



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE No. 153 OF 2019

MONICA WANGUI NJENGA.....PLAINTIFF

VERSUS

DAVIS KINYANJUI NJENGA1ST DEFENDANT

NJEMONI LIMITED2ND DEFENDANT

RULING

1. The plaintiff and the first defendant are mother and son respectively. They are the only directors and shareholders of the second defendant. The plaintiff commenced proceedings herein through plaint filed on 5th December 2019. Together with the plaint, she filed Notice of Motion dated 3rd November 2019, through which she seeks the following orders:

1. ...

2. *THAT this Honourable Court be pleased to grant leave to the Plaintiff/Applicant to prosecute this suit on behalf of Njemoni Limited through derivative action.*

3. *THAT orders be issued prohibiting the 1st defendant in relation to land reference L.R. NO. 451/2055, IR 33556 registered In the name of the 2nd defendant from taking any further action or dealings with the said property in any manner including erection of any form of structures or leasing or charging pending the determination of the application and suit.*

4. *THAT the Honourable Court do issue an order compelling the 1st defendant to immediately surrender or disclose the following particulars in relation to a loan of Kshs. 25,000,000.00 applied by the 1st defendant from Consolidated Bank of Kenya Limited and secured by the above mentioned property being LR. NO. 451/2055, IR 33556 without the consent and knowledge of the Applicant who is a co-director and shareholder:*

a) Loan Application Form

b) Account details where the loan was disbursed

c) Company resolutions if any

5. *THAT an order of inhibition/prohibition do issue restraining any dealings with respect of lands owned by the company of (sic) parcel number NAKURU MUNICIPALITY BLOCK 5/194, NAKURU MUNICIPALITY 5/56, NAKURU MUNICIPALITY BLOCK 10/176, LR 10453/1 - IR 33779, LR 8666 - IR 23868, LR. NO. 451/2055 - IR 33556.*

6. *THAT the 1st defendant to surrender all the title documents back to the company to be held is (sic) safe custody by the Applicant.*

7. *THAT cost of the Application of this application be in the cause.*

2. The application is supported by an affidavit sworn by the plaintiff/applicant. She deposed that the second defendant was incorporated in 1992 by her late husband as a family company in which she and the deceased held one share each. The deceased later transferred his share to the first defendant. That the deceased also transferred parcels of land known as LR 10453/1 and LR 8666 - IR 23868 to the second defendant in 1992. She added that in 2019 she discovered through proceedings in Succession Cause No. 211of 2015 that parcels known as LR No. 451/2055 IR33556, Nakuru Municipality Block 5/194, Nakuru Municipality Block 5/56 and Nakuru Municipality Block 10/176 had been transferred from the deceased to the 2nd defendant and that the 2nd defendant now also owns parcels known as LR 10453/1 and LR 8666 IR

23868. That owing to the fact that she has been aging the 1st defendant took the leading role in management of the 2nd defendant but instead of consulting her and acting according to the 2nd defendant's Memorandum and Articles of Association, he took unilateral decisions such as erecting buildings on the company's land, issuing leases and forging company documents including resolutions. That she discovered that he charged LR No. 451/2055 IR33556 in favour of Consolidated Bank of Kenya Limited on 18th December 2018 to secure a loan of KShs 25,000,000 without a resolution of the company and without involving her. She further deposed that she does not know how the proceeds of the loan have been utilized.

3. The defendants opposed the application through a replying affidavit sworn by the 1st defendant. He deposed that the 2nd defendant's corporate structure is intact and that the application for leave to file this suit its behalf is baseless. He added that the applicants' complaints are against him as a co-director and that there are procedures for dealing with that within the Companies Act and the 2nd defendant's Memorandum and Articles of Association. He further stated that on 8th October 2019 the applicant filed an application in HC Succession Cause No. 211 of 2015 (Nakuru) seeking to restrain him from alienating or dealing with the parcel known as LR No. 451/2055 IR33556 and that parties in the Succession Cause later agreed that the issues raised in the application be handled by viva voce evidence during the yet to be done hearing of the summons for confirmation of grant. That the lease of LR No. 451/2055 IR33556 was done according to the 2nd defendant's Memorandum and Articles of Association and with the full knowledge of the applicant and that the proceeds of the lease were applied to pay debts owed by the 2nd defendant. That the applicant participated in a meeting where a resolution was passed to obtain the loan and that she signed the loan application forms. He further deposed that the issue of whether the parcels known as LR No. 451/2055 IR33556, LR 10453/1, Nakuru Municipality Block 5/194, Nakuru Municipality Block 5/56 and Nakuru Municipality Block 10/176 had been irregularly transferred from the deceased to the 2nd defendant is pending determination in the succession cause.

4. The applicant and the defendants also filed supplementary affidavits. I have taken note of the matters deposed in them.

5. The application was canvassed through written submissions. For the applicant, it is argued that the suit mainly concerns matters of occupation, use and title to land and that this court therefore has jurisdiction and that the applicant should be granted leave to bring a derivative action under Section 238 of the Companies Act. While acknowledging that jurisdiction is everything, it is argued that should the court however find that it lacks jurisdiction, it should transfer the suit to the High Court instead of dismissing it. The case of **Spinners & Spinners Limited v Spinners & Spinners Limited [2017] eKLR** is cited in support of that submission. It is further argued on behalf of the applicant that the court should grant a prohibitory order pursuant to section 68 (1) of the Land Registration Act to preserve the suit properties pending determination of this suit and that since the 1st defendant's action have amounted to breach of trust, he should be compelled to surrender the title documents in respect of the suit properties to the applicant for safe custody.

