

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. 036 OF 2023

PATRICK KIPKOECH BIEGON PLAINTIFF

VERSUS

KIMETRICA LLC 1ST DEFENDANT

AMERICAN INSTITUTE OF RESEARCH 2ND DEFENDANT

BENJAMIN PETER WATKINS 3RD DEFENDANT

ROBERT WILLIAM ROSE 4TH DEFENDANT

LAMECK ODALLO 5TH DEFENDANT

RULING

1. This Ruling relates to two Notices of Preliminary Objection. The 1st one dated 25th April 2023 was filed by the 1st and 2nd defendants. The said defendants' Preliminary Objection was filed on the grounds that–

(1) This Honourable Court has no jurisdiction to hear and determine a claim against the 1st and 2nd defendants herein as the alleged claim against them as per the plaint, is acquisition that took place between the 1st and 2nd defendants, both American companies and took place in the United States, outside the jurisdiction of this Honourable Court;

(2) Section 15(c) explanation (3) of the Civil Procedure Act, Cap 21 states as follows:-

In suits arising out of contract, the cause of action arises within the meaning of this Section at any of the following places, namely:-

- (i) The place where the contract was made;
 - (ii) The place where the contract was to be performed or the performance thereof completed;
 - (iii) The place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.
- (3) The acquisition referred to in the plaint at paragraph 9 took place between the 1st defendant and the 2nd defendant in the United States, was performed in the United States and any consideration payable was payable in the United States. Thus, this transaction is decidedly outside the geographical jurisdiction of this Honourable Court.
- (4) Owners of the Motor Vessel, Lillian S: v Caltex Oil (Kenya) Ltd [1989] KLR,
- “Jurisdiction is everything, without it, a Court has no power to make to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*
- (5) In addition, and without prejudice to the foregoing, the plaintiff lacks the requisite and mandatory *locus standi* to bring or maintain this suit as against the 1st and 2nd defendants. Order 1 Rule 1 of the Civil Procedure Rules, 2010, defines a plaintiff as a person in whom any right to relief in respect of an act or transactions allegedly exists.
- (6) The plaintiff is asking this Court to impose itself on the terms of the contract he has no privity to, between the 1st defendant

company and the 2nd defendant company. The plaintiff herein cannot, by any stretch of imagination, be a proper plaintiff with respect to the acquisition of the 1st defendant by the 2nd defendant.

- (7) By asking this Court to grant prayer (f) of the plaint, the plaintiff is demanding a share of the proceeds of a transaction to which he has no privity. In **Alfred Njau & others v City Council Nairobi** [1982-88] 1 KAR 229, the Court of Appeal gave meaning to the term *locus standi* by stating;-

“ .. to say he has no locus standi means he cannot be heard even on whether or not he has a case worth listening to”.

- (8) The Court in **Daudi Abdalla v Hakim Yusuf Mohamud & another** [2020] eKLR held that *locus standi* is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.

2. The 3rd and 4th defendants filed a Notice of Preliminary Objection dated 25th of January 2024, raising the following grounds-

- (1) The suit offends Section 239(1) of the Companies Act, No. 17 of 2015;
- (2) The suit offends Section 912 of the Companies Act, No. 17 of 2015.
- (3) The claimant lacks *locus standi* to file the present suit.
- (4) This suit offends Order 4 Rule 1(2) of the Civil Procedure Rules.
- (5) The suit is grossly incompetent and a blatant abuse of the process of Court.
- (6) The suit ought to be dismissed with costs.

