



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 532 OF 2018

ENERGOPROJEKT ENGINEERING AND

CONTRACTING COMPANY LIMITED.....PLAINTIFF

- VERSUS -

STEPHEN KAMUNGE ALIAS WAKANYONI.....1 ST DEFENDANT

ADEN ALIO IBRAHIM.....2 ND DEFENDANT

BERNARD MIGOSI.....3 RD DEFENDANT

WESLEY KIPROTICH.....4 TH DEFENDANT

SAVANA EXPORTERS LIMITED.....5 TH DEFENDANT

CHIEF LAND REGISTRAR.....6 TH DEFENDANT

THE DIRECTOR OF SURVEY OF KENYA.....7 TH DEFENDANT

RULING

1. On 7/12/2018, the Law Firm of Osero & Co Advocates brought this suit in the name of **Energoprojekt Engineering and Contracting Company Limited** (the plaintiff). The following orders were sought against the defendants:

i. General damages for trespass against the 1st, 2nd, 3rd, 4th and 5th defendants, jointly and severally.

ii. A permanent injunction against the 1st, 2nd, 3rd, 4th and 5th defendants, jointly and severally, the servants, employees, agents and/or any other person acting in their authority restraining and/or prohibiting them from trespassing, remaining in occupation, entering, alienating, dealing and/or in any manner whatsoever interfering with property Land Reference Number 209/14475 originally part of 209/10820/1.

iii. A permanent injunction against the 6th and 7th defendants, their servants and or agents under the doctrine of Lis pendens preserving the suit property and prohibiting any unlawful and/or fraudulent registration of transfers or any disposition of any kind with Land Reference Number 209/14475 originally 209/10820/1.

iv. An order of cancellation or revocation of any subsequent title document issued by the 6th defendant to the 1st, 2nd, 3rd, 4th and 5th defendants.

v. An order directing Land Registrar, 6th defendant to forthwith issue a duplicate certificate of title for Land Reference Number 209/14475 to the plaintiff subject to payment of the requisite administrative charges by the plaintiff

vi. The costs and interests of this suit.

2. It was contended that the named plaintiff was the registered proprietor of Land Reference Number 209/14475. It was further contended that the defendants had invaded the suit property by excavating it and were laying a foundation with the intention of erecting a building thereon, actions which were considered to constitute trespass. A notice of motion was simultaneously brought in the name of the said

plaintiff, seeking interlocutory restraining orders against the defendants.

3. Subsequent to that, the 1st to 5th defendants brought a notice of motion dated 11/6/2019 seeking an order striking out this suit together with the interlocutory application, on the ground that the entity known as **Energoprojekt Engineering and Contracting Company**, the plaintiff named in this suit, was a non-existent entity, had no legal connotation, and lacked capacity to sue. The said notice of motion by the 1st to the 5th defendants dated 11/6/2019 is the subject of this ruling.

4. The application was supported by an affidavit sworn by Aden Alio Ibrahim (2nd defendant) on 11/6/2019. The case of the applicants was that the entity known as **Energoprojekt Engineering and Contracting Company**, allegedly incorporated on 11/11/1972, was a non-existent entity incapable of owning land and lacking capacity to sue or be sued. The applicants contended that the company known as **Energoprojekt Engineering and Contracting Company** was struck off the register of companies and dissolved vide Gazette Notice Number 577 of 1977 pursuant to the provisions of Section 339(5) of the Companies Act, Cap 486 (now repealed). The applicants exhibited a copy of Gazette Notice Number 577 of 1977 bearing the said Gazette Notice at page 218 of the Gazette.

5. It was the applicants' case that the entity known as **Energoprojekt Engineering and Contracting Company** having been dissolved in 1977, it lacked capacity to sue or be sued, and therefore the suit herein was a non-starter and should be struck out in *limine*. The applicants further contended that the plaintiff lacked capacity to own land.

6. The plaintiff responded to the said application through a replying affidavit sworn on 18/10/2019 by Milisavljeria Milivoje Micha. In addition, the plaintiff filed written submissions dated 18/10/2019. The deponent deposed that he was the managing director of the plaintiff company whose parent company is **Radna Organizacija "Energoprojekt Izgradnja"**, based in Serbia. He deposed that the averments made by the plaintiff in its earlier pleadings and court papers to the effect that it was incorporated on 11/12/1972 were incorrect because the plaintiff company was incorporated on 16/4/1984. He added that the plaintiff was incorporated on 16/4/1984 under the name "**Radna Organizacija "Energoprojekt – Izgradina"**" which has the English translation of "**Engergoprojekt Engineering and Contracting Company**". He deposed that the Gazette Notice exhibited by the applicant as "AA3" bears a company with Registration Number 9015 which is unknown to the plaintiff company. He contended that the plaintiff was the registered proprietor of the suit property, LR No 209/14475, comprised in Title Number 96998. He exhibited a certificate of incorporation indicating that **Radna Organizacija "Energoprojekt – Izgradina"** was incorporated on 16/4/1984. He also exhibited a copy of Title Number IR 96996 bearing 8/2/2005 as its date of registration under the Registration of Titles Act. The plaintiff urged the court to dismiss the application

7. I have considered the application together with all the supporting materials. I have also considered the responses to the application. Similarly, I have considered the relevant legal framework and jurisprudence. The single issue falling for determination in his suit is whether the plaintiff in this suit, **Energoprojekt Engineering and Contracting Company Limited**, has capacity to initiate or maintain a suit against the defendants.

