



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 66 OF 2015 (O.S)**

**ABDALLA KIBUE & 906 OTHERS.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....1<sup>ST</sup> DEFENDANT**

**PRAM COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL**

**(sued on behalf of the LAND REGISTRAR MACHAKOS).....3<sup>RD</sup> DEFENDANT**

**PATRICK KAMANO KUNGU .....DERIVATIVE LITIGANT**

**AND**

**EVALYN MURGI RUFUS.....1<sup>ST</sup> RESPONDENT**

**WANGUI MUHIU MAINA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction:**

1. This Ruling is in respect to the Applications dated 26<sup>th</sup> January, 2018, 17<sup>th</sup> May, 2018 (*amended on 5<sup>th</sup> February, 2019*) and 30<sup>th</sup> November, 2018. In the Application dated 26<sup>th</sup> January, 2018, the Applicant, Patrick Kamano Kungu, is seeking for the following orders:

- a. That the Honourable Court be pleased to grant leave to the Applicant to be enjoined in this suit as a derivative litigant.*
- b. That pending the hearing and determination of this suit the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents themselves, agents, servants or otherwise howsoever be and are hereby restrained from acting upon the resolution made on the 27<sup>th</sup> day of January, 2018 by themselves in respect of the 2<sup>nd</sup> Defendant/1<sup>st</sup> Respondent purporting to enclose the consent proposal presented in this court.*
- c. That the Defendants by themselves, agents, employees or proxies be restrained by an order of injunction from conducting any affairs of PRAM Co. Ltd pending the hearing and determination of this suit.*
- d. That there be such other or further relief as the Honourable Court deems fair and just to grant in the circumstances of the court.*
- e. That the Respondents do pay the costs of this Motion.*

2. The Application is supported by the Affidavit of the Applicant who has deponed that he holds 128 shares in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' company; that his brother, the late Michael Kabathi Kungu, who also held shares in the 2<sup>nd</sup> Defendant's company, has not been replaced as a Director of the 2<sup>nd</sup> Defendant and that there is no court order transferring the shares of the late Murugi Rufus to his wife, Evalyne Murugi Rufus.

3. According to the Applicant, Mr. Wangui Muhiu Maina is a Director in the 2<sup>nd</sup> Defendant's company but without shares; that the two

persons currently masquerading as Directors have crossly mismanaged the company and that in the instant case, there is no resolution of the 2<sup>nd</sup> Defendant authorizing Wangui Muhiu Maina to sign documents on behalf of the company.

4. The Applicant finally deponed that the 2<sup>nd</sup> Defendant has not given any authority to the firm of Mahida & Maina to represent the 2<sup>nd</sup> Defendant; that the 2<sup>nd</sup> Defendant's shareholders have been kept in the dark about the company's finances and especially indebtedness to the 1<sup>st</sup> Defendant and that his interest as a minority shareholder have been violated.

5. In opposing the Application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents (*Evalyne Murugi Rufus and Wangui Muhiu Maina*) filed a Notice of Preliminary Objection dated 22<sup>nd</sup> February, 2018 and a Replying Affidavit. In the Notice of Preliminary Objection, the two Respondents averred that this court does not have the jurisdiction to determine the issues raised in the Application and that the Application should be dismissed in its entirety.

6. In his Replying Affidavit, the 2<sup>nd</sup> Respondent, who is also an Advocate of the court, deponed that he is a Director of the 2<sup>nd</sup> Defendant and an administrator of the Estate of Gichamba Maina alongside Nyawira Wangechi Maina; that the 1<sup>st</sup> Respondent, alongside himself, are the bona fide Directors of the 2<sup>nd</sup> Defendant and that the third Director of the company as at 5<sup>th</sup> December, 2016 was Michael Kibathi Kungu.

7. According to the 2<sup>nd</sup> Respondent, him, together with the 1<sup>st</sup> Respondent have acted within their mandate and in the best interests of the company and the shareholders; that he was duly authorized to sign documents on behalf of the company and that the firm of Mahida & Company advocates was appointed by the Directors of the 2<sup>nd</sup> Defendant, which appointment was ratified by the General meeting of the company held on 9<sup>th</sup> February, 2018.

8. The 2<sup>nd</sup> Respondent finally deponed that the Applicant has not demonstrated how his rights in the company have been violated; that the Application is wrongly before this court and that the court lacks jurisdiction to entertain the Application.