3. I note that the plaintiff, Mr. Patrick Kipkoech Biegon, in his personal capacity before he engaged an Advocate to represent him, filed a response to the 1st and 2nd defendants' Notice of Preliminary. Other than written submissions, no other responses can be filed to a Preliminary Objection which is only supposed to raise issues of law. That being the case, the plaintiffs reply to the Preliminary Objection is hereby struck out and expunged from the record.
4. The firm of P.I. Onyango & Co. Advocates filed written submissions dated 28th August 2023 in support of the 1st and 2nd defendants' Preliminary Objection. On their part, the 3rd and 4th defendants filed written submissions dated 27th March 2024, to support their Preliminary Objection through the firm of Walker Kontos Advocates.
5. The plaintiff filed two sets of written submissions to oppose the Notice of Preliminary Objection dated 25th April 2023 and one set of submissions to oppose the Preliminary Objection dated 25th January 2024, and further submissions in response to the latter Preliminary Objection. The said submissions were filed by the law firm of Brian & Company Advocates.
6. In regard to the Notice of Preliminary Objection dated 25th April 2023, Ms Arek for the 1st & 2nd defendants submitted that in a dispute relating to a matter of contract, the requisite *locus standi* to bring a claim must necessarily spring from privity of contract, without which a party cannot claim on a contract. She stated that the plaintiff lacks the *locus standi* to bring the claim against the 1st & 2nd defendants. She relied on the case of **Agricultural Finance Corporation v Lengata Limited** [1985] eKLR, to support her assertion.
7. She cited the case of **Alfred Njau & others v City Council of Nairobi** (supra), a Court of Appeal decision, amplifying the meaning of *locus standi*. She also cited the case of **Julian Adoyo Onyango v Francis**

Kiberenge Abano, Migori Civil Appeal No. 119 of 2015, also on the issue of *locus standi*.

8. Ms Arek submitted that the plaintiff purports to benefit from a contract pertaining to the acquisition of the 1st defendant by the 2nd defendant, and contended that the plaintiff has audaciously made a claim for the profits from the sale of the company where he had no propriety interests. She stated that it was clear from the plaint that the plaintiff was a shareholder of Kimetrica Limited and not the 1st defendant company.
9. She further stated that the core objective of contractual privity is to protect contracting parties from third party interference. She submitted that the right to enforce a contract belongs to the contracting parties, which right forms the basis of a party's *locus standi* if a claim arises out of the said contract. She reiterated that the plaintiff herein has no right whatsoever to bring a contract that he is a stranger, to be enforced in his favour.
10. Ms Arek relied on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** [2013] eKLR, in submitting that it is a principle of law that where there is no *locus standi*, a Court lacks jurisdiction.
11. She submitted that *locus standi* and jurisdiction are intertwined, and where the former does not exist, the latter must fail. She relied on the case of the **Owners of the Motor Vessel "Lilian S" v Caltex Oil Kenya Limited** (supra), to urge this Court to down its tools.
12. The 3rd & 4th defendants' learned Counsel Mr. Wafula, stated that the plaintiff instituted this suit vide his plaint dated 29th March 2023, which was not accompanied by a verifying affidavit as required under Order 4 Rule 1(2) of the Civil Procedure Rules, 2010. He contended that even after being served with the 3rd & 4th defendants' statement of defence and

Preliminary Objection, the plaintiff has not applied to regularize the fatal defect with his plaint to date.

13. Mr. Wafula submitted that non-compliance with the provisions of Order 4 Rule 1 of the Civil procedure Rules, 2010, is fatal and renders the suit filed improper and liable to being struck out with costs. He referred to the provisions of Order 4 Rule 1(6) of the said Rules as being instructive in this regard. He cited the case of **Galerius Investments Limited v Country Government of Mombasa & another** [2020] eKLR and the case of **Mugu & another v Njoroge; Kasarani Re-settlement Project (interested party) Environment & Land case 132 of 2017** [2023] KEELC 21222 (KLR).
14. The Counsel for the 3rd & 4th defendants further submitted that the plaint as filed without a verifying affidavit is fatal and ought to be struck out with costs, more so, since it has been more than a year since the plaintiff filed this case, and since he was notified of the defects in the plaint vide the defence filed by the 3rd and 4th defendants herein, the plaintiff had not taken any steps to regularize the defect in his plaint. They urged this Court to strike out the plaint and if not, to award them throwaway costs of Kshs.100,000/= as in the case of **Kenya Alliance Insurance Co. Limited v Eunice Nyaboke Nyambari & NIC Bank Limited** [2021] eKLR.
15. On the issue of whether the plaintiff has the *locus standi* to institute a derivative claim as a shareholder of Kimetrica Limited, a company that was struck off the Register of Companies on or about March 2021, under Section 897 of the Companies Act, No.17 of 2015; Mr. Wafula stated that a company ceases to exist as a legal entity upon being de-registered and/or dissolved as was held in the case of **Cannon Assurance (Kenya) Ltd v Mohansons Food Distributors Ltd** [2016] eKLR.

