



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CASE NO. ELCC/E126/2020

JAMES NDUGI.....1ST PLAINTIFF
 DAVID KURIA MWANGI.....2ND PLAINTIFF
 JOHN MWAL.....3RD PLAINTIFF
 FRANCIS KABURI.....4TH PLAINTIFF
 JULIUS GACHERU NDUGI.....5TH PLAINTIFF

-VERSUS-

JAMLECK WAITHAKA KINYUA.....1ST DEFENDANT
 ASHFORD WAITHAKA MWANGI.....2ND DEFENDANT
 PETER MWANIKI KIIRU.....3RD DEFENDANT
 JAMES GICHUKI MURAYA.....4TH DEFENDANT
 JAMES KARIUKI IHURA.....5TH DEFENDANT
 PETER KAGWANJA KAMAU.....6TH DEFENDANT
 PETER KAROKI KAGWANJA.....7TH DEFENDANT
 GITHURE MUTUANGURE CO. LTD.....8TH DEFENDANT

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated the 14th of September 2020, the Plaintiffs/Applicants herein have sought for the following Reliefs;

i.(Spent)

ii. *This Honorable Court be pleased to grant an Inhibition order against the property known as L.R. NO. 209/118/82, pending the hearing and determination of this Application.*

iii. *This Court be pleased to grant an Inhibition order against the property known as L.R. NO. 209/118/82, pending the hearing and determination of this Suit.*

iv. This Honorable Court be pleased to grant an order of temporary injunction restraining the Defendants/Respondents either by their servants, agents or anyone at their behest from interfering with the suit property known as L.R. NO. 209/118/82, pending the hearing and determination of this matter.

v. This Honorable Court be pleased to order the nullification and/or annulment of any ongoing sale of the company land known as L.R. NO. 209/118/82 by the Defendants/Respondents.

vi. This Honorable Court do issue an order to direct the Respondents herein to involve the Applicants in the process of sale of the suit property.

vii. Consequent to the preceding prayer, this Honorable Court be pleased to grant an inhibition order against the property known as L.R. NO. 209/118/82, until such a time as the Respondents will have involved the Applicants in the process of sale.

viii. Costs of this Application do abide the results of the intended suit.

2. The subject Application is premised and/or anchored on the grounds that have been enumerated at the foot thereof and same is further supported by the Affidavit of the 1st Plaintiff/Applicant sworn on the 14th of September 2020.

3. On the other hand, following the filing of a Replying Affidavit by and/or on behalf of the Defendants/Respondents, the Plaintiffs/Applicants herein sought for and obtained leave of the Court and thereafter filed a Supplementary Affidavit sworn on the 12th of November 2020. For clarity, the Supplementary Affidavit contains three annexures to which the Applicants herein rely on.

4. On the part of the Defendants/Respondents, same responded to the subject Application vide the Replying Affidavit sworn by the 1st Defendant/Respondent, albeit on behalf of all the Defendants/Respondents, and to which the 1st Defendant/Respondent has attached the Resolution of the 8th Defendant/Respondent mandating and/or appointing the said 1st Defendant/Respondent to execute pleadings and/or Documents for and on behalf of the 8th Defendant/Respondent.

DEPOSITIONS BY THE PARTIES

PLAINTIFFS'/ APPLICANTS CASE:

5. Vide the Supporting Affidavit sworn by the 1st Plaintiff/Applicant on the 14th of September 2020, the Deponent has averred that himself together with the rest of the Plaintiffs/Applicants are members of the 8th Defendant/Respondent company.

6. On the other hand, the Deponent has further averred that he has been authorized by members of the 8th Defendant/Respondent to swear the Supporting Affidavit. Similarly, the Deponent has proceeded to aver that the property known as L.R.NO. 209/118/82, belongs to and is registered in the name of the 8th Defendant/Respondent.

7. Nevertheless, the Deponent proceeds to aver that the 8th Defendant/Respondent company has commenced the process of selling, alienating and/or disposing of the suit property, but without the involvement of the Plaintiffs/Applicants.

8. Besides, the Deponent further avers that the impugned sale of the suit property is being carried out and/or undertaken without a Resolution of the company.

9. In view of the foregoing, the Deponent contends that the impugned sale of the suit property is being carried out by the Defendants/Respondents and in particular the directors thereof, with a view to defrauding the company of the suit property and by extension depriving the Plaintiffs/Applicants of their rightful shares thereto.