8. The plaintiff is described in paragraph 1 of the plaint as follows:

"The plaintiff is a limited liability company incorporated in the Republic of Kenya under the Companies Act, 2015. His (sic) address of service for purposes of this suit shall be c/o Osero & Company, Capital House, 2nd floor suite 22, Moi Avenue, P.O Box 990-00100 Nairobi."

9. Exhibit Number "AA3" attached to the supporting affidavit by Mr Ibrahim reveals that a company under the name **Energoprojekt Engineering and Contracting Company Limited** existed under the Companies Act but was struck off the Register of Companies on 24/2/1977 vide Gazette Notice No 577 of March 1977. Exhibit No "AA4" which is an official search from the Companies Registry reveals that a company with the same name as that of the plaintiff was incorporated on 12/10/2012.

10. Mr Micha who swore both the verifying affidavit which accompanied the plaint and the replying affidavit to the application under consideration expressly disowned the company registered on 12/10/2012 under the same name as the name of the plaintiff in this suit. His position is that the entity registered on 12/10/2012 is a fraudulent entity. He contends in the replying affidavit that the name **Energoprojekt Engineering and Contracting Company Limited** is the English translation of the name of the parent company to the plaintiff registered in Serbia under the name **Radna Organizacija "Energoprojekt-Izgradnja"**.

11. It is noted that, under paragraphs 12 and 13 of the earlier affidavit sworn by Mr Micha on 7/12/2018 in support of the application for injunctive orders dated 7/12/2018, the deponent had asserted that the plaintiff was incorporated on 11/12/1972 and it was discovered that a company with a similar name was fraudulently registered in 2012. He stated thus:

12. That I wish to state that Energoprojekt Engineering & Contracting Company Limited was incorporated on 11th December 1972 and that in the year 2012 the Registrar of Companies discovered that the company with a similar name as the plaintiff/applicant had been incorporated; in a letter dated 1st October 2013, the Office of the Registrar of Companies recognized this double registration and notified the promoters of the company that was registered in 2012 to change its name or face deregistration. (annexed herewith and marked as Exhibit "MMM10" is a copy of the said letter from the Registrar of Companies.

13. That since the year 2012 we have failed to trace the Energoprojekt Engineering and Contracting Company Limited (1972) file at the Company Registry and we believe this situation is a result of the fraud that lead to the double registration. (Annexed herewith and marked as Exhibit "MMM11" is a copy of the letter dated 2nd August 2012 requesting for a copy of the certificate of incorporation and the actual file)

12. Subsequently, Mr Micha made an about turn in his replying affidavit sworn on 18/10/2009. He disowned the company incorporated in 1972. He stated in paragraph 5 thus:

5. That I wish to state that after seeking the necessary clarification from the Registrar of Companies, I can now correctly state that the plaintiff Company was incorporated in Kenya on the 16th April 1984 under the name RADNA ORGANIZACIJA “ENERGOPROJEKT – IZGRADNJA” which as per the certified translation from Serbocroatian to English reads as ENERGOPROJEKT ENGINEERING and CONTRACTING COMPANY Reg. No. F21/84 (Annexed herewith and marked as exhibit “MMM1” and MMM2” is a copy of the certificate of incorporation and a copy of the certified translation of the company’s articles of association from Serbocroatian to English See article 4 on page 9 of the bundle. That the gazette notice exhibited by the applicant as AA3 indicates a company with Registration Number 9015 which is unknown to the plaintiff company.

13. What emerges from the materials presented by the plaintiff and the applicants is that: (i) the company which prior to 1977 existed under the name “Energoprojekt Engineering and Contracting Company Limited” was struck off the Register of Companies in 1977; (ii) this suit was not brought by the entity known as “Energoprojekt Engineering and Contracting Company Limited” on 12/10/2012; (iii) the entity presently before court as plaintiff is not incorporated under the laws of Kenya; (iv) the entity incorporated in Kenya on 16/4/1984 under Certificate Number No F.21/84 is Radna Organizacija “ Energoprojekt – Izgradnja”, not the plaintiff herein.

14. In my view, if Radna Organizacija “ Energoprojekt Izgradnja” had a legitimate claim over the suit property, it ought to have brought the claim in its name. Translation of the name of a foreign registered company into English does not confer on the company the legal capacity to sue in that translation. What confers the legal capacity to sue or be sued is the incorporation of the company under the Companies Act. There is evidence on record that **Radna Organizacija “Energoprojekt – Izgradnja”** was duly incorporated in Kenya as a foreign registered company in 1984. If it is still registered, that is the entity which should have brought this suit if it has a claim over the suit property.

15. Mr Micha having disowned both the entity registered on 12/10/2012 and the entity registered in 1972 but struck off the register in 1977; and there being no evidence of incorporation of the plaintiff herein, the court is in agreement with the 1st to 5th defendants that the plaintiff in this suit lacks the capacity to sue or maintain this suit. The net result is that the 1st to 5th defendants’ notice of motion dated 11/6/2019 is allowed in terms of prayers 3 and 4. The costs of the suit shall be borne by Milisavjevic Milivoje Micha who, from the documents before court, initiated and prosecuted the suit herein in the name of the on non-existent entity.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF MAY 2020

B M EBOSO

JUDGE

In the presence of:-

Court Clerk - June Nafula