16. He submitted that the plaintiff is not a member of Kimetrica Limited which was formed and registered under the repealed Companies Act and ceased to exist once it was struck off the Register. Counsel cited the Court of Appeal case of **Alfred Njau vs City Council of Nairobi** (supra), where the term *locus standi* was defined. He also cited the case of **Julian Adoyo Ongunga Kiberenge Bondeva (suing as the Administrator of the Estate of Fanuel Evans Amudavi (deceased))** [2016] eKLR, on the issue of *locus standi*. He emphasized that if a party is found to have no *locus standi*, he cannot be heard even if he has a meritorious case.
17. Mr. Wafula contended that this suit offends Section 239(1) of the Companies Act for having been filed without seeking leave of the Court to commence it, in the event that this Court finds that the plaintiff is a member of Kimetrica Limited. Counsel cited the case of **Harjinder Singh Rihal v Jaswinder Singh Rihal** [2020] eKLR, to show that leave is obtained before the filing of a derivative suit so as to enable the Court at the preliminary stage, to screen the case and satisfy itself that there is a *prima facie* and meritorious case worthy of its leave/permission before the case can be filed. He also relied on the case of **Nilkunj Ratilal Dodhia v Shashikant Mepa Shah & 5 others** [2018] eKLR.
18. Counsel stated that without leave of the Court having been sought, the plaintiff's suit should not be heard, as lack of leave is fatal and the suit should be struck out with costs.
19. The 3rd & 4th defendants' Counsel submitted that the suit offends Section 912 of the Companies Act, as in one of the prayers in the plaint, the plaintiff seeks to have Kimetrica Limited restored to the Register of Companies.

20. Counsel stated that to restore a company to the Register of Companies, an application ought to be made to the Registrar of Companies pursuant to Section 912 of the Companies Act, but the plaintiff has instead instituted this suit seeking to have Kimetrica Limited restored to the Register of Companies. Counsel prayed for the plaintiff's suit to be dismissed.
21. The plaintiff filed separate sets of written submissions in opposition to the Notices of Preliminary Objection dated 25th April 2023 and the one dated 25th January 2024.
22. In the 1st set of written submissions filed by the plaintiff, Mr. Langat, learned Counsel for the plaintiff submitted that the plaintiff instituted this suit vide a plaint dated 29th March 2023 in person, as against the defendants seeking a raft of remedies pursuant to what he claims to have been an irregular winding up and fraudulent transfer of assets of a company known as Kimetrica Limited, to which he was a minority shareholder.
23. The plaintiff's Counsel stated that the plaintiff's suit though not expertly articulated in the plaint, centres around the folding up of a company named Kimetrica Limited and transfer of all its assets to its subsidiary named Kimetrica LLC without the knowledge and participation of the plaintiff as its shareholder.
24. Mr. Langat stated that as a result, the plaintiff was divested of all his investment in Kimetrica Limited. He stated that all the staff at Kimetrica LLC are the same Directors and staff at the wound up Kimetrica Limited.
25. He contended that the transfer of assets of Kimetrica Limited, to Kimetrica LLC whether fraudulent or otherwise, means that Kimetrica LLC was holding these assets in trust for the shareholders of Kimetrica Limited, meaning that Kimetrica LLC was a trustee of the plaintiff.

Counsel further contended that the plaintiff is a beneficiary of the transaction between the 1st and 2nd defendants, in order for the 2nd defendant to take over the 1st defendant.