DEFENDANTS'/ RESPONDENTS CASE:

10. Upon being served with the pleadings and the subject Notice of Motion Application, the Defendants/Respondents filed a Replying Affidavit sworn on the 18th of October 2020 by the 1st Defendant/Respondent and in respect of which, the 1st Defendant/Respondent averred that he is a Director of the 8th Defendant/Respondent alongside the 2nd to 7th Defendants/Respondents.

11. Besides, the 1st Defendant/Respondent has further averred that same has been authorized by the 8th Defendant/Respondent Company as well as the rest of the Defendants/Respondents to swear the subject Affidavit. In this regard, the 1st Defendant/Respondent has exhibited a copy of the resolution under same.

12. Further, the 1st Defendant/Respondent avers that the allegations contained in the Supporting Affidavit sworn by the 1st Plaintiff/Applicant are false, unfounded and in any event unverifiable.

13. On the other hand, the 1st Defendant/Respondent has averred that the allegations pertaining to the imminent alienation of the suit property are based and/or founded on apprehensions, which are devoid of any factual basis.

14. Be that as it may, the 1st Defendant/Respondent further avers that to the extent that the suit property belongs to and is registered in the

name of the 8th Respondent company, it is only the said 8th Defendant/Respondent, through directors or such other authorized persons, who can determine the sale and/or disposal of the suit property.

15. Nevertheless, the 1st Defendant/Respondent has further averred that the Plaintiffs/Applicants have not availed and/or supplied the Honorable Court with credible evidence or at all to establish the existence of a prima facie case, as against the Defendants/Respondents, including the 8th Defendant/Respondent, who is the registered proprietor of the suit property.

16. Further, the 1st Defendant/Respondent has also averred that to the extent that the Plaintiffs/Applicants herein have not exhibited any evidence of membership and/or shareholding in the 8th Defendant/Respondent, coupled with the fact that the Plaintiffs/Applicants herein are not the registered owners of the suit property, same are therefore not disposed to suffer any irreparable loss.

17. In the premises, the Defendants/Respondents have implored the Honorable Court to dismiss the subject Application.

FURTHER DEPOSITION BY THE 1ST PLAINTIFF/ APPLICANT:

18. Stung by the contents of the Replying Affidavit sworn by the 1st Defendant/Respondent, the 1st Plaintiff/Applicant sought for and obtained leave to file a further Affidavit and in this respect a Supplementary Affidavit was sworn and filed on the 12th of November 2020.

19. Pursuant to the Supplementary Affidavit, the 1st Plaintiff makes a repetition of the averment that same has been authorized by members of the 8th Defendant/Respondent to swear the subject Supplementary Affidavit.

20. Besides, the 1st Plaintiff/Applicant now proceeds to and annexes a document, which is deemed to be the authorization by and/or on behalf of the rest of the Plaintiffs, mandating the 1st Plaintiff/Applicant to swear the Supplementary Affidavit.

21. On the other hand, the 1st Plaintiff/Applicant has further averred that the 8th Defendant/Respondent company was formed by 15 members and proceeds to aver that most of the original members are now deceased.

22. Finally, the 1st Plaintiff/Applicant avers that the current directors of the 8th Defendant/Respondent were not legally and/or lawfully elected and thus their participation in the affairs of the 8th Defendant/Respondent, as such Directors, is fraudulent.

23. In a nutshell, the Plaintiffs/Applicants reiterate the request that the intended sale of the suit property, be stopped, prohibited and/or otherwise enjoined, in the manner sought vide the Application dated 14th of September 2020.

SUBMISSIONS BY THE PARTIES

24. The subject Application came up for hearing on the 22nd of March 2021, on which date directions were given to the effect that the Application be heard and disposed of by way of written submissions. In this regard, the parties were directed to file and exchange their respective submissions within set timelines and thereafter same was to be mentioned to confirm compliance and for purposes of fixing a date for Ruling.

25. On the 27th of October 2021, the subject Application came up, whereupon both parties confirmed to the Honorable Court that same had filed and exchanged their respective submissions. Consequently, the parties implored the Honorable Court to set down the matter for Ruling.

26. As pertains to the filing and exchange of written submissions, it is appropriate to state that the Plaintiffs/Applicants filed their detailed and elaborate submissions on the 16th of April 2021, whereas the Defendants/Respondents filed their submissions on the 6th of April 2021. For clarity, the Defendants/Respondents submissions preceded the submissions by the Plaintiffs/Applicants.

27. Suffice it to note, that the two sets of submissions as well as the caselaw relied upon are on record and thus the Honorable Court is enjoined to take same into account.

