



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 22 OF 2016**

**SOLIAN INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**KSC INTERNATIONAL LIMITED IN RECEIVERSHIP**

**(FORMERLY KNOWN AS KUNDAN SINGH**

**CONSTRUCTION LIMITED).....1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF LANDS KILIFI.....3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF TITLES.....4<sup>TH</sup> DEFENDANT**

**DISTRICT SURVEYOR KILIFI.....5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**AND**

**OPKAR SINGH UBHI.....1<sup>ST</sup> APPLICANT**

**RIPTHUMAN SINGH UBHI.....2<sup>ND</sup> APPLICANT**

**RULING**

1. By a Chamber Summons Application dated and filed herein on 20<sup>th</sup> March 2017, the Applicants Opkar Singh Ubhi and Riphuman Singh Ubhi seek to be enjoined in this suit as Defendants. Their application is based on a number of grounds which may be summarized as follows:-

*i. That the two are members and shareholders of KSC International Limited (formerly known as the 1<sup>st</sup> Kundan Singh Construction Ltd) which is the 1<sup>st</sup> Defendant herein.*

*ii. That the 1<sup>st</sup> Defendant is the registered proprietor of free hold interests in Title No. 11, 16, 17, 20 and 62 situate in Mtondia/Roka, Kilifi which properties are currently charged to the Bank of Baroda.*

*iii. That as shareholders of the 1<sup>st</sup> Defendant, the Applicants have beneficial interest in the properties of the company and for purposes of determining the real issues in controversy herein, it is fair and in the interest of justice that they be enjoined.*

2. The Plaintiff, Solian Investment Limited is opposed to the grant of the orders sought. In Grounds of Opposition dated and filed herein on 14<sup>th</sup> June 2017, they oppose the application on the grounds that:-

*i. The said Application is wholly misconceived and has no legal basis;;*

*ii. Both the Applicants are members and shareholders of the 1<sup>st</sup> Defendant which is the proper party in these proceedings and is the only entity which can defend this suit in the interest of its directors and shareholders.*

*iii. The Applicants cannot seek to be enjoined in this suit as Defendants in addition to the 1<sup>st</sup> Defendant with the sole intention(of) defending the 1<sup>st</sup> Defendant in these proceedings by raising the same defence on behalf of the 1<sup>st</sup> Defendant which his evident from the grounds of their application and affidavit of service; and*

*iv. The Applicants have no intention of defending themselves and in any event they have not been sued in their capacities, as shareholders.*

3. I have considered the Application and the Grounds of Opposition thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties. I have also taken into account the authorities they referred me to.

4. Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows:-

***“(2) 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.”***

5. Arising from the foregoing, it is my considered view that for one to qualify to be enjoined in proceedings under Order 1 Rule 10 (2) of the Rules aforesaid, he/she must not only be a necessary but also a proper party against or for whom a remedy must flow to or from the other side. It must be a party whose presence is necessary for the Court to effectually and completely adjudicate the matter and without whose presence any resultant decree cannot be enforced.

6. In *Jan Bolden Nielsen –vs- Hersman Philipus Steyn & 2 others(2012) eKLR*, Mabeya J. observed as follows:-

***“In my view, “a necessary party” is a person who ought to have been joined as a party and in whose absence no effective decree can be passed in a proceeding by the Court. If a necessary party is not impleaded, the suit may be a non-starter as the reliefs sought if granted, may be ineffective.”***

7. Quoting from the decision in the English case of *Amon- vs- Raphael Tuck & Sons LN(1956) 1 All ER 273*, Mabeya J went on to state in the *Jan Bolden Nielsen* case(supra) that:-

***“The party to be enjoined must be someone whose presence is necessary as a party. What makes a person a necessary party?...The only reason which makes a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party...”***

***It is not enough that the intervener should be commercially or indirectly interested in the answer to the questions; he must be directly and legally interested in the answer to the questions, he must be directly and legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally-that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested.”***

8. In the matter before me, the Applicants contend that as members and shareholders of the 1<sup>st</sup> Defendant, they have a beneficial interest in the outcome of this case. It is further their case that since the 1<sup>st</sup> Defendant is under receivership, the functions of the Directors are taken up by the Receiver and as such the Applicants need to be enjoined to protect their personal interests.

