



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ukingoni Farm Limited v Nganga & 2 others (Civil Suit 31 of 2021)  
[2024] KEHC 14553 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14553 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 31 OF 2021  
SM MOHOCHI, J  
NOVEMBER 21, 2024**

**BETWEEN**

**UKINGONI FARM LIMITED ..... APPLICANT**

**AND**

**LUCY WANJIKU NGANGA ..... 1<sup>ST</sup> DEFENDANT**

**BEN MUNYASYA ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. On the 6<sup>th</sup> of February 2024 this Court delivered a ruling on an interlocutory Application dated 10<sup>th</sup> December 2021, on the following terms;
  - a. A Conditional order of temporary injunction is hereby issued restraining the Respondents their agents, employees, servants or any other person from acting and executing documents making resolutions, issuing documents and/or interfering in any manner whatsoever in the Applicant/Plaintiff;
  - b. The Applicant/Plaintiff shall file in Court certified copies of all Company Annual Returns filed in compliance with Section 705 of the *Companies Act* for the years 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016;
  - c. Failure to comply with directions in number (2) above shall automatically cause the temporary injunction being vacated;
  - d. The Plaintiff Shall be expected to set down the suit for pre-trial directions within the next sixty (60) days from the date hereof; and



- e. The costs shall be in the cause.
  - f. Mention for pre-trial directions shall be on 11<sup>th</sup> April 2024
2. Of critical mention here was the duty to demonstrate bona fide as a corporate entity and dispel any notion that the Applicant was a briefcase entity existing as such for litigation purposes.
  3. On the 8<sup>th</sup> April 2024 just two days to the mention to confirm setting down the main suit for hearing, the plaintiff filed an Application which unfortunately is clothed as a motion seeking the extension of time to comply with the Court ruling.
  4. The Application dated 8<sup>th</sup> April is filed pursuant to Order 51 of the Civil Procedure Rules and Section 705 of the [Companies Act](#) and Section 3A of the [Civil Procedure Act](#) Cap 80 seeking the following reliefs;
    - i. That, this Honourable Court be pleased to certify this application as urgent and the same be heard on priority basis.
    - ii. That, this Honourable Court be pleased to grant the Plaintiff/Applicant extension of time to file their annual returns for the period (1991-2016) as directed and/or ordered vide ruling on 6<sup>th</sup> February, 2024 and issued on the 7<sup>th</sup> March, 2024 by Hon.J.S.M.Mohochi as under section 705 of the [Companies Act](#) 2015, within 60 days from the date of the ruling.
    - iii. That, this Honourable Court be pleased to direct and/or order the Registrar of Companies to amend and/or remove the CR-12 issued in November 2021, with factually incorrect and forged list of directors who are long dead and therefore cannot execute nor hold the office of director of the Plaintiff/Applicant Company.
  5. The Application claims to be supported by a sworn Affidavit by Mr. Kahiga Watindi Advocate that does not exist and is based on the following grounds;
    - i. That, the Plaintiff/Applicant is a private company limited by shares and with numerous members/shareholders. The same was incorporated sometime on 14<sup>th</sup> January, 1965.
    - ii. That, the same is a land buying company with numerous members mainly located within Nakuru County, and on 24/6/1991, a general meeting was held where new directors were elected by the members of the Plaintiff Company and the same duly registered and issued with CR- 12 in the year 2017.
    - iii. That, this Honourable Court directed that, the Plaintiff/Applicant herein file their returns for the period (1991-2016) vide a ruling delivered on 6 February, 2024, however the same has not been as the same is to be filed online, and we have been experiencing challenges to execute the same.
    - iv. That, the Plaintiff/Applicant seeks more time to file returns as directed by the Court on 6th February, 2024, as the same is filed online through the KRA portal, which has proved challenging to accomplish within the 60 days issued by Court
    - v. That, the said challenge in filing the returns online is not intentional and is not meant to malign or to be malicious as the same returns have been duly audited and prepared, save for filing, which is why we have made the same Application.
    - vi. That, the same is not meant to prejudice the position of the directors and/or the members of the company and it is only just and equitable that the application herein be heard and the orders granted in the first instance.



