



Enacta Limited v Nagari & 5 others (Environment and Land Case E228 of 2021) [2024] KEELC 413 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E228 OF 2021
LL NAIKUNI, J
JANUARY 30, 2024**

BETWEEN

ENACTA LIMITED PLAINTIFF

AND

MARTIN MUREITHI NAGARI 1ST DEFENDANT

BEATRICE WACERA NGARI 2ND DEFENDANT

**LAHARI JETHANAND MANGHNANI T/A SACHEDEVA & COMPANY
ADVOCATE 3RD DEFENDANT**

LAND REGISTRAR MOMBASA COUNTY 4TH DEFENDANT

KENYA COMMERCIAL BANK 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

RULING

I. Introduction

1. This Honorable Court was formally moved for its determination of the Notice of Motion application dated 15th March, 2023 instituted by the 3rd Defendant/Applicant herein – “Lahari Jethanand Manghnani T/Sachdeva & Company Advocate. The application was brought under the provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 respectively.
2. Upon service of the said application the Plaintiff/Respondent, 1st and 2nd Defendants herein filed their replies and the Honourable Court shall be dealing on them at a later stage of this Ruling hereof.



II. The 3rd Defendant/Applicant's Case

3. The 3rd Defendant/Applicant sought for the following orders:-
 - a. That Bhupinder Singh Dogra be joined to this suit for purposes of this application.
 - b. That the court do determine by whom the 3rd Defendant's costs of the suit are to be paid.
 - c. That Bhupinder Singh Dogra do pay the 3rd Defendant's costs of the suit.
4. The application was based on the grounds, testimonial facts and the averments of the eight (8) Paragraphed of Lahori Jethanand Manghnani a resident of Nyali of Post Office Box Number Mombasa together with two (2) annexures marked as "LJM – 1 to 2" annexed hereto and who made oath and stated as follows that:-
 - a. He was the 3rd Defendant herein and competent to make this affidavit.
 - b. By a ruling delivered by the Court on 9th December 2022 the Plaintiff was given 60 days to file a fresh verifying affidavit compliant with the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules failing which the suit stood automatically struck out with costs to the Deponent.
 - c. On 1st March 2023 when the matter came up for mention, it was confirmed that the Plaintiff had failed to file a fresh verifying affidavit and therefore the suit stood struck out with costs to the Deponent.
 - d. It was necessary for the Court to determine by whom his costs were to be paid in accordance with the provisions of Section 27 of the Civil Procedure Act 2010 because although the suit was filed in the name of Enacta Limited it had transpired that the suit was in fact not filed by Enacta Limited as the only directors of Enacta Limited who should have authorized the filing of the suit were themselves sued as the 1st and 2nd Defendants in the suit.
 - e. One of the documents in the bundle of documents filed by the Plaintiff on 9th November 2021 was an "Authority to Plead, Act or Prosecute dated 18th August 2021" a copy of which was annexed hereto and marked as "LJM - 1". In that document Mr. Bhupinder Singh Dogra purporting to be the Managing Director of Enacta Limited gave himself the authority to instruct Counsel and to file suit. Similarly, there was filed a purported Minutes of a meeting of the Board of Directors which was allegedly attended by Bhupinder Singh Dogra as Managing Director, George Kilonzo as Company Secretary and Talijinder Kaur Dogra as Director. A copy of the said minutes was annexed hereto and marked as "LJM - 2". The said minutes of the alleged meeting of the board of directors was signed only by Bhupinder Singh Dogra.
 - f. From the records of the Registrar of Companies which were produced in court by one Mr. Njagi from Business Registration Services Enacta Limited the only directors of Enacta Limited were Beatrice Wacera Ngari and Martin Mureithi Ngari who were the 2nd and 1st Defendants herein.
 - g. Bhupinder Singh Dogra improperly used the name of Enacta Limited to file suit and he should be the one to bear the costs of his action. It seemed to him to be patently unjust for Enacta Limited to be made to bear the costs of a suit that clearly was engineered by Mr. Dogra without any authority of Enacta Limited.



