



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 40 OF 2019

AGRICULTURAL DEVELOPMENT CORPORATION.....PLAINTIFF

VERSUS

MICHAEL WANGILA MAKAWA & 159 OTHERS.....DEFENDANTS

RULING ON THE DEFENDANTS' PRELIMINARY OBJECTION DATED 13/11/2019.

1. In this suit, the plaintiff brought an application dated 14/5/2019 under Section 63(c) Civil Procedure Act and Order 40 Rule 1 and 4, Order 1 Rule 8, Order 5 Rule 17 and Order 51 Rules 1 and 3 of the Civil Procedure Rules. It seeks the following orders:-

(1) ...spent

(2) ...spent

(3) ...spent

(4) spent

(5) ...spent

(6) That upon *inter partes* hearing, the injunction order be confirmed to such time when the pending suit would be heard and finally determined.

(7) That the OCS Endebess Police Station be directed to ensure the compliance of the injunction order.

(8) That the costs of this application be provided for.

2. The grounds upon which the application is made are that the applicant is the owner of the land comprised in LR Nos 4140/3, 6106/4/7136/5, 7155, 7156, 7156/7,7156/9-11, 7156/14-16, 9437 and 9439. These parcels combined form Japata Farm whose acreage is said to be 6302 acres. The applicant avers that the defendants have trespassed on the suit land yet they have no proprietary interest whatsoever in the same. The suit land is used for food crops, seed maize and seed grass, and livestock production. The occupation of the land under staff housing was restructured and more land was put under agricultural production. However the respondents petitioned the court alleging that their constitutional rights were being violated and subsequently withdrew the petition before hearing. The respondents are said to have subsequently interfered with the agricultural operations of the respondent on the suit land and have even uprooted the applicant's germinated maize plants on the farm.

3. The application is supported by an affidavit of the Regional Manager of the applicant, Dr. Maurice Cherogony, the dated 14/5/2019 which reiterates the above grounds.

4. In reply to the application the respondents filed an affidavit sworn on 13/11/2019 by Julius Simiyu Makokha, one of the defendants. that main grounds of opposition contained in that affidavit are that the land is registered in the name of a third party and the plaintiff has no locus in the suit; that the defendants are the descendants of colonial labourers who worked for a white man called Brooks Bank; that the defendants have been living and working on the suit land since the 1960s to date and it is their source of livelihood and they would suffer from lack of food if an injunction was issued against them; that there is clear demarcation between the land used by the plaintiff and the land used by the defendants; that the defendants do not reside on the land used by the plaintiff but merely live near it; that the plaintiff has recently commenced action aimed at evicting the defendants; that the defendants have not uprooted the plaintiff's crops;

5. Alongside that replying affidavit of the defendants was filed a notice of preliminary objection dated **13/11/2019** stating as follows:

a. That the plaintiff has no locus standi to bring the suit on behalf of its subsidiary company;

b. The plaintiff lacks an identifiable or justifiable or discernible interest in the suit land;

c. The suit offends the principles laid down in the case of Salomon Vs Salomon 1895-99 ALL E.R. 33.

6. The plaintiff filed its submissions on **14/11/2019** while the defendant filed theirs on **21/11/2019**. I have considered the application, response and the filed submissions.

7. This court will deal with the preliminary objection first as it would, if successful, be capable of disposing of the application, and possibly, the suit before it. The preliminary objection is simply put that the plaintiff has no *locus standi* to bring this suit since the land in question belongs to Lands Limited, its subsidiary which according to the rule in the celebrated case of Salomon Vs Salomon is a separate entity.

8. The defendants submitted that the titles exhibited by the plaintiff are evidence that the land belongs to the plaintiff's subsidiary company, which is separate and distinct for purposes of taxation, regulation and liability and which is capable of suing or being sued in its own name. It is urged that the property of a company is distinct from that of its shareholders who only have a right to the shares they own. Relying on *inter alia* the cases of **Omondi and another Vs National Bank Kenya Ltd and 2 Others (2001) KLR 579**, and **Edwin Makanyanga Mwangale Vs Moses Wafula Khaoya 2016 eKLR and Foss vs Harbottle 1843 67 ER 189** the defendants' counsel submits that the interest of the shareholder is said to be limited to the share he holds and the right to vote in a meeting called by the company and any dividends that may be declared and thus the plaintiff is not competent to bring the instant suit. It is also submitted that the plaintiff has not sought the court's leave to commence a derivative suit on behalf of Lands Limited.