26. Mr. Langat submitted that the plaintiff has the *locus standi* to claim his share of the proceeds from the said transaction. He relied on the case of **Juletabi African Adventure Limited & another v Christopher Michael Lockley** [2017] eKLR, to support the assertion that the plaintiff had the requisite *locus standi* to file the instant suit on his own behalf.
27. In reference to the 1st & 2nd defendants' submissions on lack of privity of contract with the plaintiff, Mr. Langat submitted that the exception to the general rule of privity of contract is when it confers benefit to a third party.
28. He reiterated that the plaintiff's claim is based on fraud, in that he worked hard to found a company that acquired assets, which were fraudulently transferred to a subsidiary in an attempt to divest him of his shareholding and his company was irregularly wound up.
29. Mr. Langat stated that the plaintiff may not be privy to the subsequent contract for transfer of those assets, but he is by law a beneficiary of the transaction based on the doctrine of constructive trust. He relied on the case of **Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others** (Petition 18 E020 of 2022) [2023] KESC 106 (KLR), where the Court held that a constructive trust automatically arises where a person who is already a trustee takes advantage of his position for his own benefit.
30. On the issue of whether this Court has the jurisdiction to hear the suit filed by the plaintiff, Mr. Langat submitted that despite the 1st and 2nd defendants not being Kenyan companies and the transaction having

occurred outside the territorial jurisdiction of this Court, it is the duty of this Court to protect the rights of Kenyans even against foreign entities. He cited the provisions of Order 5 Rule 2(e), (f) and (h) of the Civil Procedure Rules, 2010, to illustrate to whom service of Summons outside Kenya, may be allowed.

31. Mr. Langat stated that none of the defendants is challenging service of Summons, as they were all served and they entered appearance, and the need to apply for leave to serve Summons outside this Court's jurisdiction is therefore superfluous at this point. He relied on the case of **Motaung v Sama Source Kenya EPZ Limited t/a Sama & 2 others** (Petition E071 of 2022) [2023] KEELRC 320 KLR, on service of Summons outside jurisdiction.
32. Counsel submitted that the plaintiff's claim stems from the irregular winding up and fraudulent transfer of assets of Kimetrica Limited, a company incorporated in Kenya that and the claim the plaintiff seeks to enforce occurred in Kenya, and that all the defendants are necessary parties to answer to the plaintiff's claim. He stated that the 3rd and 4th defendants were Directors of the wound up Kimetrica Limited and they are the current Directors of the 1st defendant, and that the 2nd defendant bought assets of Kimetrica Limited which were fraudulently transferred to the 1st defendant. He also stated that the 1st and 2nd defendants through foreign entities, carry on business in Kenya and have Kenyan employees such as the 5th defendant. Counsel submitted that all those factors militate in favour of this Court assuming jurisdiction over the 1st and 2nd defendants, though foreign entities.
33. In opposition to the Notice of Preliminary Objection dated 25th January 2024, the plaintiff filed written submissions dated 21st May 2024. Mr. Langat submitted that the plaintiff did not institute this suit on behalf of

Kimetrica Limited but on his own behalf, based on what he believes to have been an elaborate fraudulent scheme to divest him of his investment in Kimetrica Limited and as such, the exceptions to the rule in **Foss v Harbottle** do not apply to this case.

34. He asserted that the plaintiff did not need seek leave to institute this suit under Section 239(1) of the Companies Act, 2015, even if it was necessary to institute this claim as a derivative suit. He submitted that Section 240 of the said Companies Act empowers the Court to hear an application by a plaintiff to continue a pending claim as a derivative suit, and such an application may be brought at any stage of the proceedings. He expressed the view that it would be draconian and unjust to dismiss the plaintiff's suit at this stage.
35. Mr. Langat agreed that under Section 912 of the Companies Act, 2015, the Registrar of Companies is empowered to administratively consider an application to restore a company that has been dissolved or struck off the Register of Companies, but similarly, the Companies Act, 2015, empowers the Court to entertain a similar application. Counsel stated that the plaintiff being a shareholder of Kimetrica Limited is entitled to apply to this Court for its restoration to the Register of Companies under Section 912 of the Companies Act, 2015.
36. In regard to compliance with the provisions of Order 4 Rule 1(2) of the Civil Procedure Rules, 2010, Mr. Langat admitted that the plaintiff's verifying affidavit sworn on 29th March 2023, does not contain an averment that there is no other suit pending and that there has been no other suit between the same parties over the same subject matter. He stated that the said shortcoming is curable under Article 159(2)(d) of the Constitution of Kenya. He relied on the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another** [1980] eKLR.