ISSUES FOR DETERMINATION

28. Having reviewed and/or appraised the Notice of Motion Application dated the 14th of September 2020, the Affidavit in support thereof, as well as the Supplementary Affidavit sworn on the 12th of November 2020, and the elaborate submissions by the Plaintiffs/Applicants, on one hand, and the Replying Affidavit sworn by the 1st Defendant/Respondent on the 18th of October 2020, together with the written submissions dated the 6th of April 2021, **I am of the humble opinion that the following issues do arise for determination;**

i. Whether the Plaintiffs/Applicants herein have established and/or proven a Prima facie case with overwhelming chances of success.

ii. Whether the Plaintiffs are disposed to suffer irreparable loss, if the orders sought are not granted.

iii. In whose favor does the Balance of Convenience tilt.

ANALYSIS AND DETERMINATION

Issue Number One

Whether the Plaintiffs/Applicants herein have established and/or proven a Prima facie case with overwhelming chances of success.

29. The Plaintiffs/Applicants have filed the subject suit premised on the basis that same are lawful members and thus shareholders of the 8th Defendant/Respondent company.

30. In this regard, it behooved the Plaintiffs/Applicants to exhibit and/or display evidence of such Membership, either vide their share certificates and/or otherwise, a copy of the Register of shareholders of the 8th Defendant/Respondent company.

31. On the other hand, the Plaintiffs/Applicants herein could also have exhibited and/or tendered to the Court copies of the Memorandum of Association and the Articles of Association of the 8th Defendant/Respondent company with a view to authenticating, whether indeed the names of the Plaintiffs/Applicants are contained in the subject documents, either as promoters, subscribers and/or shareholders.

32. Suffice it to say, that the Plaintiffs/Applicants herein, for reasons best known to them, have failed to annex and/or exhibit any of the requisite documents, which would have been helpful, to enable the Honorable Court to authenticate and/or better still, verify the Plaintiffs/Applicants membership status.

33. Be that as it may, it is imperative to note that when the Plaintiffs/Applicants were hit by the Replying Affidavit of the 1st Defendant/Respondent and particularly, the aspect that averred that the claims on behalf of the Plaintiffs/Applicants, were baseless and unverifiable, the Plaintiffs/Applicants endeavored to react thereto by attaching a copy of a document which is said to be the list of the original members and their respective share contributions. **See annexure JN1 attached to the Supplementary Affidavit sworn on the 12th of November 2020.**

34. However, a look at the said annexure whose source and authenticity are not verifiable, it is apparent that the names of the Plaintiffs/Applicants herein are not contained therein.

35. On the other hand, it is also worthy to recall that the Plaintiffs/Applicants have averred that the original 15 members who formed and/or founded the 8th Defendant/Respondent company are mostly deceased. **See paragraph 4 of the Supplementary Affidavit.**

36. Curiously, it is however not stated who are these original members, who have since passed on and besides, there is no evidence in terms of either certificate of death or burial permits to authenticate the allegation of death of most of the original/founding members.

37. Granted, most of the original/founding members could very well be deceased, but the question then is, if same are deceased, then who are the Plaintiffs/Applicants herein and on whose behalf are they acting.

38. Without delving into the issue as to whether grant of Letters of Administration have been sought for and/or obtained on behalf of the estates of the original members who are now said to be deceased, it is sufficient to state that if the Plaintiffs/Applicants herein are staking a claim to membership of the 8th Defendant/Respondent company, on the basis of being kinsmen of the deceased members, then such a claim can only be ventilated by the duly appointed legal administrators of the respective estates and not otherwise.

39. In support of the foregoing observation, I can do no better than to restate the position of the law as was enunciated in the decision in the case of **Virginia Edith Wambui Otieno vs Joash Ochieng Ouko [1987] eKLR** whereby the Honorable Court stated as hereunder;

“But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the Law of Succession Act provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.

This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death (see 1 Williams on Executors and Administrators (14th edn) paras 84 et seq and 230 et seq).

But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death, cannot be invoked so as to render the action competent (see Ingall v Moran [1944] 1 KB, and the case which follow namely Burns v Campbell [1952] KB 15). This doctrine is as old as Wankford v Wankford [1702] where Powys J said:

‘but an administrator cannot act before letters of administration granted to him.’

40. Other than the foregoing issues, which I have addressed, there is also the question of the competence of the suit that has been filed by and/or on behalf of the Plaintiffs as well as the Notice of Motion Application under reference.

