



**REPUBLIC OF KENYA**

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

**ELC NO.72 OF 2016**

**NYANDO FARMERS COMPANY LIMITED .....  
PLAINTIFF/APPLICANT**

**VERSUS**

**LICHET FARMERS CO-OPERATIVE LIMITED .....1<sup>ST</sup>  
DEFENDANT/RESPONDENT**

**SILAS OMBURA ONYANGO.....2<sup>ND</sup>  
DEFENDANT/RESPONDENT**

**THOMAS AOMO OGODO.....3<sup>RD</sup>  
DEFENDANT/RESPONDENT**

**JEREMIAH ODONGO OCHIENG.....4<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**LAND REGISTRAR, NAIROBI CENTRAL LANDS REGISTRY.....5<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**RULING**

**1. Silas Ombura Onyango, Thomas Aomo Ogodo and Jeremiah Odongo Ochieng, the 2<sup>nd</sup> to 4<sup>th</sup> defendants respectively, through M/S Odhiambo & Odhiambo advocates filed the notice of preliminary objection dated 20<sup>th</sup> May 2016 to the suit and notice of motion filed by Nyando Farmers Co. Ltd, the plaintiff, setting out the following six grounds;**

**“1.The Plaintiff’s/applicant’s application and suit offends mandatory provisions of the Company’s Act, Cap 486 Laws of Kenya.**

**2.That there is no Plaintiff before court.**

**3. No summons to enter appearance issued in the suit herein.**

**4. In the alternative and without prejudice to the foregoing the Plaintiff never served summons to enter appearance upon the Defendants/Respondents.**

**5. That the Plaintiff’s application and suit are frudarentally flawed and incompetent for want of locus standi.**

## **6. Jurisdiction is contested.”**

2. The preliminary objection is opposed by the Plaintiff through **the** grounds of opposition dated 26<sup>th</sup> July 2016, filed through M/S Ogone Angienda & Co. advocates on four grounds as follows:

**“1. That the grounds set out herein do not constitute a preliminary objection as defined by the East African Court of Appeal in Mukhisa Biscuit Manufacturing Company Limited -V- West End Distributors (1969).**

**2. The Honourable court has jurisdiction pursuant to all the relevant laws.**

**3. The Plaintiff is properly before the court and has the requisite locus to institute the present application and suit.**

**4. The application and suit do not offend the Company’s Act.”**

3. The preliminary objection came up for hearing on the 15<sup>th</sup> September with Mr. Odhiambo, Mr. Kimanga, M. Biko and Mr. Mutai, learned counsel for the Plaintiff, 1<sup>st</sup> Defendant, 2<sup>nd</sup> to 4<sup>th</sup> Defendants and the 5<sup>th</sup> Defendant respectively present. Mr. Kimanga for the 1<sup>st</sup> Defendant indicated that his client would not be participating in the hearing of the preliminary objection. Mr. Mutai for the 5<sup>th</sup> Defendant also indicates that his client had no submissions at this stage. The court heard Mr. Biko and Mr. Odhiambo for the 2<sup>nd</sup> to 4<sup>th</sup> Defendants and the Plaintiff respectively and their submissions are as summarized hereinbelow;

### **a. 2<sup>ND</sup> TO 4<sup>TH</sup> DEFENDANTS COUNSEL’S SUBMISSIONS:**

i. That summons to entire appearance were not issued, extracted and served on the Defendants as required.

That this omission on the part of the Plaintiff cannot be said to be a technical issue to be excused under **Article 159** of the Constitution in view of the Supreme Court of Kenya decision in the case of **Raila Odinga –V- IEBC & Others {2013}** eKLR where the court observed that the Article did not oust the procedural requirements. That therefore summons needed to have been issued and served in accordance with **Order 5** of the Civil Procedure Rules.

ii. That the persons who instructed counsel to file this suit and the notice of motion are neither directors nor shareholders of the Plaintiff’s Company. That the meetings and resolutions of 6<sup>th</sup> May 2005 and 26<sup>th</sup> March 2016 were by persons who are not directors or shareholders of the Plaintiff’s Company. That there was no quorum to transact business during the two meetings.

