



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 200 OF 2017**

**IN THE MATTER OF ASCERTAINMENT OF OWNERSHIP OF LAND PARCELS NUMBERS L.R. 775/1, 776/4/1 AND 776/4/2 WHICH CHANGED TO NEW NUMBERS AS ELDORET MUNICIPALITY BLOCK 15/323, ELDORET MUNICIPALITY BLOCK 15/324 AND ELDORET MUNICIPALITY BLOCK 15/325 RESPECTIVELY**

**TARA SINGH DOGRA SUING THROUGH**

**MANMOHAN SINGH DOGRA.....PLAINTIFF/APPLICANT**

**VERSUS**

**ELESH CHANDRAKANT**

**GHEEWALA (KENYAN).....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SHRIKESH CHANDRAKANT**

**GHEEWALA (BRITISH).....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RURAL HOUSING CO. LIMITED.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**THE COUNTY LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL...5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of a preliminary objection by the 1<sup>st</sup> and the 3<sup>rd</sup> defendants dated 27<sup>th</sup> November 2017 on the grounds that the plaintiff/applicant lacks the locus standi to institute these proceedings and that the suit is barred under the limitations of Actions Act.

Before the hearing of this application an application dated 23<sup>rd</sup> November 2017 for striking out the name of the 2<sup>nd</sup> defendant from the suit was allowed by consent of all Counsel on record.

Mrs. Odede Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendants submitted that a party is bound by their pleadings and cannot deviate from them. She submitted that from the pleadings filed by the plaintiff, the plaintiff describes himself as suing through Manmohan Singh Dogra which suggests that the suit is brought in a representative capacity but it is not properly pleaded.

It was Counsel's submission that paragraph 2 of the supporting affidavit gives an idea of what capacity the plaintiff was suing whereby it states that the company of which he was a partner closed down 18 years ago and has not been in operation. The question that Counsel posed was whether in the circumstances there is a plaintiff who has capacity to sue being that Tara Singh does not exist. The other question that Counsel posed was whether an individual can sue on behalf of a company. She relied on the case of **Foss Vs Harbottle(1843) 67 ER 189** where it was stated that an individual member of a company cannot bring a suit on behalf of a company. Counsel further submitted that the plaintiff is bound by his pleadings and if the company closed shop 20 years ago as pleaded, then it is not a juristic person capable of suing and being sued and therefore the suit as filed is a nullity and void *abinitio*. Further that if an act is void, then in law is a nullity and it is incurable.

It was Counsel's submission that the same decision was upheld in the case of **Housing Finance of Kenya Ltd Vs Embakasi Youth Development project Nairobi HCCC No. 1068 of 2001 whereby Ojwang JB** as he then was, applied the principle that only a juristic person endowed with legal personality can have locus standi to file a suit before the court. Counsel further stated that if the plaintiff is a company then it cannot purport to sue through other persons.

Lastly Mrs. Odede Counsel for the applicants submitted on the issue of limitation that the rights that the plaintiff could have claimed extinguished 20 years ago as they became statute barred under section 7 of the Limitation of Actions Act. Further that both in fact and in law a company cannot claim adverse possession as a claim of adverse possession is intrinsically linked to the existence of the person. She therefore submitted that either the plaintiff does not exist or has no capacity to bring the suit before this court and urged the court to uphold the preliminary objection.

Mr. Odongo for the 4<sup>th</sup> and 5<sup>th</sup> defendants supported and associated himself with the submissions of Counsel for the applicant. He submitted that the claim before the court is statute barred by the Limitation of Actions Act. Mr. Odongo submitted that the subject matter is a leasehold interest as per annexure MSD 5 and that adverse possession cannot arise against a leasehold interest. He relied on section 41 (a) (1) of the Limitation of Actions Act which excludes application of adverse possession on land owned by the government or public land.

Counsel further submitted that for a leasehold interest the government is the head lessor and therefore determines the manner in which a lessee enjoys the lease as a result of leasehold interest. He also submitted that the government is paid annual rent by the lessee and as such the lessee can only operate within the conditions set in the lease. He stated that leasehold falls under section 41 of the Limitation of Actions Act and therefore the preliminary objection should be upheld.

Mr. Koros for the respondent urged the court to look at the provisions of Article 22 of the Constitution which states that every person has a right to institute a suit if there is any violation. He also referred the court to article 258 which provides for representative suits. He admitted that the company ceased to exist 20 years ago but that the company had acquired property which they should not be denied by a procedural technicality.

It was Counsel's submission that the plaintiff has been in occupation of the suit land and as such there are documents on record indicating the plaintiff's capacity to sue. Counsel also stated in the grounds of opposition to the application that the plaintiff is suing as an administrator of the estate of the deceased and in the same breathe as a director of the company. He stated that the plaintiff was present when the agreement was drafted and therefore it is a continuous action. As such he submitted that the suit has been brought by the right parties. He relied on Article 159 of the Constitution and urged the court to dismiss the preliminary objection on the ground that the court should not rely on procedural technicalities. Counsel stated that the authorities relied on are pre 2010 and therefore not binding.

In response to Mr. Koros' submission Mrs. Odede submitted that proceedings contemplated under Articles 22 and 258 of the Constitution are where parties are claiming violation of rights for themselves or other parties and such proceedings must be commenced by way of a petition as directed by the Chief Justice and must clearly cite the violations that have been infringed.

It was further Counsel's submission that a claim of adverse possession does not fall under Article 22 of the Constitution as it is not a violation. She reiterated her earlier submissions and stated that Counsel has admitted that the plaintiff does not exist and that the plaintiff must lift the veil before they can sue as directors of a company. On the issue of procedural technicality counsel stated that this matter goes to the root of the case and as such is a valid point of law.