III. The Replying Affidavit by the Plaintiff/Respondent.

5. On 16th June, 2023 the Plaintiff/Respondent while opposing the application by the 3rd Defendant filed an 19 Paragraphed Replying Affidavit sworn by Bhupinder Singh Dogra together with three (3) annexures marked as “BSD – 1 to 3” annexed hereto. He averred as follows: -
- a. He was the Shareholder of the Plaintiff hence competent to make this affidavit.
 - b. He had read and understood the 3rd Defendant's Notice of Motion Application dated the 15th March, 2023 and the supporting affidavit dated on even date thereto together with the annexures.
 - c. The Application was misconceived and brought in bad faith. The Applicant not being a director or shareholder of the Plaintiff could not purport to elect how the bills of the Plaintiff ought to be paid.
 - d. The Plaintiff was a legal person with ability to pay its bills. The Applicant had not shown any evidence that the Plaintiff lacked the ability to meet the costs.
 - e. When the 3rd Defendant annexed a forged CR - 12 form to his Application for striking out the suit, it was the Deponent who brought to the attention of the court the surprise availability of the controversial and disputed CR - 12 form at the Companies registry.
 - f. When he filed this suit under the very sad circumstances, he did so in the best interest of the Plaintiff. No evidence had been tendered to show that he filed the suit for his personal interest and selfish gain. As was in the verifying affidavit, he innocently believed he was in the official government records as the bona fide director of the Plaintiff. In fact in all his correspondences with the Defendants, they never contested his directorship but instead had pleaded innocent purchaser for value. It was unfathomable that a Director of a Company could plead innocent purchaser for value while purchasing a Company's property which they were expected to have actual knowledge of.
 - g. The circumstances of the that led to the filing of this suit was now well within the court's actual knowledge particularly that;
 - i. At filing of the suit, it was incorrectly asserted by no less than the Registrar of the Companies that the Plaintiff didn't actually exist as they couldn't trace its records either in the system or by paper trails. Annexed Marked as “BSD – 1” letter from registrar.
 - ii. Frustrated by what would later appear to be a grave but mistaken misrepresentation by the registrar, he had no option but to file the suit on the basis of the materials he had at hand that showed me and my wife as the founding director/shareholders of the Plaintiff. Annexed Marked as BSD – 2
 - iii. To his shock, an official CR - 12 form became available several months after the suit was filed.
 - iv. While the said official CR - 12 form showed the 1st and 2nd Defendants as the official Directors of the Plaintiff, the said Martin Ngari & Beatrice Ngari “categorically stated before the honourable court that they were not directors of the Plaintiff and do not understand how they were made directors”. The did not say this once but twice; first on the 14th July, 2022 before they doubled down on the same of the 27th November, 2022 during cross examination of the company's official.



- v. The 1st and 2nd Defendants vide their defense and letters confirms that they were just innocent purchasers without notice.
- h). The honorable court in its appreciated wisdom correctly dismissed the 3rd Defendant's Application on the 9th December, 2022 and gave the deponent a lifeline to regularize the records. However, the deponent was frustrated by none other than the 1st and 2nd Defendants from complying with the said directions within the timeline. A letter to the both the Defendants and Registrar of companies to regularize records went unanswered. Annexed Marked as "BSD - 3 (a)" and "(b)" are the letters.
- i). It became apparent to the Deponent that regularizing the records would need more than the 60 Days granted by court.
- j). He was informed by his advocates on record that it would take another fresh suit before a commercial court to regularize the records. He was therefore not in his making that the directions of the 9th December, 2022 were not complied with.
- k). To condemn him to pay costs of the suit without any good basis and particularly in the circumstances of the matter at hand would possibly be a kin to exalting the evil over the righteous.
- l). To the extent that the 1st and 2nd Defendants had denied being directors, and not opposed the issues of costs ,the Applicant should follow the procedure and tax his bill against the company.
- m). The Applicant could not purport to go after him when the Plaintiff had not declined to pay costs nor has the applicant demonstrated the inability of the Plaintiff to do so.
- n). The Applicant had not demonstrated that he was not acting in good faith and best interest of the Plaintiff.
- o). It would be grave injustice if the application herein was to be allowed out considering all the circumstances at play.
- p). The Applicant is deserving of rebuke for orchestrating the mess we are in and then coming back to benefit from his corrupt scheme is just abhorrent.
- q). It was thus in the interests of justice that this Honorable court dismiss the Application.
- s). He swore this Affidavit in opposition to the Application herein.

