it was clear that the matter stemmed from a derivative action as captured under Section 238 of the Companies Act. He averred that the 2nd Plaintiff had no *locus standi* to institute a case on behalf of the 1st Plaintiff Company and submitted that the suit offends the provisions of the Companies Act and Order 4 Rule 1(3) & (4) of the Civil Procedure Rules. Further, that the 2nd Plaintiff had no written authority to act on behalf of the 1st Plaintiff and the Verifying Affidavit of the Plaintiff was not sworn by an officer of the company duly authorized to do so. He reiterated that there was no company resolution to institute the suit and or to instruct the firm of Githogori & Harrison Associates Advocates to act for the 1st Plaintiff. He insisted the issue of *res judicata* had erroneously been raised by the 2nd Plaintiff and explained that Civil Suit No. 270 of High Court Milimani Commercial Division did not address the merits of the case as the matter was withdrawn by consent of the 2nd Plaintiff including the 1st as well as the 3rd Defendant but without his consent. He urged the court to uphold the Preliminary Objection and dismiss the Plaintiff's suit herein. To buttress his averments, he relied on the following decisions: The owners of ***Motor Vessel "Lilian S" v Caltex Oil Kenya Limited (1989) KLR; Tavuli Clearing & Forwarding Limited v Charles Kalujje Lwanga Nairobi (Milimani) HCCC No. 585 of 2004 and Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 eKLR.***

In response, the 2nd Plaintiff submitted that the 2nd Defendant failed to comply with the rules of a Preliminary Objection as it was meant to be based on issues of law and not fact. Further, that issues of management, resolutions are facts/evidence that needed to be brought out during trial and not in a Preliminary Objection. She contended that the 2nd Defendant had not provided evidence that the 1st Plaintiff denied conferring authority to her to file the suit. She was emphatic that HCCC 270 of 2016 Milimani Commercial Division was withdrawn by consent, in negligent absentia of the 2nd Defendant who was duly served and absconded willfully to attend or send a personal representative. She explained that there were only two (2) directors of the 1st Plaintiff who parted ways before the 2nd Defendant sold and transferred suit land without a board of resolution to the 4th Defendant. She reiterated that she stood to lose a lot if the suit property was auctioned given the fact that she had demonstrated how she incurred expenses with regards to the said suit property. On the issue of *locus standi*, she argued that the 1st Plaintiff had been out of operations and she would have to seek a resolution from her own self since the 2nd Defendant had already mischievously intermingled with the affairs of the 1st Plaintiff and a resolution could not be obtained by one party especially one who had defrauded the company and it needed both directors to be present. Further, on the issue of company resolution, she submitted that an incorporated person is but just a legal person in the eyes of the law and has necessity to act through agents who are usually members of its board of directors. She explained that proceedings started without proper authority may subsequently be ratified. Further, that the Preliminary Objection was defective and should be dismissed. To support her arguments, she relied on the following decisions: ***Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000 and Leo Investments Ltd v Trident Insurance Company Limited [2014] eKLR.***

I will deal with the issue of jurisdiction and *locus standi* jointly. The 2nd Defendant claims this court is not clothed with jurisdiction to handle this matter. Further, that the 2nd Plaintiff did not have *locus standi* to institute this suit as she did not obtain a resolution from the 1st Plaintiff. I note the fulcrum of the claim herein revolved around dispute to land involving two persons who were the only directors of one company. Further, one of the directors proceeded to dispose of the suit land to a third party (4th Defendant). The 2nd Defendant who claims to be a director of the 1st Plaintiff has not informed court on whether he obtained company resolution when he disposed of said suit land. Further, the suit land has already passed to a third party and the 2nd Plaintiff contends that she heavily contributed in its acquisition and will hence suffer irreparable loss. Ibrahim, JSC in Supreme Court of Kenya ***Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal vs. Judicial Service Commission & Others*** in demystifying the issue of jurisdiction cited the decision in Supreme Court of Nigeria ***Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others*** where Walter Samuel Nkanu Onnoghen, JSC expressed himself as follows:-

"...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost..."

Further, in the Court of Appeal case of ***Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR*** on the centrality of the issue of jurisdiction stated that: -

"So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."

While in the case of ***Mumo Matemu vs. Trusted Society of Human Rights Alliances & 5 Others (2014) eKLR***, the Court held that;

"It is proper to note that the evaluation of locus ought to be based upon the constitutional consideration of capacity (Articles 3, 22 and 258, the nature of the suit and the enforceability of the orders sought. These considerations inform the enforcement mechanisms and coherent clarity of the following inquiries. Who will the orders be enforced against? Who bears the costs of litigation if at all? Who represent the parties in Court."

Further, in *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 (emphasis mine).”

See also the decisions in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2004] eKLR and Quick Enterprises Ltd vs. Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999*; and *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga vs. Eliud Timothy Mwangunga & Sagalla Ranchers Limited [2017] eKLR*; *Law Society of Kenya vs. Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000*.

Upon gleaning, the pleadings filed herein as well as the evidence presented, to my mind, I find that the 2nd Defendant’s action of raising the Preliminary Objection after the hearing had commenced is actually mischievous. I note he has not particularized the main points of law he is raising and as it reads, I opine that the same is ambiguous. Further, he seems to seek to block the 2nd Plaintiff from being heard which cannot do in this current Constitutional dispensation as she has a right to be heard. It is my considered view that Upholding the said Preliminary Objection at this stage would be draconian as there are several substantive issues that have emerged which require viva voce evidence to enable the court make a just and proper determination of the same. To my mind while associating myself with the findings in the case of *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No.391 of 2000* I hold that proceedings started without proper authority may subsequently be ratified and cannot be deemed fatal. I further find that in this instance, the court is being called upon to ascertain the facts from elsewhere apart from looking at the pleadings alone.

In the circumstances, while associating myself with the decisions cited above, I find the Notice of Preliminary Objection dated 22nd February, 2021 unmerited and will proceed to dismiss it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 15TH DAY OF NOVEMBER, 2021.

CHRISTINE OCHIENG

JUDGE