Mr Odongo in response stated that the subject matter being a leasehold and the plaintiff has not challenged the conversion from freehold to leasehold falls under section 41 of the Limitation of Act.

### **Analysis and Determination**

The issues for determination in this application is whether the plaintiff has locus standi to bring this suit and whether he is a juristic person. The essence of a preliminary objection is to raise issues of law and not fact and when upheld in many cases determines the suit by striking the offending acts. Therefore courts are guided by the principles as enunciated in the case of MUKISA BISCUIT MANUFACTURING CO LTD VS. WEST END DISTRIBUTORS LTD [1969] EA 696, where the defunct Court of Appeal of East Africa defined a preliminary objection as one which: "consists of a point of law which has been pleaded, or which arises by clear implication, and which if argued as a preliminary point, may dispose of the suit.

It is a general principle of company law that an individual shareholder cannot sue for wrongs done to a company or complain of any internal irregularities. This principle is commonly known as the rule in Foss v Harbottle. This rule derives from the fact that the company has a separate legal personality. However it should be noted that there are exceptions to the rule in Foss Vs Harbottle namely where

- (a) *an act which is illegal or ultra vires (sic) to the company;*
- (b) *an irregularity in the passing of a resolution which requires a qualified majority;*
- (c) *an act purporting to abridge or abolish the individual rights of a member;*
- (d) *an act which constitutes a fraud against the minority and the wrongdoers are themselves in control of the company."*

These exceptions were applied by the Court of Appeal in the case of Prudential Assurance co. Ltd Vs Newman Industries Ltd (1982) Ch. 204 where the court held that:

*"In our view, whatever may be properly defined boundaries of the exception to the rule, the plaintiff ought to at least be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries to the rule in Foss -v- Harbottle."*

In this current case the plaintiff does not benefit from the exceptions laid down in the case of Foss vs Harbottle. In fact the plaintiff is claiming adverse possession against the defendants who include the County Land Registrar Uasin Gishu and the Attorney General. Further if the plaintiff was to benefit from the exceptions which is unlikely, he had to seek and obtain the leave of the court to bring a derivative action. It was held in the case of **DADANI –Vs- MANJI & 3 OTHERS [2004]KLR 95** by Mwera J as he then was that:

*“It is a cardinal principle in Company Law that it is for the Company and not an individual shareholder to enforce rights of actions vested in the Company and to sue for wrongs done to it. It is also cardinal that in absence of illegality a shareholder cannot bring proceedings in respect of irregularities in the conduct of the Company’s internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matter (see Foss v. Harbottle (1843)2 Hare 461). All this is in deference to the self-regulation the law allows corporations and thus limits the interference by courts in the running of such bodies on their own. However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit.”*

The plaintiff has admitted in his pleadings that the company who is the plaintiff in this case of which he is suing through ceased to exist 20 years ago. That means that the company is nonexistent as it has not been fulfilling its statutory obligations of filing returns as required. If that is the position then is there a plaintiff in this case. The party purporting to sue on behalf of a non-existent company is therefore also a sham.

The law is very clear about legal personality on who can sue and be sued. A company is a juristic person and is separate from its directors and shareholders. That is why in the beginning of this application an application to strike out the name of the 2<sup>nd</sup> defendant from the suit was allowed by consent as he was sued together with the 3<sup>rd</sup> defendant of which he is a director. Shareholders can sue if they lift the veil of the company which has not been done in this case. From the pleadings on record which are binding on the plaintiff, the court is left with the defendants minus the plaintiff who has no capacity to sue the said defendants. What happens in a case where there is no complainant? It goes without say that there is no case against the defendants.

Further in the grounds of opposition filed by the plaintiff’s Counsel he stated that the plaintiff is suing as an administrator of the deceased person which was not pleaded. This was in a bid to rescue the case but I find that it messed the capacity further.

On the issue of the Limitation of Actions Act, the purported plaintiff admitted that they have not been in operation for the last 20 years. They went to sleep and suddenly woke up in 2017. I do not agree with Counsel’s submission that section 41 of the limitation of Actions Act applies to this case where the plaintiff is claiming a leasehold whereby the government is the head lessor. The lease gives the terms and conditions for use of the lease. This land does not fall under public land provision as it is titled to the 3<sup>rd</sup> defendant as per the certificate of official search annexed by the plaintiff/respondent.

I also note that this case does not fall under the provisions of Article 22 which deals with enforcement of bill of rights and where the Chief Justice is mandated to make rules providing for the court proceedings referred to. The plaintiff has not claimed a violation of any right but has claimed adverse possession against the defendants. The rules provide that proceedings for enforcement of a violation of rights shall be by way of a petition.

On the issue that the court should not dwell on procedural technicality, I find that this is not a case where such argument can be sustained as it goes to the root and substance of the suit. When there is no plaintiff then the suit must suffer the fate of being struck out.

Finally with due respect to Counsel for the respondents, I was appalled by the argument that the authorities cited by the applicant were pre 2010 and therefore should not be relied upon. Courts are guided by judicial precedents.

I have considered the submissions of Counsel and the judicial authorities cited and I am of the considered view that we do not have a plaintiff in this case and therefore the preliminary objection is upheld and the suit is hereby struck out with costs to the defendants.

**Dated and delivered at Eldoret this 19<sup>th</sup> Day of June, 2018.**

**M. A ODENY**

**JUDGE**

Ruling read in open court in the presence of Miss Ruto holding brief for Mrs. Odede for 1<sup>st</sup> and 3<sup>rd</sup> defendants. Mr. Wabwire for 4<sup>th</sup> & 5<sup>th</sup> defendants and Miss Lagat for Plaintiff. The Preliminary Objection is upheld.

Mr. Koech – Court Assistant.