



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. SUIT NO.120 OF 2017

SAMUEL KANOGO RITHO.....1ST PLAINTIFF

SARIMU HOLDINGS LIMITED.....2ND PLAINTIFF

VERSUS

LISCOM COMPUTERS & ACCESSORIES LTD.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR, NAIROBI.....3RD DEFENDANT

RULING

The 1st Defendant filed the Notice of Preliminary Objection on 13/4/2017. The objection taken is that both the application dated 20/2/2017 and the plaint are fatally and incurably defective since the supporting and verifying affidavits were sworn by Geoffrey Avugwi Ritho, a stranger who is not a party to the suit. It is argued that he lacks *locus standi* to sue and has no cause of action against the 1st Defendant. The Defendant seeks to have the suit and application for injunction struck out with costs.

Both parties filed submissions and authorities. In its submissions the 1st Defendant urged that there is no resolution from the 2nd Plaintiff authorising the filing of this suit. The 1st Defendant's assertion is that Geoffrey Avugwi Ritho is a stranger to the suit and not competent to swear the supporting and verifying affidavit as he purported to do on 20/2/2017. The Defendant contends that the competent person to swear the affidavit would be the 1st Plaintiff, Samuel Kanogo Ritho either in his personal capacity or as a shareholder and director of the 2nd Plaintiff. The Defendant contends that Geoffrey Avugwi Ritho should have brought the suit in his personal capacity while indicating that is suing under the power of attorney donated by the 1st Plaintiff.

The Defendant further avers that the 1st Plaintiff has at all times material to this suit been an adult of sound mind not prejudiced by any circumstances that would deprive him of the capacity to sue as a director or shareholder of 2nd Plaintiff or to be sue in his personal capacity. The 1st Defendant contends that any claimant must show how he derived the right to the suit property or the right to sue which Geoffrey Avugwi Ritho has failed to demonstrate. It is also urged that Geoffrey Ritho has not stated that he has been authorised by the 2nd Plaintiff to swear the Affidavit on its behalf. The 1st Defendant argues that the Plaintiff has not attached any written authority from the 2nd Plaintiff to commence this case which is contrary to order IV Rule 1 (4) of the rules made under the Civil Procedure Act.

The Plaintiff argues that Geoffrey Avugwi Ritho is a director of a 2nd Plaintiff and holds the power of attorney to handle the affairs of the 1st Plaintiff. It is urged that Elizabeth Muthoni Ritho was granted limited letters of administration *ad litem* in respect of the affairs of Gladys Luhunga Ritho who is now deceased. The court previously appointed Gladys Luhunga Ritho as the legal administrator and guardian *ad litem* of the affairs of the 1st Plaintiff on 7/5/2013 in **HCC No. 16 of 2013**. Mrs. Gladys Luhunga Ritho died on 14/10/2013. It is contended therefore, that the suit property herein formed part of the estate that the late Gladys Luhunga Ritho was expected to administer on behalf of the 1st Plaintiff.

The Plaintiffs claim against the 1st Defendant is that the 1st Defendant illegally and fraudulently transferred the land known as Nairobi Block 94/3 to itself on the basis of gazette notice number 3661 appearing at page 2612 which referred to the reconstruction of a lost or destroyed land register under the Land Registration Act. The gazette notice made reference to other persons and was in relation to a different property being L. R. No. 36/1/105. This is what was used to reissue a certificate of lease in respect of the Plaintiff's property to the 1st Defendant without the Plaintiff's authority. The Plaintiff also maintains that Geoffrey Avugwi Ritho is a director of the 2nd Defendant and competent to swear the affidavits.

The court has looked at the certificate of lease over Nairobi Block 90/932 which shows that the Plaintiffs own the suit property as proprietors in common having been issued with a certificate of lease on 30/12/2005. The 1st Defendant was registered as proprietor of Nairobi Block 94/3 on 13/7/2016. Nairobi Block 90/932 and Nairobi Block 94/3 appear to be the same land.

The issue for determination is whether the Plaintiff's suit ought to be struck out as the 1st Defendant seeks.

In **Mukisa Biscuit Manufacturing V. West End Distributors Co. Ltd** the court stated that a preliminary objection consists of a point of law which has been pleaded or arises out of the pleadings and which may dispose of the suit. 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 facts have to be ascertained or if what is sought is the exercise of judicial digression.

Geoffrey Avugwi Ritho states in his replying affidavit that his father donated a power of attorney to him and he is duly authorised and competent to swear the affidavit. He states that his father donated a power of attorney to him on 16/12/2009 appointing him to take care of his estate. He attached a copy of the power of attorney which was registered 16/12/2009. The power of attorney empowers him to sue on his father's behalf.

The court has considered the decisions relied on by the Defendant. In **Kenya Commercial Bank Ltd v Stage Coach Management Ltd** [2014] eKLR a preliminary objection was taken that there was no resolution approving the institution of the suit. The Judge referred to the decisions of Odunga and Kimaru JJ. in which they found that the mere failure to file the resolution of the corporation with the plaint did not invalidate the suit and such a resolution by the board of directors may be filed at any time before the suit is fixed for hearing. The court upheld the preliminary objection since the Plaintiff had been lackadaisical having done nothing for over a year after becoming aware of the preliminary objection. In the instant case the suit property is jointly owned by the 1st Plaintiff and the 2nd Plaintiff.

The court struck out the suit in **Edwin Makanyanga Mwangale V. Moses Wafula Khahoya** [2016] eKLR because it had not been filed in the company name unlike the present suit in which the company is named as the 2nd Plaintiff.

The objection taken in **S.R. Shah Trading as Lento Agencies V. Diamond Trust of Kenya**, HCC No. 2075 of 2000 (Milimani Commercial Courts) was that the plaint was not accompanied by a verifying affidavit as required by the Civil Procedure Rules. The court notes that the plaint in this case is accompanied by a verifying affidavit.

The court has considered the preliminary objection together with submissions of counsels and finds that the objection does not raise pure points of law. There are facts which have to be ascertained. For instance, the 1st Defendant argues that the 1st Plaintiff is of sound mind and not being prevented by any circumstance, ought to have sworn the affidavits verifying the plaint and in support of the application for injunction. This argument may not lie if it is established that Gladys Luhunga Ritho was appointed the legal administrator and guardian *ad litem* of the affairs of the 1st Plaintiff on 7/5/2013 in HCC No. 16 of 2013 as this will have a bearing on the capacity of the 1st Plaintiff to swear the affidavits. The issue as to whether Geoffrey Avugwi Ritho had authority under the power of attorney and was competent to prosecute this case will have to be determined at the hearing.

The court however agrees with the 1st Defendant that Geoffrey Avugwi Ritho the deponent of the impugned affidavits ought to have stated in the plaint that he was suing on behalf of the 1st Plaintiff based on the power of attorney that he holds from the 1st Plaintiff.

There are ample decisions which support the position that pleadings should only be struck out when they are so hopeless that life cannot be breathed into them through amendments. The court does not think this case is hopeless. Life can be breathed into it through amendments.

The court dismisses the preliminary objection with costs to the Plaintiffs.

Dated and delivered at Nairobi on 21st November 2017.

K. BOR

JUDGE

Read in open court in the presence of: -

Mr. V. Owuor- Court Assistant

Mr. Kinyua and Mr. Maina for the Plaintiff

No appearance for the Defendants