6. On the part of the defendants/respondents, it is argued that the applicant cannot bring a derivative action since she is the majority shareholder, that the matters complained of can be resolved through the company's internal processes, that an order of prohibition should not issue since an order of status quo has been issued in the succession cause and that the application is an abuse of the court's process.

7. I have carefully considered the application, the affidavits and the submissions. Two issues arise for determination: whether this court has jurisdiction and if so, whether the orders sought should issue.

8. As properly pointed out by counsel for the applicant, jurisdiction is everything and a court cannot make any further step without it. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**. As was reiterated by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**:

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. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...

9. This court's jurisdiction is provided for under **Article 162** of the **Constitution** as follows:

162. System of courts

(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) ...

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

10. So as to give effect to **Article 162 (3)**, parliament further legislated the court's jurisdiction under **Section 13** of the **Environment and Land Court Act, 2011** which provides as follows:

13. Jurisdiction of the Court

(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.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

11. Consequently, the court has jurisdiction in matters to do with the environment and the use and occupation of, and title to, land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under **Articles 42, 69 and 70** of the **Constitution**. The court also has wider jurisdiction when dealing with disputes involving environment and land, to resolve claims concerning breaches of other fundamental rights related to environment and land. See **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR**.

12. As noted earlier, the plaintiff and the first defendant in addition to being mother and son respectively, are the only directors and shareholders of the second defendant, a limited liability company. A perusal of the plaint herein shows that the plaintiff's case revolves exclusively around management and control of the 2nd defendant company. At paragraph 6 of the plaint it is pleaded that the plaintiff has 30 shares while the 1st defendant has 21 shares in the 2nd defendant company. It is pleaded at paragraph 7 that the 1st defendant has been performing most of the management roles in the company but was expected to act in accordance with the law and company's Memorandum and Articles of Association. Needless to state, the pivotal statutory provisions regarding management of companies are found in the **Companies Act, 2015 Section 2** of which provides:

The objects of this Act are to facilitate commerce, industry and other socio-economic activities by enabling one or more natural persons to incorporate as entities with perpetual succession, with or without limited liability, and to provide for the regulation of those entities in the public interest, and in particular in the interests of their members and creditors.

13. At paragraph 9 of the plaint, the 2nd defendant is accused of charging one of the properties owned by the company to Consolidated Bank of Kenya Limited thereby securing a loan of KShs 25,000,000 without a resolution of the company and without involving the plaintiff and without disclosing the purpose of the proceeds of the loan. Other accusations are that the 1st defendant sublet company property and constructed structures on the company property without consulting the plaintiff and without any company resolution to that effect. Further, the 1st defendant is accused of attempting to unilaterally increase his shares in the company with a view to getting full control thereof and acting fraudulently in a scheme to use land belonging to the company for his own benefit. Flowing from these averments, the plaintiff seeks judgment for the following:

a) A declaration that the 1st defendant had no legal authority to charge the suit land on behalf of the company, 2nd defendant herein

b) That the 2nd defendant be found personally liable for charge registered on the 18th of December 2018 and ordered to restore all that piece of land to its original position prior to the charge.

c) That all the transfers made in the year 2004 in LR. NO. 451/2055 IR 33556, Nakuru Municipality Block 5/194, Nakuru Municipality 5/56, Nakuru Municipality Block 10/176 from James Njenga Mathu to the company be cancelled and the title be returned to its original position before 2004.

d) That all the sublease agreements the 1st defendants (sic) has entered into without the company's resolution be declared null and void and lessees be evicted from all that piece of land

e) Any other relief that this honorable Court deems fit

f) Cost for the suit

14. Looking at the reliefs sought in the plaint, it is manifest that they all relate to the manner in which the affairs of the company were conducted. Even where they appear to refer to matters to do with the use, occupation and title to land, there is possibly no way of resolving the dispute without first determining whether the processes within the 2nd defendant that led to such use or occupation or title to the suit properties were lawful and valid. Pursuant to **Section 3 (1)** of the **Companies Act, 2015**, the court with the jurisdiction to deal with such matters is the High Court. This court does not have jurisdiction in such matters.

15. The applicant has urged that should this court find that it lacks jurisdiction, it should transfer the suit to the High Court instead of dismissing it. I am afraid I do not have any leeway in the matter. The Court of Appeal recently stated in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** as follows:

... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. ...

20. It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. ...

16. I do not see any route through which to salvage the plaintiff's claim so as to transfer it to the High Court. In the words of the Court of Appeal, it is dead on arrival and cannot be remedied. Although striking out is a draconian remedy that must be resorted to in the clearest of cases, I am of the considered view that it is the only option available to sanitize this situation. Perhaps the parties will seize the opportunity to properly plead their cases before the High Court. Once the matter is determined in the High Court parties can approach this court to resolve any aspect that falls within the jurisdiction of this court, if such aspect will not have been determined by the High Court.

17. Arising from the above outcome, I do not need to consider the second issue as to whether the orders sought in Notice of Motion dated 3rd November 2019 should issue.

18. In view of the foregoing discourse, I make the following orders:

i. This suit is hereby struck out.

ii. Considering that the plaintiff and the first defendant are mother and son and at the same time the only directors and shareholders of the second defendant, I order that each party bears own costs.

19. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th day of April 2020.

D. O. OHUNGO

JUDGE