9. The plaintiff in response to the preliminary objection stated that it is pleaded in the plaint that the plaintiff is a state corporation having power to sue and be sued and that it holds the lands through its subsidiary company, Lands Limited. It is submitted by counsel for the plaintiff that in certain instances the parent company and the subsidiary are viewed as one, and further that a subsidiary company acts as an agent to the parent company. The counsel for the plaintiff states further that the issue that arises is simply the joinder of parties in the suit, and no suit may be defeated by reason of misjoinder or non-joinder of parties as provided by **Order 1 Rule 9** of the **Civil Procedure Rules** and the present suit should not therefore be struck out as the court has power to order the joinder the correct party. Relying on the decision in **Nairobi HCCC 555 Of 2008- Medisel Kenya Ltd Vs Pharmacies And Poisons Board and another**, the plaintiff's counsel also adds that under **Order 1 Rule 10** the court can at any stage of the suit where it is satisfied that the suit has been instituted through a bona fide mistake and that it is necessary for the determination of the real matter in dispute to do so, order that any other person be substituted or added as plaintiff upon such terms as the court thinks fit. It is further submitted that such an order of joinder may be issued at any stage of the proceedings and without the application of any of the parties. It is therefore proposed that the above provisions may be invoked in this case. Further citing the decision in **Supreme Court Of Kenya Application No 4 Of 2018 Tullow Oil Plc & Others Vs PS Ministry Of Energy And Others**, the plaintiff's counsel submitted that a preliminary objection can not be raised if any fact has to be ascertained or if what is sought to be exercised is the exercise of judicial discretion such as that this court is vested with in respect of striking out for misjoinder as in this case. Further the plaintiff's counsel in his submissions distinguished the decision in the **Omondi case, (supra)** pointing out that compared to the present scenario where the parent company of a subsidiary has sued, the directors rather than the company in the **Omondi case (supra)** sued. It is also pointed out that in the **Edwin Makanyanga case, (supra)** an individual had sued yet the property belonged to a limited liability company.

10. Lastly the plaintiff's counsel has stated in his submissions that in order to avoid "unnecessary arguments" the plaintiff has filed an application seeking to substitute the plaintiff on record with Lands Limited, its subsidiary. I have sought that application in the court record without any success.

11. I note that the scenario in this case is a far cry from that in the **Omondi case** and the **Edwin Makanyanga case (supra)** in that there is admission by the defendants/objectors that a very close relationship of principal and subsidiary exists between the plaintiff and Lands Limited.

12. It is also the case that this court is empowered by the provisions of **Order 1 Rule 10(2)** to order the joinder of a party where it is satisfied that the suit has been instituted in the name of another party through a bona fide mistake and that it is necessary for the determination of the real matter in dispute to do so. The fact remains that objection has been raised to the capacity of the plaintiff to institute these proceedings where the property belongs to its subsidiary.

13. It is crystal clear that going by the provisions of **Order 1 Rule 9** of the **Civil Procedure Rules** that no suit shall be defeated by reason of misjoinder or non-joinder of parties. In the circumstances of this case therefore, striking out the suit would be a draconian course of action which this court will not take.

14. The preliminary objection is therefore upheld. However, instead of striking out the application or the entire suit, this court hereby orders that Lands Limited shall be enjoined as a co-plaintiff herein alongside the existing plaintiff and the plaint shall be appropriately amended to reflect that order.

15. The costs of the preliminary objection shall be in the cause.

Dated, signed and Delivered at Nairobi via electronic mail on this 29th day of May, 2020.

MWANGI NJOROGE

JUDGE