9. A perusal of the Amended Plaintiff filed herein on 16<sup>th</sup> September 2016 reveals that the Plaintiff is seeking inter alia:-

.....

***(d) A declaration that the 1<sup>st</sup> Defendant acquired no lawful title/right/interest to Title No. Mtondia/Roka/11 in so far as the same encompassed Title No. 15351, CR 22091 North of Kilifi Greek.***

***(e) Alternatively, a declaration that the 1<sup>st</sup> Defendant acquired no lawful title/right/interest to Title No. Mtondia/Roka/11 at all for lack of a Land Control Board Consent for the transactions involving the transfer of Title No. Mtondia/Roka/11 from the original allottees to Magomeni Properties Limited and/or from Magomeni Properties Limited to the 1<sup>st</sup> Defendant; and***

***(f) A declaration that the 1<sup>st</sup> Defendant’s construction on Title No. Mtondia/Roka/11 is unlawful and illegal in so far as the said construction is within the boundaries of Title No. 15351, CR 22091 North of Kilifi Greek and/or in so far as such construction is being undertaken without a change of user being obtained, that such construction amounts to an unlawful interference with the***

**Plaintiff's lawful rights to Title No. 1535, CR 22091 North of Kilifi Greek and that the 1<sup>st</sup> Defendant has no right to enter, occupy, carry out construction activities or developments thereon and or to remain on Title Number 15351, CR 22091 North of Kilifi Greek.**

10. It is clear from paragraph 4A of the Amended Plaintiff that the prayers sought against the 1<sup>st</sup> Defendant results from a discovery the Plaintiff claims to have made on or about 17<sup>th</sup> May 2016 to the effect that the 1<sup>st</sup> Defendant was on or about 12<sup>th</sup> April 2011 issued with a Certificate of Title in respect of all that land known as Mtondia/Roka/11 comprising 14.2 hectares. The Plaintiff contends that the said certificate was unlawfully created as the land in issue or sections thereof falls within the Plaintiff's title.

11. From the foregoing, it is clear to me that the 1<sup>st</sup> Defendant has been sued on the basis of the title it holds and the construction that it was undertaking in the suitland. The 1<sup>st</sup> Defendant though in receivership is a Limited Liability Company. It is trite law that a Limited Liability Company is a legal entity separate from its shareholders and directors. It has full capacity to sue and be sued as is the case herein. In other words, a company is a legal person.

12. As was stated in the celebrated case of *Salomon –vs- Salomon & Company Ltd(1987) AC 22* at 51:-

***“The company is at law a different person altogether from the subscribers to the Memorandum, and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act.***

13. Arising from the foregoing, the general position is that where a wrong has been committed by or against a company, the proper party is the company itself. Although a shareholder may in certain instances be allowed to bring a derivative claim, it must be proved in those circumstances that the Directors are not acting in the best interest of the company.

14. In the matter before me, the Applicants have filed two separate affidavits in support of their application. There is no allegation directly or otherwise in either of the Affidavits that the Receiver/Managers are not acting in the best interest of the 1<sup>st</sup> Defendant.

15. As it were, shareholders such as the Applicants herein only have an interest in their shares in the company which, as we have seen, is a separate legal entity. They have no stake in the company in the manner purported herein. A perusal of the Plaintiff as amended does not disclose any allegation as against the two applicants.

16. Accordingly and in the end result, I consider the application dated 20<sup>th</sup> March 2017 to be misconceived. The same is dismissed with costs.

**Dated, signed and delivered at Malindi this 15<sup>th</sup> day of March, 2018.**

**J.O. OLOLA**

**JUDGE**