IV.The Replying Affidavit by the 1st and 2nd Defendants.

- 6. On 31st July, 2023, the 1st and 2nd Defendant while opposing the application filed by the 3rd Defendant herein, filed its 8 Paragraphed Replying Affidavit sworn and dated by Martin Mureithi Ngari. He swore and stated as follows:-
 - a. He was the 1st Defendant herein and competent to swear this affidavit on my own behalf and on behalf of the 2nd Defendant who was his wife.
 - b. The wife and himself had read and understood the 3rd Defendant's application dated 15th March 2023 and the Replying Affidavit of Bhupinder Singh Dogra sworn on 16th June 2023 and in reply to both they stated as follows: -
 - c. It was apparent from the pleadings filed herein the 2nd Defendant and himself were the directors of the Plaintiff and the majority shareholders.



- d. In the Replying Affidavit of Mr. Bhupinder Singh Dogra, the Deponent had urged this court to order that the costs of the 3rd Defendant be paid by the Plaintiff as the Plaintiff had not declined to pay the costs and that the Plaintiff was a legal person with the ability to pay bills.
- e. It was common knowledge to all the parties herein that the only property that the Plaintiff used to own is Plot No.3176/I/MN which today was owned by the 2nd Defendant and himself which was their matrimonial home having been transferred to them.
- f. The Plaintiff never owned anything and therefore to condemn the Plaintiff to pay the costs would be tantamount to condemning the 2nd Defendant and himself yet they never instituted the suit and they were advised if the Plaintiff was unable to pay the costs, the 3rd Defendant would ask the court to lift the veil of incorporation and once the same was done the court would order the 2nd Defendant and himself to pay the costs as directors.
- g. It would be unjust to condemn the 2nd Defendant and the Deponent to pay costs for a suit that they had no hand in the institution of.

V.Submissions

7. On 21st June, 2023 while all the parties were present in Court, directions were granted and parties agreed to have the Notice of Motion application dated 15th March, 2023 be canvassed by way of written submissions. However, for unclear reason non of the parties herein complied with these directions. Subsequently, the Honorable Court reserved a date for the delivery of its ruling on merit accordingly.

VI. Analysis and Determination

8. I have keenly considered the filed Notice of Motion application dated 15th March 2023 by the 3rd Defendant/Applicant, the responses by the Plaintiff/Respondent, the annexures attached, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
9. For the Honorable Court to arrive at an informed, fair, reasonable and Equitable decision on the subject matter, it has condensed the matter into three (3) issue for its determination. These are:-
 - a. Whether the Notice of Motion application dated 15th March, 2023 filed by the 3rd Defendant/Applicant has any merit.
 - b. Whether the parties are entitled to the relief sought.
 - c. Who will bear the costs of the application.

Issue No. a). Whether the Notice of Motion application dated 15th March, 2023 filed by the 3rd Defendant/Applicant has any merit.

10. Under this Sub – heading, the Honourable Court has deciphered the main substratum of this application by the 3rd Defendant/Applicant herein to be twofold. Firstly, whereby they are seeking for joinder of a party to the suit and secondly, to be awarded the costs of both the application and the suit instituted by the Plaintiff/Applicant herein. To begin with, the issue of joinder of parties and issuance of costs in a suit are governed by the provisions of Order 1 Rule 10 (2) and (4) of the Civil Procedure Rules, 2010 and Section 27 (1) of the Civil Procedure Rules, 2 Cap. 21. Paradoxically, although the 3rd Defendant/Applicant sought for joinder of one Mr. Bhupinder Singh Dogra to the suit, they never cited the above stated provisions of the Law. Instead, the 3rd Defendant/Applicant averred that the suit was filed in the name of Enacta Limited and it had transpired that the suit was in fact not filed by



Enacta Limited as the only directors of Enacta Limited who should have authorized the filing of the suit were themselves sued as the 1st and 2nd Defendants in the suit.