41. It is common ground that the suit is alleged to have been filed by all the Plaintiffs herein and that the rest of the Plaintiffs thereafter authorized the 1st Plaintiff/Applicant to swear the Verifying Affidavit, as well as the Supporting Affidavit in respect of the suit and the Application respectively.

42. I have glanced at and/or examined the Verifying Affidavit sworn on the 14th of September 2020 and particularly Paragraph 2 thereof, where the Deponent adverts to the authority and/or authorization by members of the 8th Defendant/Respondent to swear the Verifying Affidavit.

43. However, no such authorization has been exhibited and/or annexed. In any event, if the authorization and/or authority to swear the Verifying Affidavit was granted by the rest of the Plaintiffs/Applicants, nothing would have been easier than to attach and/or exhibit same.

44. In my humble view, the failure to attach and/or exhibit such a critical document, only means and/or otherwise connotes that the 1st Plaintiff herein has not been authorized either in the manner alluded to or at all.

45. There being no such authorization that has been exhibited and/or availed, it is therefore apparent that the suit on behalf of the 2nd to 5th Plaintiffs/Applicants have not been verified by the requisite Verifying Affidavit, either in accordance with the law or at all. Consequently, the suit by and/or on behalf of the 2nd to 5th Plaintiffs/Applicants offend the mandatory provisions of **Order 3 Rule 2 of the Civil Procedure Rules, 2010**.

46. Notwithstanding the foregoing, it is also worthy to point out that when the issue of the lack and/or absence of the authority to act, plead and/or swear Affidavit on behalf of the rest of the Plaintiffs/Applicants was raised, the 1st Plaintiff/Applicant herein quickly filed a Supplementary Affidavit and annexed thereto a document referred to as annexure **JN1**, alleged to be the authority given by the 2nd to 5th Plaintiffs/Applicants.

47. First and foremost, the said authority which is curiously dated the 14th of September 2020, is neither signed by the persons mentioned therein nor by the Advocate for the Plaintiffs/Applicants, the latter who is the originator of the subject document.

48. In the absence of the signatures of the 2nd to 5th Plaintiffs/Applicants, who are alleged to be giving the said authority, it is obvious that the document in question falls short of what is expected by and/or under the law.

49. Nevertheless, the reason why the document has not been signed by the persons alleged to be giving the authority, has not been disclosed and/or explained. Could it be that the names of the 2nd to 5th Plaintiffs have merely been brought on board albeit without their knowledge. The answer to this question, is most probably in the affirmative.

50. Without belaboring the validity of the document which has been referred to as the authority, it is sufficient to draw the attention of the Plaintiffs' Advocates to the provisions of **Order 1 Rule 13(1) and (2) of the Civil Procedure Rules** which are reproduced hereunder;

“[Order 1, rule 13.]

Appearance of one of several plaintiffs or defendants for others.

13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

51. Other than the preceding defect, which in my humble view is fatal, I need also to mention that neither of the Plaintiffs/Applicants herein are the registered owners of the suit property. For clarity, the suit property is admitted to belong to and is registered in the name of the 8th Defendant/Respondent company.

52. It may be, subject to proof, that the Plaintiffs herein are members of the 8th Defendant/Respondent company, (for which no document has been exhibited), but it must be remembered that a company is separate and distinct from its directors and shareholders. Consequently, the Plaintiffs/Applicants herein as alleged members, cannot purport to originate a suit touching on and/or concerning the property of the company, whatsoever.

53. In support of the foregoing observation, it is sufficient to invoke and rely on the decision in the case of **Ardhi Highway Developers Ltd vs Westend Butchery Ltd & Others [2015] eKLR** where the Court of Appeal referred to **Moir V. Wallersteiner[1975] 1 ALL ER 849atp. 857** and observed as hereunder;

“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.”

54. From the foregoing decision, it is evident that if the property in question belongs to the company and the company is allegedly being defrauded, whether by outsiders and/or insiders, albeit of a minor nature, the only person who can commence civil proceedings for the protection of property is the company and not a member, subscriber and/or shareholder.

55. In view of the foregoing, it must have become apparent that the Plaintiffs/Applicants herein are strangers and thus cannot originate, commence and/or otherwise maintain the subject suit as pertains to the suit property.