- vii. That, unless the application is allowed, the subject charge will be rendered void thereby exposing the both the company and the Applicant Bank to huge financial risks.
6. An Affidavit in support is sworn by Harun Chekeitany Chejor who regurgitates his assertions claiming that this Court directed him to file company returns with the registrar of companies and technical hitches on the KRA portal is a hindrance to compliance.
  7. The aforesaid affidavit bears annexures of the said Annual Returns filings all dated and signed 21<sup>st</sup> March 2024 by Harun Chekeitany Chemjor.
  8. The Application came up for directions on the 4<sup>th</sup> July 2024 where Counsel Mwangi for the Applicants and in the absence of the Respondents Counsel, indicated that he seeks directions on his Application dated 8<sup>th</sup> April 2024 that had been responded to by the Respondents on the 14<sup>th</sup> June 2024, he sought leave to file a further supplementary affidavit and that parties be allowed to file their written submissions.
  9. The Court directed the parties to file written submissions within 14 days and the matter was scheduled for mention to confirm compliance and fix the ruling date.
  10. On the 24<sup>th</sup> October 2024 Ms Gathecha Advocate for the respondents was in attendance and in the absence of the Applicants indicated that she was yet to comply and she sought for fourteen (14) more days that was allowed with the Court reserving the instant ruling date.
  11. So in essence what is before this Court is the Applicants Notice of Motion dated 8<sup>th</sup> April 2024, the Response thereto that is a Notice of Preliminary objection dated 19<sup>th</sup> April 2024 as follows;
    - a. That, the Plaintiff's suit filed vide a plaint dated 15<sup>th</sup> October, 2021 is fatally and incompetent in that it contravenes Order 4, Rule 4 of the Civil Procedure Rules, 2010 in that the verifying affidavit is signed by someone who is not a director and or authorized officer of the Plaintiff.
    - b. That, one Dr. Harun Chemjor Chepkeitany who swore the verifying affidavit dated 15 October, 2021 has never been a shareholder and or director of the Plaintiff and as such lacks the locus standi to swear the verifying affidavit on behalf of the Plaintiff.
    - c. That, the suit offends section 129 of the companies act hence it is defective
    - d. That, the suit is incurably defective, misconceived and bad in law hence an abuse of the Court process.
  12. This Court further notes that, the Notice of Preliminary objection dated 19<sup>th</sup> April 2024 comes attached therewith a Notice of Motion Seeking to have the suit struck off, and the same is supported by a notarized Affidavit of the 1<sup>st</sup> Respondent.
  13. The Response to the Application is not a response per se, but attack the very foundation of the Applicant's suit before the Court and not just the Application. It has not been challenged at all and remains unopposed.
  14. As regards Response to the Application dated 8<sup>th</sup> April 2024 apparently there is none, so for all intents it is unopposed.
  15. It is of Significance that none of the Parties herein, complied with the Court's direction on filing of written submissions and the Court has to render ruling on the basis of the filed documents only.



## Analysis and Determination

16. It is the duty of this Court to consider the Notice of Preliminary Objection dated 19<sup>th</sup> April 2024. This Court is to the principles established in determination of Preliminary Objection raised on matter of law.
17. The preliminary objection is on the capacity of the Applicant to bring forth this action, that the person purporting to be director authorized to execute documents on its behalf and further that no company resolution exists initiating the Action.
18. Section 705 of the *Companies Act* provides that,

“the company should make its returns to the Registrar of Companies once every year on the company's return date, which shall be the anniversary of the company's incorporation or the date the company last made returns”.
19. The validity of any Preliminary Objection is gauged against the requirement that it must raise pure issues of law capable of disposing of a dispute at once. It is, therefore, mandatory for a Court to ascertain that a Preliminary Objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.
20. The foregoing nature of Preliminary Objections was discussed in *Mukisa Biscuit Manufacturers Ltd - vs- Westend Distributors Ltd*, (1969) E.A. 696 page 700 when the Court observed as follows: -

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.