11. The 3rd Defendant/Applicant stated that one of the documents in the bundle of documents filed by the Plaintiff on 9th November 2021 was an "Authority to Plead, Act or Prosecute dated 18th August 2021" a copy of which was annexed hereto and marked as "LJM - 1". In that document Mr. Bhupinder Singh Dogra purporting to be the Managing Director of Enacta Limited and gave himself the authority to instruct Counsel and to file suit. Similarly, there was filed a purported Minutes of a meeting of the Board of Directors which was allegedly attended by Bhupinder Singh Dogra as Managing Director, George Kilonzo as Company Secretary and Talijinder Kaur Dogra as Director. A copy of the said minutes was annexed hereto and marked as "LJM - 2". The said minutes of the alleged meeting of the board of directors was signed only by Bhupinder Singh Dogra.
12. He further informed Court that from the records of the Registrar of Companies which were produced in court by one Mr. Njagi from Business Registration Services Enacta Limited the only directors of Enacta Limited were Beatrice Wacera Ngari and Martin Mureithi Ngari who were the 2nd and 1st Defendants herein.
13. According to the 3rd Defendant/Applicant, Mr. Bhupinder Singh Dogra improperly used the name of Enacta Limited to file suit and he should be the one to bear the costs of his action. It seemed to him to be patently unjust for Enacta Limited to be made to bear the costs of a suit that clearly was engineered by Mr. Dogra without any authority of Enacta Limited.
14. On its part, the Plaintiff/Respondent informed Court that he was the Shareholder of the Plaintiff hence competent to make the affidavit. He stated that the Applicant not being a director or shareholder of the Plaintiff could not purport to elect how the bills of the Plaintiff ought to be paid. He argued that the Plaintiff was a legal person with ability to pay its bills. The Applicant had not shown any evidence that the Plaintiff lacked the ability to meet the costs.
15. He averred that when the 3rd Defendant annexed a forged CR - 12 Form to his Application for striking out the suit, it was the Deponent who brought to the attention of the court the surprise availability of the controversial and disputed CR - 12 Form at the Companies registry. Further that when he filed this suit under the very sad circumstances, he did so in the best interest of the Plaintiff. No evidence had been tendered to show that he filed the suit for his personal interest and selfish gain. As was in the verifying affidavit, he innocently believed he was in the official government records as the bona fide director of the Plaintiff. In fact in all his correspondences with the Defendants, they never contested his directorship but instead had pleaded innocent purchaser for value. It was unfathomable that a Director of a Company could plead innocent purchaser for value while purchasing a Company's property which they were expected to have actual knowledge of. By all means, Mr. Bhupinder Singh Dogra on implication already and ought to be joined in the matter as he took full responsibilities of all the actions of omission and commission in instituting this suit against the 1st, 2nd, 3rd and 4th Defendants herein which ironically included the 1st and 2nd Defendants who were the Directors of the Plaintiff herein. However, it just the nature of the case that making an express order for joinder would be superfluous as the suit has already collapsed on arrival. There is no suit for him to be joined to. Nonetheless, he cannot escape and will have to bear the liabilities all together arising from this suit.

Issue No. b). Whether the parties are entitled to the relief sought.

