



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 497 OF 2014

GUSII MWALIMU INVESTMENT CO. LTD.....PLAINTIFF

VERSUS

GUSII MWALIMU SAVINGS CREDIT CO-OP SOCIETY LTD..... DEFENDANT

R U L I N G

1. The plaintiff vide the amended plaint dated 10th March 2016 filed on the same date avers that it is the registered lease holder of land parcel **Kisii Township/Block III/214** measuring 0.3582 Hectares where the plaintiff has developed a complex, Mwalimu House and Mwalimu International Hotel. The plaintiff avers that at some point when the plaintiff experienced difficulties in servicing of some loan they had sourced from Kenindia Assurance Co. Ltd and there was a threat to auction the property, the plaintiff approached the defendant who was its tenant in the premises to take up the management of the property and utilize the rent proceeds from the building to service the loan. The plaintiff claims that the defendant refused to hand the property back to the plaintiff and instead attempted to have the plaintiff liquidated and deregistered as a company vide Gazette Notice No. 3586 of 10th July 1998. The plaintiff claims the defendant has not accounted for the rental proceeds from the building for the last 28 years aggregating kshs. 178,752,000/=. The plaintiff prays for orders:-

- a. **That any lease issued to the defendant be declared null and void.**
- b. **That the defendant gives vacant possession of the premises.**
- c. **That the defendant settles all tax obligations to the government before handing over the suit premises to the plaintiff in any event.**
- d. **That the defendant meets the cost of the suit.**

2. The defendant through its amended statement of defence dated 18th April 2016 filed on 19th April 2016 denied the plaintiff's averments contained in paragraphs 4(a), 7(a), 8(a), 9(a), 10(a) and 11 of the amended plaint and put the plaintiff to proof. The defendant stated that it was legally and procedurally registered as the owner of land parcel **Kisii Town/Block III/214** and that the plaintiff has had notice of the fact and that the claim by the plaintiff after 15 years is farfetched and unsustainable. The defendant further avers the plaintiff's suit is incompetent, time barred, vexatious and unmerited and ought to be struck out. The defendant under paragraph 9(e) of the amended defence intimated that it would take a preliminary objection and apply to seek the plaintiff's suit to be struck out and/or dismissed.

3. The defendant on 7th February 2017 filed a Notice of Preliminary Objection on points of law on the following grounds:-

1. **That the plaintiff company was wound up vide a Gazette Notice of 10th July 1998 and therefore non-existent and incapable of suing.**
2. **As an admission of the non-existent of Gusii Mwalimu Investment Company Ltd the alleged directors have filed Miscellaneous Application No. 2 of 2017 in the High Court Kisii seeking leave to file a petition which seeks a declaration that the dissolution of Gusii Investment Company Ltd was irregular (pleadings of Misc. suit attached).**
3. **Its against this background information that we apply for dismissal of the suit for being incompetent with costs to the defendant.**

Simultaneously with the notice of preliminary objection the defendant filed written submissions in support of the preliminary objection. The court on 21st February 2017 granted leave to the plaintiff to respond to the defendant's written submissions in support of the preliminary objection. The plaintiff filed its submissions on 13th April, 2017.

4. The defendant's position is that the plaintiff company was dissolved by the Registrar of Companies on 16th June 1998 and does not as such exist as a legal entity that can initiate a suit such as the present suit. The defendant argues a party that has no legal existence cannot have capacity to institute a suit. Thus it is the defendant's submission that the plaintiff lacks the *locus standi* to bring the present suit against the defendant. In support of its submission the defendant relied on the cases of **Fort Hall Bakery Supply Co. –vs- Fredrick Muigai Wangoe [1959] E.A 474** and **Emmanuel Sichangi Chonge & 2 Others –vs- Fanuel Walekwa & another [2014] eKLR**. In the case of **Fort Hall Bakery supply Co. –vs- Fredrick Mungai Wangoe** (supra) the court held that a trading enterprise that had not been registered had no legal existence and was incapable of maintaining the action. The Judge stated thus:-

“A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent and therefore incapable of maintaining the action, it cannot allow the action to proceed.”