...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, on occasion, confuse the issues, and this improper practice should stop.”
21. In Civil Suit No. 85 of 1992, *Oraro vs. Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of preliminary objection: -

“.... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified 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 processes of evidence. Any assertion which claims to be a preliminary objection, and 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.”
22. And in the case of *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, it was observed that , a Court in determining a preliminary objection can look at the pleadings and



other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

“...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.”

23. Section 129 of the [Companies Act](#) obligates a Company to have at least one natural person as a director.
  - a. A company is required to have at least one director who is a natural person.
  - b. Subsection (1) is complied with if the office of director is held by a natural person as a corporation sole or otherwise by holding a specified office.
24. Section 130 of the [Companies Act](#) provides for redress mechanism where Section 129 is contravened by way of Direction requiring company to make appointment.
  1. On forming the opinion that a company is in breach of section 128 or 129, the Registrar may give the company a direction in accordance with subsection (2).
  2. A direction is in accordance with this subsection if it specifies—
    - a. the statutory requirement of which the company appears to be in breach;
    - b. the action that the company is required to take in order to comply with the direction;
    - c. the period within which the company is required to comply with the direction; and
    - d. the consequences of the company failing to comply with the direction.
  3. The period referred to in subsection (2)(c) may not be shorter than one month, or longer than three months, after the date on which the direction is given.
  4. A company that is in breach of section 128 or 129 shall comply with the direction given by the Registrar by—
    - a. making the necessary appointment or appointments; and
    - b. giving notice of the appointment under section 138, before the end of the period specified in the direction.
  5. If the company has already made the necessary appointment or appointments, it shall comply with the direction by giving notice of the appointment under section 138 before the end of the period specified in the direction.
  6. If a company fails to comply with a direction given under this section, the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding five hundred thousand shillings.
  7. If, after a company or any of its officers is convicted of an offence under subsection (6), the company continues to fail to comply with the direction, the company, and each officer of



the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding fifty thousand shillings for each such offence.

25. It is thus Apparent that the substratum of the objection is the legality of persons representing the Applicant matters that would invite the Court in establishment of factual details, whether the issue was ever attended to by the Registrar of Companies pursuant to Section 130 and whether the directions so issued were ever complied with. This remains a contested fact.
26. This Court thus overrules the respondents notice of preliminary objection as not being on a purely matter of law and that legality of representatives of the Applicant shall be determined upon presentation of evidence.
27. This Court equally fails to find in favor of and declines to exercise its discretion to consider the prayer sought in the Application dated 8<sup>th</sup> April 2024 for the following reasons;
  - a. The Court ruling dated 6<sup>th</sup> of February 2024 expressed reservations on the bonafides of the Applicants and ordered the demonstration of bonafides by filing in Court certified copies of all Company Annual Returns filed in compliance with Section 705 of the *Companies Act* for the years 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016;
  - b. The Applicant was never directed or ordered to file company returns, it is and has been the obligation of the Applicant to comply with all existing laws and the *companies act* being the primary regulatory law, there is nothing to extend, the temporary orders granted automatically vacated.
  - c. The Applicant has maintained a stealth silence as regards setting down the main suit for hearing within 60 days as directed.
28. In the upshot is that, the Notice of Preliminary objection dated 19<sup>th</sup> April 2024 is without merit and the same is overruled and dismissed. Equally the Notice of Motion dated 8<sup>th</sup> April 2024 is found to be without merit and the same is dismissed.
29. The Court shall not condemn any party to costs owing to the want of participation to either motion.
30. The Plaintiff is in breach of the orders of Court, of setting-down the suit for pretrial hearing directions not later than 11<sup>th</sup> March 2024 and are finally ordered to set-down the main suit for pretrial directions on hearing and disposal of the main suit within the next thirty (30) days from the date of this Ruling.
31. Failure to comply by the Plaintiff shall automatically lead to the dismissal of the primary suit, without recourse of further judicial pronouncements.

It is so Ordered.

**SIGNED, DELIVERED AT NAKURU ON THIS 21<sup>ST</sup> NOVEMBER 2024.**

**MOHOCHI S.M**

**JUDGE**

**Parties:**

For the Applicants

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For the Respondents

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