16. Under this sub – heading, it is instructive to note that on 9th December, 2022 this Honourable Court while making a determination on an application by the 3rd Defendant dated 12th April, 2022 made the following orders:-



- a. That the Notice of Motion application dated 12th April, 2022 by the 3rd Defendant lacks merit and hence be and is hereby dismissed with costs.
 - b. That the Plaintiff be and is hereby granted Sixty (60) days leave from the date of the delivery of the Ruling to file and Serve fresh Verifying Affidavit with full compliance with the provision of Order 4 Rule 1 (4) of the Civil Procedure Rules, 2010.
 - c.
 - d. That in default of compliance with Order (b) above, the suit shall automatically stand struck out with costs to the 3rd Defendant/Applicant herein.
17. From the records, on 1st March 2023 when the matter came up for mention, it was confirmed that the Plaintiff had failed to file a fresh verifying affidavit and therefore the suit stood struck out with costs to the Deponent. Indeed, through its Learned Counsel, the Plaintiff/Respondent admitted on non compliance based on several reasons for instance failure to obtain the necessary documents from the offices of the Registrar of Companies and the Enacta Company Limited and verbally sought to be granted leave for enlargement time of the 60 days granted by Court under Order 50 Rule 6 and 7 of the Civil Procedure Rules, 2010. Court declined to bulge taking that it clearly appeared to have been an after thought. For that reason, the suit by the Plaintiff stood automatically dismissed and parties were granted time to submit on the issue of costs.
18. Thus, it was necessary for the Court to determine by whom his costs were to be paid in accordance with the provisions of Section 27 of the Civil Procedure Act 2010 because although the suit was filed in the name of Enacta Limited it had transpired that the suit was in fact not filed by Enacta Limited as the only directors of Enacta Limited who should have authorized the filing of the suit were themselves sued as the 1st and 2nd Defendants in the suit.
19. It is trite law that the issue of Costs is at the discretion of Court. Costs mean the award that a party is granted at the conclusion of every legal action or proceedings in any litigation. In the write up “Judicial Hints On Civil Procedure 2nd Edition (Nairobi Law Africa) 2011 Page 94 states that:-
- “ Costs are (awarded at) the unfettered discretions of the Court subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force they must follow the event unless Court has good reason to order otherwise”
20. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By events it means the outcome of results arising from the said legal action. See the Supreme Court decision of “Jasbir Rai Singh v Trachalans Singh” eKLR 2014; Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR and Kenya Sugar Board v Ndungu Gathini [2013] eKLR where the Court held:-
- “ The basic rule on attribution of costs is that costs follow the events....it is well recognized that the principles costs follow the events is not to be used to penalize the losing party rather it is for compelling the successful party for the trouble taken in presenting or defending the case”
21. In the instant case, the Plaintiff through the ruling of this Court delivered on 9th December, 2022 was granted a conditional order to have complied with the provision of Order 4 Rule 1 (4) of the Civil Procedure Rules, 2010 to file fresh Verifying Affidavit. This never happened nor did they move Court formally for the enlargement of time. For that reason, therefore, the suit by operation of law and /



or direction stood automatically dismissed. In the given circumstances, Mr. Bhupinder Singh Dogra has to personally bear the costs of this suit. For avoidance of any doubt, the 1st and 2nd Defendants are exempted from this liability whatsoever.

VI. Conclusion and Disposition

22. Consequently, upon conducting an intensive analysis of the framed issues herein, on preponderance of probability, this Honorable Court now proceeds to make the following determination. Specifically, these are the orders:-
- a. That the Notice of Motion application dated 15th March, 2023 by the 3rd Defendant/Applicant has merit and hence be and is hereby allowed with costs.
 - b. That pursuant to the Order (d) of the Ruling delivered on 9th December, 2022 order the suit by the Plaintiff and operation of law and /or direction stand automatically dismissed. Hence, the suit be marked as settled.
 - c. That in the given circumstances, Mr. Bhupinder Singh Dogra to personally bear the costs of this application and the suit. For avoidance of any doubt, the 1st and 2nd Defendants are exempted from this liability whatsoever.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH MICRO – SOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 30TH DAY OF JANUARY, 2024.

.....

HON. JUSTICE (MR.) L. L. NAIKUNI

ENVIROMNENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant;
- b. No appearance for the Plaintiff/Respondent.
- c. M/s. Layoo Advocate holding brief for Mr. Kiarie Kariuki Advocate for the 1st & 2nd Defendants.
- d. Mr. Omollo Advocate for the 3rd Defendant/Applicant.