37. He proposed that the plaintiff may be granted an opportunity to amend his pleadings so as to align them with the requirements of procedure.
38. In his further submissions in response to the Preliminary Objection dated 25th January 2024, the plaintiff reiterated his earlier submissions which I will not replicate as it will add no value. The only new issue brought up is that throwaway costs should not be awarded to the 3rd & 4th defendants. Mr. Langat contended that the authority relied on by the said parties in support of their prayer for the said costs is not relevant, as such costs are awarded where proceedings are set aside or rescheduled. He cited the case of the **County Government of Tana River & another v Hussein Fumo Hiribae** [2021] eKLR, and stated that no proceedings have taken place that require to be rescheduled and the prayer for throwaway costs is unwarranted. He prayed for the Notices of Preliminary Objection to be dismissed.

ANALYSIS AND DETERMINATION.

39. I have considered the two Notices of Preliminary Objection and the submissions filed in support of, and in opposition to the same. The issue for determination is if the said Notices of Preliminary Objection should be sustained.
40. From the outset, I must comment about the manner in which the 1st and 2nd defendants' Notice of Preliminary Objection was drafted. It leans more towards being written submissions than a Notice of Preliminary Objection. While a Preliminary Objection is meant to be brief, crisp and precise, the one filed by the 1st and 2nd defendants is too detailed and goes to the extent of citing authorities, which should have been limited to written submissions.

41. The starting point in determining this matter is by making reference to the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited** [1969] EA 696, where a Preliminary Objection was defined by the Court of Appeal as follows-

So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of Court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

In the said case, Sir Charles Newbold P, stated thus -

... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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 points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse issues. This improper practice should stop.”

42. On the same issue of what constitutes a valid Preliminary Objection, the Supreme Court in the case of **Aviation and Allied Workers Union Kenya v Kenya Airways Limited & 3 others** [2015] KESC 23 (KLR) stated as follows-

... thus, a Preliminary Objection may only be raised on a

“ pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

43. The 1st, 2nd, 3rd and 4th defendants have challenged this Court’s jurisdiction to hear this case on various grounds and have also challenged the plaintiff’s *locus standi* to file the suit against them.
44. The 1st to 4th grounds of the 1st and 2nd defendants’ Preliminary Objection must fail because from the plaint filed by the plaintiff, he avers in paragraph 2 that the 1st and 2nd defendants are foreign limited liability companies incorporated under the Laws of Kenya with the principal place of business in Westland Post Office Box Number 1327-00621 Nairobi, Kenya.
45. A further reading of paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18 and 19 of the plaint reveals that grounds 1 to 4 of the Preliminary Objection raised by the 1st and 2nd defendants, when considered alongside the averments in the above paragraphs of the plaint, raise issues of facts which can only be determined by calling evidence.
46. The issue of the 1st and the 2nd defendants being companies registered in the USA cannot be looked into singly since the plaintiff avers that the said companies have been conducting some business transactions in Kenya, and that Kimetrica LLC is in breach of trust and the duty of Directors to act in the best interest of Kimetrica Limited.
47. The issue of the assets of Kimetrica Limited having been fraudulently transferred without the knowledge of the plaintiff as well as the issues of unfair prejudice and oppressive conduct, all will need to go to trial on their merits and since some of the actions complained of occurred in Kenya, this Court has the requisite jurisdiction to try the suit against the 1st and 2nd defendants.