56. I am afraid that the Plaintiffs herein may not have procured sound legal advice as pertains to the capacity under which the subject suit was being mounted and/or filed. Nevertheless, in my humble view, the law pertaining to the distinction between a company and its members has crystallized ever since the rendition of the decision in the case of **Salomon vs Salomon & Co. Ltd [1896] AC 22.**

57. In view of the foregoing, I am now called upon to determine whether the Plaintiffs/Applicants herein have established a Prima facie case with overwhelming chances of success.

58. To my mind, taking into account the various issues discussed herein before, the case mounted by and/or on behalf of the Plaintiffs/Applicants falls short of what constitutes a Prima facie case, as known to law and which has been delineated in various decisions.

59. In support of the foregoing observation, I beg to adopt and restate the description of what amounts to a prima facie case as was captured in the decision in the case of **Mrao Ltd. Vs First American Bank of Kenya Ltd & 2 others [2003] eKLR** where the Court stated as hereunder;

“So, what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Issue Number Two

Whether the Plaintiffs are disposed to suffer irreparable loss, if the orders sought are not granted.

60. Other than the establishment of a Prima facie case with overwhelming chances of success, a claimant who is desirous to obtain an order of temporary injunction is also called upon to establish the existence of the Irreparable loss that same is disposed to suffer in the event that the orders sought are not granted.

61. Perhaps before venturing to discuss whether the Plaintiffs/Applicants shall suffer irreparable loss, it is worthy to ascertain the meaning, import and tenor of what amounts to irreparable loss.

62. In this regard, my attention quickly turns to the decision in the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014] eKLR.** where the Honorable Court observed as hereunder;

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

63. Having reproduced the definition of what amounts to irreparable loss, the question then is, can the Plaintiffs/Applicants herein who are firstly not members of the 8th Defendant/Respondent and secondly, not the registered owners of the suit property, suffer any irreparable loss on account of alienation and/or disposal of the property by the company?

64. I am afraid that the Plaintiffs/Applicants herein shall not suffer any loss known to law or at all. If anything, the loss that the Plaintiffs/Applicants shall suffer is so remote nay inconsequential.

65. On the other hand, if the Plaintiffs/Applicants herein are legitimate members of the 8th Defendant/Respondent, (which is not the case), then upon sale of the property belonging to the company, the proceeds realized therefrom shall then percolate to and in favor of the Plaintiffs/Applicants.

66. Simply put, whatever loss, if any, that the Plaintiffs/Applicants may suffer (which loss is however unseen and intangible), is compensable in monetary terms.

67. I am afraid that no evidence has been placed before me to arrive at the conclusion that the Plaintiffs/Applicants shall suffer irreparable loss. Conversely, the obtaining position is a pointer to the fact that no such loss shall be suffered by the Plaintiffs/Applicants.

Issue Number Three

In whose favor does the Balance of Convenience tilt.

68. Having dealt with and/or otherwise addressed the issue of proof of a Prima facie case and the existence of irreparable loss, both of which I have answered in the negative, I would have been constrained to terminate the subject Ruling at this point.

69. Nonetheless, because I had serialized the issues for determination and included the Balance of Convenience, I am thus obliged to render myself on the same.

70. Be that as it may, I have pointed out that the Plaintiffs/Applicants herein have not placed before the Honorable Court any evidence of membership of the 8th Defendant/Respondent, and having not done so, the question is whether the Balance of Convenience can be said to tilt in favor of such cluster of persons.

71. In my humble view, the Balance of Convenience does not tilt in favor of the Plaintiffs. In any event, the Plaintiffs herein are bound by the decision in the case of **Salomon vs Salomon & Co. Ltd [1896] AC 22**, which has been applied variously, from time immemorial.

72. To the contrary, the 8th Defendant/Respondent, who is the registered owner of the suit property, must be allowed to appropriate and/or benefit from the ownership of the suit property and in the event, any member thereof is aggrieved, the provisions of the Articles of Association of the company should be adhered to and/or complied with, where appropriate.

73. For me, the Balance of Convenience tilts in favor of the 8th Defendant/Respondent company, and those who are authorized to execute her affairs.

FINAL DISPOSITION

74. In line with the various observations made herein before, and more particularly, the observation of absence of any Document, be it a Shareholding Certificate and/or a Register of Membership of the 8th Defendant/Respondent company, I come to the inescapable conclusion that the subject Application must fail.

75. In the premises, the Notice of Motion Application dated the **14th of September 2020**, which has its inherent shortcomings, is hereby Dismissed.

76. Costs be and are hereby awarded to the Defendants/Respondents.

77. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant

.....**for the Plaintiffs/ Applicants.**

.....**for the Defendants/Respondents.**