9. In the Notice of Motion dated 17<sup>th</sup> May, 2018, 288 Applicants are seeking for the following orders:

***a. That the Applicants herein whose names are set out in the annexed authority to appear, act and plead be enjoined as Plaintiffs in the suit herein.***

***b. That the costs of this Application be provided for.***

10. The Application is supported by the Affidavit of Mutua Muia who has been authorized by 288 Applicants to plead and swear the Affidavit on their behalf.

11. According to the Applicants, the Plaintiffs herein were expected to represent all persons who were in occupation of parcels of land known as L.R. No. 5938, 11610 and 10314; that a large number of persons who are in occupation of the suit land were left out of the suit and that the representatives of the Plaintiff have been engaging with the Defendants through their respective advocates.

12. The Applicants finally deponed that any resolution that may have been passed may bind other persons who are in occupation of the suit land and who have not been enjoined in the suit and that the 288 Applicants have been in occupation of the suit land for over twenty (20) years.

13. The Plaintiffs opposed the Application for joinder by way of Grounds of Opposition. In the said Grounds of Opposition, the Plaintiffs averred that the Application has been filed over three (3) years after the suit was filed; that the Application is intended to delay the finalization of the suit and that the parties have already reached a consent to settle the suit out of court.

14. The Application for joinder was also opposed by both the Applicants and the two Respondents in the Application dated 26<sup>th</sup> January, 2018. According to the Applicants in the "*derivative action*", the Applicants have not stated why it has taken them more than three (3) years to know the existence of the suit and that the Applicants have not stated how they occupied the unspecified parcel of land.

15. The Applicants in the Application dated 17<sup>th</sup> May, 2018 also filed the Notice of Motion dated 30<sup>th</sup> November, 2018 in which they sought for injunctive orders in the following terms:

***a. Pending the hearing of this Application the Honourable Court be pleased to issue a temporary injunction against the Defendants/Respondents their agents, servants and/or representatives from further subdivision, surveying, transferring assigning and/or in any manner whatsoever interfering with the possession of the Applicants of plot numbers L.R. No. 5938, 11610 and 10314 pending the hearing and determination of the suit herein.***

***b. The orders herein be enforced by the officer in-charge Masinga Police Station.***

***c. Costs be provided for.***

16. The said Application is premised on the grounds that there is an urgent need to preserve the *status quo*, to wit, to stop any further dealings on the land pending the hearing of the suit and that the Applicants will suffer irreparable damage if the orders of injunction are not granted.

17. The advocates for the parties filed their respective submissions which I have considered. I have also considered the authorities filed by advocates.

#### **Analysis and findings:**

18. In the Application dated 26<sup>th</sup> January, 2018, the “*derivative Applicant*” is seeking to be enjoined in the suit as a “*derivative litigant*”, and for the court to stop the 2<sup>nd</sup> Defendant from acting upon the resolution made on 27<sup>th</sup> January, 2018. The “*derivative litigant*” is also seeking for an order of injunction restraining the Respondents from conducting any affairs of the company pending the hearing and determination of the suit.

19. The Applications dated 17<sup>th</sup> May, 2018 and 30<sup>th</sup> November, 2018 were filed by 288 Applicants. In the said Applications, the Applicants are seeking to be enjoined in the suit and for an injunctive order respectively.

20. Before looking at the merits of the three Applications, a brief background of the matter will suffice. This suit was commenced by way of an Originating Summons by 906 Plaintiffs against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. In the said Originating Summons, the Plaintiffs sought for a declaratory order that they are entitled to land known as L.R No. 5938; L.R. No. 11610 and L.R. NO. 10314 by way of adverse possession. The 905 Plaintiffs gave to the 452<sup>nd</sup> Plaintiff the authority to plead, swear and act on their behalf.

21. The 1<sup>st</sup> Defendant’s Legal Officer filed a reply in opposition to the Originating Summons. According to the 1<sup>st</sup> Defendant, in order to secure repayment of the loans advanced by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant offered the title of the suit land as security and that the Plaintiffs have not acquired any legal, equitable or proprietary rights over the said parcels of land.

22. According to the 1<sup>st</sup> Defendant, there had been previous proceedings between the Plaintiffs, the Defendants and other 3<sup>rd</sup> parties over the same parcels of land which have either been determined or abandoned. The 1<sup>st</sup> Defendant’s Legal Officer listed three such matter in his Affidavit.

23. The record shows that the Plaintiff and the Defendants engaged in negotiations with a view of recording a consent. However, before the said consent could be recorded, the three Applications which are the subject of this Ruling were filed.