48. Grounds 5, 6, 7 and 8 of the Preliminary Objection raise the issue of the plaintiff having no *locus standi* to sue the 1st and 2nd defendants. It must be noted that the plaintiff's bone of contention is that he co-founded Kimetrica Limited together with the 3rd and 4th defendants. He alleges that the two surreptitiously wound up the company and fraudulently transferred the assets of the said company to Kimetrica LLC (1st defendant). He avers that although the 1st & 2nd defendants are registered in the USA, they opened offices in Nairobi. The plaintiff claims not to have benefitted at all from the disposal of the assets of Kimetrica Limited to Kimetrica LLC.
49. The plaintiff avers that he was a shareholder of Kimetrica Limited and having had its assets transferred fraudulently to Kimetrica LLC, it is my finding that he has the *locus standi* to sue the companies and the persons who allegedly benefited from the purchase of the assets of Kimetrica Limited, where he claims to have been a shareholder.
50. Having so found, I hold that the 1st and 2nd defendants' Notice of Preliminary Objection has no merits. It is hereby dismissed with costs to the plaintiff.
51. The 3rd and 4th defendants also challenge the suit against them on the ground of the plaintiff having no *locus standi* to file the instant suit.
52. They also contest the said suit on the ground that the plaintiff did not seek leave of the Court to file a derivative suit against them, thereby offending the provisions of Section 239(1) of Companies Act, No. 17 of 2015.
53. The plaintiff in his written submissions was however categorical that his claim against the 3rd & 4th defendants is not a derivative claim.
54. Having perused paragraph 13 of the plaint, it is clear to me that the plaintiff's suit is not a derivative claim. In the said paragraph he accuses

the defendants of breaching Section 955(4) of the Companies Act, 2015 by re-registering a defunct corporation with a similar name for the purpose of misleading creditors and members. He avers that their illegal action has oppressed and unfairly prejudiced the plaintiff's minority interests.

55. In paragraph 19, the plaintiff avers that in summary, the 3rd and 4th defendants engaged in illegal conduct by re-registering a company under a similar name, using a subsidiary to sell off company assets and denying minority shareholders their rightful share of profits, which constitutes oppression and/or unfair prejudice under the Companies Act and a breach of the 3rd & 4th defendants' fiduciary duties as Directors.
56. Further, it must be noted that if the plaintiff intended to file a derivative suit as a minority shareholder, he could only have done it by having Kimetrica Limited where he alleges to have been a minority shareholder, joined as a plaintiff in this suit. He could have done that by having the plaintiff restored to the Register of companies first, before filing suit. It is however clear from the plaint and his submissions that a derivative suit is not his cause of action. Since the issue of the claim herein not being a derivative suit can be made out from the plaint, the 3rd & 4th defendants' 1st ground of Preliminary Objection is found to be without merits.
57. The said defendants also challenge the suit under Section 912 of the Companies Act, No. 17 of 2015 on the basis that an application to restore Kimetrica Limited to the Register of Companies should be brought under Section 912 of the Companies Act, by making an application to the Registrar of Companies.
58. The plaintiff is however correct in stating that restoration of a company to the Register of Companies can also be made to the Court under Section

916 of the Companies Act, 2015. Sub-section 2 thereof lists down the parties who can file such an application.

59. The plaintiff herein asserts that he has made the said prayer in his plaint, under Section 916(2)(f) of the Companies Act, 2015, having been a former member of Kimetrica Limited. Going back to the plaint in this case, the plaintiff's prayer under paragraph (d) is for an order directing the Registrar of Companies to restore Kimetrica Limited to the Register of Companies, and award full shareholding to the plaintiff, pursuant to Section 351 of the Companies Act, 2015.
60. Since this Court also has the powers to restore a company that has been struck out of the Register of Companies to the said Register, the 3rd and 4th defendants' Preliminary Objection on ground No. 2 must fail.
61. Having addressed the issue of whether the suit filed by the plaintiff is a derivative claim or not in the Preliminary Objection raised by the 1st and 2nd defendants and having found that it has no merits, the 3rd and 4th defendants' 3rd ground of Preliminary Objection must similarly fail.
62. The last ground raised in the 3rd and 4th defendants' Preliminary Objection is that the plaintiff's suit offends Order 4 Rule 1(2) of the Civil Procedure Rules, 2010, by the plaint not having been accompanied by a verifying affidavit.
63. The above contention can however not be correct because in the pleadings filed by the plaintiff in the Civil Division, which documents were transferred to the Commercial & Tax Division when the suit was transferred to this Division, there is a verifying affidavit sworn by the plaintiff on 29th March 2023, which means that the plaintiff filed a verifying affidavit. The only shortcoming in the said verifying affidavit is that the plaintiff did not specifically aver to there being no other suit

pending, and that there have been no previous proceedings in any Court between him and the defendants over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.

64. In the suit filed by the plaintiff, what is apparent is the non-conformity of the verifying affidavit to the provisions of Order 4 Rule 1(f) of the Civil Procedure Rules, 2010. The Court of Appeal in the case of **Luke Cheruiyot and 37 others v National Oil Corporation** Nrb CA Civil Appeal No. 91 of 2009 [2015] KECA 572 (KCR), considered the import of failure to file a verifying affidavit and took the view that such failure was not fatal and where none has been filed, the Court may give the party an opportunity to file one. The Court further held that the power to strike out a suit is only permissive and not mandatory. The said Court stated thus-

As recently as 11th July 2014 the position taken by the Court in Research International East Africa Ltd v Julius Arisi & 213 others (supra), was reiterated in the case of Kenya Oil Company Limited v Javantilal Dharamshi Gosrami (Nairobi Civil Appeal No. 324 of 2005) UR. There we said-

“The provisions of Rule 1(6) of Order 4 formerly Rule 1(3) of Order VII, gives the Court the powers to strike out a plaint which is not accompanied by a verifying affidavit containing the stipulated particulars. The power to strike out that plaint or (counterclaim) under the Rule is not mandatory but permissive. The phrase “the Court may...” in Order 1 Rule 3 and in the new Order 1 (6) gives the Court discretion whether or not to strike out a plaint as the Court held in the Arisi case (supra). In the end the Court dismissed the appeal which was against an Order of the

High Court refusing an application to strike out the plaint and instead giving leave to the respondent to file a compliant verifying affidavit.

In dismissing the appeal, the Court reiterated the principle stated in D.T. Dobie & Company (K) Ltd v Muchina [1982] KLR 1 that discretion of the Court to strike out pleadings for various reasons such as failure to disclose a reasonable cause of action should be used very sparingly and that a plaintiff should not be driven from the judgment seat unless the case is hopeless.”

65. Being bound by the above decision, I decline to strike out the suit against the 3rd and 4th defendants for the reason that the plaintiff’s verifying affidavit is not fatally defective to lead to such a drastic action. Instead, I grant the plaintiff 14 days to bring his verifying affidavit in conformity with the provisions of Order 4 Rule 1(f) of the Civil Procedure Rules, 2010, by filing a supplementary verifying affidavit.
66. Further, in order to bring a close to the pleadings, I grant the plaintiff leave to amend his plaint within 30 days and file supplementary witness statements and compliance documents. The defendants will within 30 days of service file and serve amended statements of defence and compliance documents, if need be. The plaintiff will within 14 days of service file a reply to the amended statements of defence, if need be.
67. In the end, I hold that the plaintiff’s case should be heard on its merits. The two Notices of Preliminary Objection are dismissed with costs to the plaintiff.

It is so ordered

DATED, SIGNED and DELIVERED at NAIROBI on this 23rd day of January 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Langat for the plaintiff

Mr Osodo h/b for Mr. Onyango for the 1st, 2nd & 5th defendants

Ms Wangari Chege h/b for Mr. Ogunde for the 3rd and 4th defendants

Ms B. Wokabi - Court Assistant.