



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 334 OF 2012

LESAAN HARDWARE LTD.....PLAINTIFF

VERSUS

SETTLEMENT FUND TRUSTEE.....1ST DEFENDANT

ALICE CHELAGAT TOO.....2ND DEFENDANT

ROBERT KIPKOECH KORIR.....3RD DEFENDANT

RULING

(Application for injunction together with prayer for striking out plaint; earlier application for injunction having been made and considered; issue of injunction cannot be revisited; argument that a member of plaintiff company has died and company has ceased to exist; private company now with one member; whether the company ceases to exist; company does not cease to exist; consequence being that there may be personal liability and may be subject to being wound up; application dismissed).

1. This ruling is in respect of an application dated 25 September 2015 filed by the 2nd and 3rd defendant. It seeks the following orders :-

1. Spent...

2. Spent...

3. This Honourable Court be pleased to issue an order of temporary injunction restraining the plaintiff/respondent by itself, its agents or servants from further cultivating, selling, entering, leasing, transferring, alienating, disposing , or in any way interfering with the 2nd and 3rd defendants'/applicants' quiet possession of the portion of land namely Plot ADC Sirikwa Plot Numbers 520 and 521 of Sirikwa Settlement Scheme now known as Nakuru/Sirikwa/520 and Nakuru/Sirikwa/521 pending the hearing and determination of the suit.

4. That the entire suit or claim against the 2nd and 3rd defendants be struck out.

5. That costs of this application be provided for.

2. The grounds upon which the application is based are inter alia, that the suit properties are rightfully

owned by the applicants and that the plaintiff is trespassing on the same. It is also averred that one co-director of the company, Mr. Wilson Chepkony died in the year 1999 and that a private company is considered wound up when the shareholders are less than two. It is averred that the plaintiff no longer exists as a company and therefore the suit against the defendants is an abuse of the court process and should be struck out. The application is supported by the affidavit of the 2nd defendant who has annexed title deeds showing that the applicants are registered proprietors of the suit properties. It is also deposed that Mr. Chepkony is now deceased and it is contended that the plaintiff company no longer exists.

3. I have not seen any response filed by the plaintiff on this application and the only submissions filed were those of the applicants.

4. I have considered the matter. Before I delve into it, I think it is best I give a little background to this suit.

5. The suit itself was commenced on 25 April 2012. The plaintiff is a limited liability company. Its claim as filed is that the plaintiff is the owner of the Plots No. 520 and 521 having purchased them from the Agriculture Development Corporation (ADC). It is pleaded that the 2nd and 3rd defendants have obtained a fraudulent title and invaded the suit properties. Together with the suit, the plaintiff filed an application for injunction to restrain the 2nd and 3rd defendants from the suit properties. Through a ruling delivered on 4 October 2013, the court (Waithaka J), was of the view that the plaintiff has established a prima facie case and allowed the application for injunction. The 2nd and 3rd defendants were restrained from the suit properties pending hearing and determination of the suit.

6. It will be observed that the 2nd and 3rd defendants, in this application, have also applied for an order of injunction to restrain the plaintiff from the suit property. I am of the opinion that the issue of injunction was resolved in the ruling of 4 October 2013, and I cannot visit it. My predecessor made orders on how the suit properties should be preserved pending hearing and determination of the case. It is improper for the 2nd and 3rd defendants to now seek to reverse that order of injunction through this application. If I entertain the prayer for injunction, then I will essentially be sitting on appeal on the orders of 4 October 2013. I therefore disallow the prayer for injunction.

7. The other limb of this application is to have the suit struck out. It is the argument of the applicants that since one of the two shareholders of the plaintiff company is deceased, the plaintiff company has ceased to exist.

8. It is not in contention that the plaintiff company is a private company. I have seen its Memorandum and Articles of Association which were displayed in an affidavit sworn on 30 April 2012, in a separate application, by Jane Cherotich Chepkwony who is a director of the plaintiff company. I have seen that the company has two shareholders, Wilson Chepkwony and Jane Chepkwony, each having a single share. It is common knowledge that Wilson Chepkwony died in the year 1999. Does that then mean that the plaintiff company ceased to exist ?

9. Under Section 30 of the former Companies Act, (CAP 486) (repealed in 2015) but which was in existence when this suit was filed, and which is applicable for the circumstances herein, a private company needed to have at least two persons as shareholders. Section 33 thereof provides for the consequences where the number of members is reduced below the legal minimum. It provides as follows :-

S. 33 : If at any time the number of members of a company is reduced, in the case of a private company, below two or, in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after the six months and is cognizant of the fact that it is carrying on business with fewer than two members, or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

10. The death of a shareholder, does not mean that the company ceases to exist. However, under Section 33 above, a member (shareholder) may end up being personally liable for the debts of the company contracted during that time and may be sued for the same. There is also another consequence, in that the company could be subject of winding up proceedings. Section 219 (d) of the repealed Companies Act, does provide that where the number of members falls below the statutory minimum, this may be a ground for winding up the company. But unless and until a company is wound up, it does continue to exist. It is noteworthy to mention that the new Companies Act, 2015, does now provide that a company may be formed by one person.

11. Given my reasoning above, I am unable to allow the prayer to strike out this suit for the reason that when filed the plaintiff company had less than two members.

The end result is that the application herein must fail and it is hereby dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 12th day of May, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr.B.N. Kipkoech for 2nd and 3rd defendants/applicants.

No appearance on part of M/s Ikua Mwangi & Co. for plaintiff/respondent.

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU