



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 204 OF 2017

JOEL O. ONCHIRI & 38 OTHERS.....PLAINTIFFS

VERSUS

NGENDA LOCATION RANCHING CO. LTD.....1ST DEEFENDANT

STIMA INVESTMENT COOPERATIVE SOCIETY LTD....2ND DEEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 25th September 2018 and Preliminary Objection dated 25th September 2018, both filed by 2nd defendant. Both were heard together through written submissions.

2. The objection is on the following grounds:

- 1. That this court lacks jurisdiction by dint of Section 3 of the Companies Act No. 17 of 2015 as the dispute herein is a dispute between a company and its members.*
- 2. That the Companies Act, No. 17 of 2015 and the Articles of Association of the 1st defendant company ousts the jurisdiction of this court and/or the High Court to issue prayers as sought for in the plaint.*
- 3. That the plaintiffs herein lack the requisite locus standi to institute the suit as they have not sought leave to bring the suit as a derivative action under the provisions of Section 238 and 239 of the Companies Act, Act No. 17 of 2015.*

3. On the other hand, the following orders are sought in the Notice of Motion:

- 1. That the suit as against the 2nd defendant be struck out for being frivolous, vexatious and an abuse of the court process.*
- 2. That in the alternative to prayer 1 above, this honorable court be pleased to order the 2nd defendant/applicant be struck out from the suit and/or proceedings herein.*
- 3. That costs of this application and the suit be provided for by the respondents.*

4. The application is supported by an affidavit sworn by Viola Odhiambo, a Legal Officer in the 2nd defendant/applicant. She deposed that the amended plaint herein does not make any claim against the 2nd defendant and only mentions it in the descriptive paragraph. That the foregoing notwithstanding, the plaintiffs have prayed for nullification of a sale agreement between the 1st defendant and the 2nd defendant. She added that the 2nd defendant entered into the sale agreement dated 2nd October 2014 for purchase of L.R. No. 9264 from the 1st defendant. That the sale agreement was validly executed by the 1st defendant and that the land was transferred to the 2nd defendant which in turn subdivided it and disposed the new subdivisions to its members and to 3rd parties. Consequently, joinder of the 2nd defendant to this suit is vexatious as there is no cause of action against it.

5. The plaintiffs responded to the application through a replying affidavit sworn by Abraham Njihia Mwangi, the 36th plaintiff. He deposed that the sale agreement was without the plaintiffs' consent and that the plaintiffs will seek to further amend the plaint to seek nullification of the sale for want of their consent.

6. The court ordered that the preliminary objection and the application be canvassed through written submissions. The 2nd defendant filed submissions while the plaintiffs did not file any, opting to instead rely entirely on the replying affidavit. The 1st defendant neither filed a response nor submissions, instead taking the position that the issues raised are between the plaintiffs and the 2nd defendant.

7. The 2nd defendant argued that the suit herein is purely a dispute between a company and its members and that consequently, this court has no jurisdiction since **section 3** of the **Companies Act, 2015** defines court as the High Court unless some other court is specified. It further argued that it entered into a valid sale agreement and was not obligated to enquire into the internal workings of the 1st defendant and that since no allegations have been made against it in the suit, the suit is frivolous and vexatious. It cited *inter alia* the cases of **Republic v Resident Magistrate's Court at Kiambu Ex parte Geoffrey Kariuki Njuguna & 19 others** [2017] eKLR and **Law Society of Kenya v Martin Day & 3 others** [2015] eKLR.

8. I will consider the preliminary objection first since it raises jurisdictional issues. If it is upheld, there will be no need to consider the application.

9. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** (1969) EA 696, the *locus classicus* on preliminary objections in this region, Law JA stated:

So far as I'm 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 the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

10. Sir Charles Newbold, P. added as follows:

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 the 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.

11. So as to better appreciate the objection, it is necessary to summarise the plaintiffs' claim as disclosed in the amended plaint filed on 26th June 2018. They aver that they are members of the 1st defendant, a company that was formed to buy land for its members and that the 1st defendant is the registered proprietor of land known as LR No. 11764 (originally number 9397/1, 0398/2 4767), I.R. No. 9264 (originally number 8943/5 and 469/12) and L.R No. 6290. They add that the 1st defendant sold the suit property to the 2nd defendant without their consent as shareholders. The reliefs sought in the plaint include a permanent injunction restraining the "defendant" from disposing of land belonging to shareholders without their consent, an order directing the "defendant" to settle all landless shareholders according to their shares and an order annulling the sale of the suit property to the 2nd defendant. It is clear to me that the suit has two aspects: a claim against a company by its members and a claim concerning validity of a contract for sale of land.

12. There is no dispute that **section 3** of the **Companies Act, 2015** defines "the court" as the High Court unless some other court is specified. The dispute between the 1st defendant company and its members would ordinarily be for determination by the High Court. Nevertheless, in the same suit there is the other dispute concerning validity of a contract for sale of land. It must also be remembered that the 1st defendant is a land buying company: a company formed principally to acquire land and transfer it to its members.

13. This court's jurisdiction is provided for under **Article 162** of the **Constitution of Kenya, 2010** as read with **section 13** of the **Environment and Land Court Act, 2011**. **Article 162** provides 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) employment and labour relations; and

(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). [Emphasis supplied]

14. **Section 13** of the **Environment and Land Court Act, 2011** 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. [Emphasis supplied]

15. In view of the foregoing provisions of **Article 162** of the **Constitution of Kenya, 2010** as read with **section 13** of the **Environment and Land Court Act, 2011**, the aspects of this suit that concern validity of the contract for sale of land are matters that fall principally within this court's jurisdiction. As previously noted, the 1st defendant is a company formed principally to acquire land and to transfer it to its members. The entire dispute, though raising cross cutting issues, ultimately boils down to ownership of land. I would therefore resolve the issue by utilizing the predominant purpose test. The purpose of the suit is predominantly to resolve a dispute on ownership of land.

16. In **Suzanne Butler & 4 Others v Redhill Investments & Another [2017] eKLR** the court stated as follows:

When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.

17. In view of the foregoing, I find that this court has jurisdiction in the matter. The preliminary objection is thus dismissed with costs to the plaintiffs.

18. I will now consider the application. It is brought under **Order 1 Rules 10 (2)** and **14** and **Order 2 Rule 15 (1) (b) (c) and (d)** of the **Civil Procedure Rules, 2010**. **Order 1 Rules 10 (2)** provides:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

19. On the other hand, **Order 2 Rule 15 (1) (b) (c) and (d)** provides:

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

20. The 2nd defendant seeks striking out of the suit against it. I remind myself that the remedy sought is a draconian one that must be applied very sparingly. The Court of Appeal restated this in **Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR** as follows:

It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must

balance these two rival considerations.

21. The principles applicable when considering such an application, in addition to the above general caution, are that striking out may only be resorted to in plain cases and that a court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.

22. The 2nd defendant has argued that suit against it is frivolous and vexatious since no allegations have been made against it in the amended plaint and further since according to it, it entered into a valid sale agreement. The concept of frivolous and vexatious was defined by Ringera, J (as he then was) in ***Mpaka Road Development Ltd. v Kana [2004]1EA 161*** as follows:

... And I would say a pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously, it would annoy or tend to annoy if it was not serious or it contained scandalous matter which was irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is ipso facto vexatious.

23. The claim against the 2nd defendant herein is that the 1st defendant sold the suit property to the 2nd defendant without the consent of the plaintiffs as shareholders. The plaintiffs therefore seek judgment for among others an order annulling the sale of the suit property to the 2nd defendant. The plaintiffs have identified the cause of action against the defendants and the relief they seek. The 2nd defendant admits that there was indeed a sale but takes the position that the sale was validly entered into. Whether or not the claim may succeed at trial is not for me to determine at this point. Suffice it to state that there is a claim. This is certainly not a plain and obvious case since a semblance of a cause of action is disclosed. Any shortcomings in the claim are curable by amendment. The arguments raised by the 2nd defendant in support of the striking out sounded more like a premature consideration of the merits of the plaintiffs' case. That must await trial. I am not persuaded that the plaintiffs' claim is frivolous or vexatious.

24. In view of the foregoing discourse, I find no merit in Notice of Motion dated 25th September 2018. I therefore make the following final orders:

a) The preliminary objection dated 25th September 2018 is dismissed with costs to the plaintiffs.

b) Notice of Motion dated 25th September 2018 is dismissed with costs to the plaintiffs.

Dated, signed and delivered in open court at Nakuru this 19th day of December 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Aim for the 2nd defendant/applicant

Mr Ombati for the plaintiffs/respondents

Ms Mungai holding brief for Mr Orege for the 1st defendant

Court Assistants: Beatrice & Lotkomoi