24. The Application by the “*derivative litigant*” is premised on the ground that he is a minority shareholder of the 2<sup>nd</sup> Defendant; that the current Directors are “*masquerading as Directors*” of the company after the demise of the real Directors and that the acts of the Respondents are detrimental to the well-being of the company.

25. In opposing the “*derivative litigants*” Application dated 26<sup>th</sup> January, 2018, the Respondents annexed on their Affidavit the list of the Directors of the 2<sup>nd</sup> Defendant as at 5<sup>th</sup> December, 2016. The said list is a reflection of the records at the company’s registry. The 2<sup>nd</sup> Defendant also produced in evidence the Minutes of the General Meeting of the 2<sup>nd</sup> Defendant which was held on 9<sup>th</sup> February, 2018. One of the resolutions of the said meeting was the replacement of the late Michael Kibathi with Michael Nyaga Kungu as a Director to represent the Kungu’s family.

26. The Minutes of the meeting of 9<sup>th</sup> February, 2018 also shows that the Director and the Shareholders of the 2<sup>nd</sup> Defendant agreed to appoint Messrs Mahida and Maina Company Advocates for the period from 2008 to date. The meeting further adopted the draft consent that was to be filed in this matter.

27. A “*derivative claim*” is defined by the Companies Act to mean “*proceedings by a member of a company in respect of a cause of action vested in the company; and seeking relief on behalf of company.*” (See Section 238 (2) of the Companies Act). Section 239(1) of the Companies Act provides as follows:

***“239(1). In order to continue a derivative claim under this part by a member, the member has to apply to the court for permission to continue it.”***

28. It is clear from the above provision of the law that an Applicant must first of all obtain the leave of the court before he can institute a claim as a member of a company in respect of a cause of action vested in the company. Having not obtained the leave as required by the law, the Applicant does not have the requisite *locus standi* to bring this Application.

29. In any event, the Companies Act, No. 17 of 2015 has defined a court to be the “*High Court*”. That being so, the court with the requisite jurisdiction to determine whether an individual or entity can commence a derivative action or not is the High Court and not this court.

30. To the extent that there is no evidence before me showing that the individuals who have signed and pleaded on behalf of the 2<sup>nd</sup> Defendant are not the Directors of the 2<sup>nd</sup> Defendant, and the Applicant having not filed a derivative action in the High Court, coupled with the absence of the leave of the court to commence such an action, I find the Application dated 26<sup>th</sup> January, 2018 to be contra-statute. The Application dated 26<sup>th</sup> January 2018 is therefore struck out with costs.

31. In the Notice of Motion dated 17<sup>th</sup> May, 2018 and amended on 5<sup>th</sup> February, 2019, the 288 Applicants are seeking to be enjoined in the suit.

32. As I have stated above, this suit was instituted in the year 2015 by more than 900 Plaintiffs. The Plaintiffs and the Defendants are at an

advanced stage of negotiations with a view of recording a settlement. The Applicants have not informed the court why they had to wait for more than four (4) years, and when the negotiations in respect to the suit property is at an advanced stage, to apply to be joined in the suit.

33. If indeed the Applicants are in possession of the suit land, they have not demonstrated how they will be prejudiced by the consent that the Plaintiffs are likely to enter into with the Defendants. Although Order 1 Rule 10(2) of the Civil Procedure Rules allows the court to order for the joinder of a party to the suit whose presence before the court is necessary, the Application for joinder may be refused if it will lead to practical problems of handling the existing cause of action or if it is unnecessary or will cause unnecessary delay or costs on the parties in the suit.

34. Having not explained why they had to take more than four (4) years to apply to be joined in the suit and considering the advanced stage of the negotiations between the Plaintiff and the Defendants, I find the Applicants' Application not to be meritorious. Indeed, if the Applicants' claim is that they are entitled to the suit land, they should file a suit independent of the Plaintiffs' claim. That is the only way the Plaintiffs will be able to reap the fruits of their negotiations and bring this old matter to an end.

35. For the reasons I have given above, I decline to allow the Applicants' Application dated 17<sup>th</sup> May, 2018 and amended on 5<sup>th</sup> February, 2019. Having declined to allow the Applicants in this suit, it follows that the Application dated 30<sup>th</sup> November, 2018 by the same Applicants for an injunctive order cannot issue.

36. The Applications dated 26<sup>th</sup> January, 2018, 5<sup>th</sup> February, 2019 and 30<sup>th</sup> November, 2018 are therefore dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF MAY, 2019.**

**O.A. ANGOTE**

**JUDGE**