5. In the case of **Emmanuel Sichangi Chonge & 2 Others –vs- Fanuel Walekwa & Another** (supra) the plaintiffs had brought a suit on behalf of a company which had been dissolved and the defendants took a preliminary objection that the plaintiffs lacked the *locus standi* to bring the suit on behalf of a company that had been dissolved. The Judge stated as follows:-

“Under Section 338 of the Companies Act, any person interested was at liberty to apply to court within 2 years asking the court to declare the dissolution void. There is no evidence to show whether any of the members of Endebess Investment Company Limited moved the court to declare that dissolution void. The company instead proceeded to act as if it had not been dissolved. It therefore follows that anything done in the name of the company is null and void and of no consequence. I therefore find the plaintiffs had no locus standi to bring the present suit on behalf of a company which had been dissolved and was therefore non-existent and had no capacity to enter into any transactions.

6. The defendant submitted that the plaintiff company having been dissolved on 19th June 1998 and there having been no application for the reinstatement of the company on the register as provided under the Companies Act, before the institution of the instant suit the suit is incompetent as it has been instituted by a non-existent entity and hence the suit should be struck off and/or dismissed.

7. The plaintiff in its response submissions states that the plaintiff company was never dissolved and in this regard submits that the resolution to wind up the company taken on 27th August, 1999 was stayed by an order issued in CMCC No. 711A of 1999. The plaintiff further asserts that in the financial statements

prepared by the defendant for the period 2009 to 2012 the account of the plaintiff appears which supports the plaintiff's position that it was never liquidated and continues to exist. The plaintiff states they have sought leave vide HC Misc. Application No. 2 of 2017 to challenge the alleged dissolution of their company by the Registrar of Companies and argues that it is for the High Court to determine whether the plaintiff company was dissolved and if the dissolution was valid.

8. The issue for this court to determine is whether the preliminary objection taken by the defendants meet the threshold of what constitutes a preliminary objection as outlined in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] EA 696** where **Sir Charles Newbold, P** stated thus:-

“...A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by 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 issue as I perceive it, is whether the plaintiff company was dissolved and therefore ceased to exist as a company that could carry out any transactions. This in my view consists a pure point of law which if determined could dispose of the matter. The defendant in support of its preliminary objection annexed Gazette Notice No. 1535 of 13th March 1998 giving notice of the intended dissolution of the companies listed as per the schedule set out in the Gazette Notice. The plaintiff company **“No. 20/82 Gusii Mwalimu Investments Company Ltd”** was listed under the schedule. The notice signed by the Registrar of Companies was in the following terms:-

“Pursuant to Section 339 subsection (3) of the Companies Act, it is notified that at the expiration of three (3) months from the date of this Gazette, the names of the undermentioned companies will, unless cause be shown to the contrary be struck off the register of the companies and the companies will be dissolved.”

9. The Registrar of Companies vide a Gazette Notice No. 3586 dated 16th June, 1998 gave notice of dissolution in the following terms:-

“Pursuant to Section 339 subsection (5) of the Act, it is notified for general information that the under mentioned companies have this day been struck off the register of companies and that the companies are dissolved.”

The plaintiff company **“No 20/82 Gusii Mwalimu Investments Company Ltd”** was amongst the listed companies. The company therefore ceased to exist as a company on 16th June 1998 when it was struck off and dissolved as per the Gazette Notice. The plaintiff admits the aforesaid notices were issued and in any case, the notices having been published in the official Kenya Gazette, all and sundry are deemed to have had notice of the same.

10. The plaintiff could have sought the revocation of the dissolution order through its liquidator within two years of the date of dissolution under Section 338 (1) of the Companies Act, Cap 486 now repealed or could under Section 339(6) of the Act have applied within 10 years to have the company restored to the register if the company was carrying on business or was in operation. The plaintiff has not demonstrated that it had made such an application as is envisaged under Section 338(1) or Section 339(6) of the Act before the institution of these proceedings and hence the order of dissolution still stands. The dissolution of the company took effect on the date the Gazette Notice was signed and as from that date (16th June 1998) the plaintiff company ceased to exist as a legal entity. Only an application under Section 338(1) or 339(6) of the Act could have restored the company to the register of companies.

11. The HC Misc. Application No. 2 of 2017 that the plaintiff has instituted has come too late in the day and cannot salvage the present suit. As matters stand as at 30th December 2014 when the plaintiff filed the present suit, it had no legal existence as it had been struck off the register of companies as at 16th June

1998. The plaintiff therefore lacked any legal capacity to file this suit. It had no locus standi and hence the instant suit is incompetent and is unsustainable. The court accordingly upholds the defendant's preliminary objection and hereby dismisses the plaintiff's suit.

12. The suit is by a none-existent party and I regrettably cannot order costs against a non-existent party and I therefore make no order for costs.

13. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 19th day of May, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

..... court assistant

J. M. MUTUNGI

JUDGE