iii. That no notice had been issued for the meetings held on 6<sup>th</sup> may 2005 and 26<sup>th</sup> March 2016. That the alleged chairman and secretary who instructed counsel to file this suit were not directors or shareholders of the Plaintiff and no authority was exhibited allowing the counsel to file this suit. That the 2<sup>nd</sup> Defendant is the official chairman and yet he has been sued.

iv. That only the person named at position 4 out of the 18 persons attending the meeting of 26<sup>th</sup> March 2016 was a shareholder and the quorum being 33, the meeting lacked quorum to transact any business.

v. That the meeting of 6<sup>th</sup> May 2005 is shown to have been attended by 263 people while the membership of the Plaintiff’s Company is capped at 50 people as per clause **2 (b)** of the Article of Association. That the resolutions thereof can only have been by strangers with no mandate to act for the Plaintiff.

vi. That the lease of the suit land expired in 2014 and there is therefore no subject matter capable of being the basis of a cause of action until such a time that the lease of the said land will have been renewed.

vii. That the verifying affidavit accompanying the plaint was sworn by unauthorized person and hence contravenes **Order 4 rule 4** of the Civil Procedure Rules, and the plaint should be struck out.

viii. That the dispute brought to the court is a commercial one as it relates to proposed sale contract. That it is the Commercial Court that would settle who the directors to the Plaintiff Company are. That the confirmation of what the resolution of the shareholders were will require viva vole evidence to be adduced before the Commercial Court, and therefore this court lacks jurisdiction.

ix. That the 2<sup>nd</sup> to 4<sup>th</sup> Defendants are not impeding the minority shareholders and the two decided cases cited by the Plaintiff's counsel of **Dadani –V- Manji & 3 others** {2004} I KLR 95 and **Foss –V- Herbottle (1843) 2 HARNE 461** on derivative suits are not relevant to this case. The counsel referred the court to the first three decided cases in their list of authorities being **Kenya Commercial Bank Ltd –V- Stage Coach Management Ltd** (2014) eKLR , **Edwin Makanyanga MuangaLe –V- Moses Wafula Khaoya** (2016) eKLR and **Tash Goel Vedprakash –V- Moses Wambua Mutua & Another** [2014] eKLR in support of the Defendants case.

b. **PLAINTIFF'S COUNSEL SUBMISSIONS:**

i. That this is not a derivative suit as the Plaintiff is a legal person with capacity to sue and be sued. That in derivative suits, a party seeks to be allowed to file suits in their name on behalf of the company.

ii. That this suit is about wrongs done to the company and is properly filed. The counsel referred to the two cases in their list of authorities being **Dabanji–V- Manji & 3 others** [2004] IKLR 95 and **Foss –V- Herbottle (1843) 2 HARNE 461**.

iii. That the persons who instructed counsel to file this suit are members of the Plaintiff's Company and are known to the Defendants.

iv. That the Defendants have never challenged the meetings of 6<sup>th</sup> May 2005 and 26<sup>th</sup> March 2016 and the resolutions thereof.

v. That the claim that summons were not issued and served has no merit as the Defendants are before the court and are participating in the proceedings.

vi. That the issues in this matter and the prayers sought cannot be issued by the Commercial Court and therefore this suit is in the correct forum. That the Plaintiff has a reasonable expectation on the pending application for renewal of the lease and therefore there is no basis to claim that the property does not exist.

vii. That the issues herein should be determined through viva voce evidence and the suit should be allowed to proceed to hearing and determination on merit.

4. The following are the issues for the determination by the court:

a. Whether the Plaintiff has acted through recognized agents in filing this suit and instructing counsel.

b. Whether the Plaintiff served summons to enter appearance on the Defendants.

c. Whether the court has jurisdiction in this suit.

5. The court has considered the grounds on the notice to raise the preliminary objection, grounds of opposition to the preliminary objection, oral rival submissions by both counsel, the court record and come to the following conclusions;

a. That from the copy of certificate of incorporation **No.9788** annexed to the supporting affidavit, sworn by **Benson Yugi Konyango** on 6<sup>th</sup> April 2016, copies of the letter from the Registrar of Companies dated 21<sup>st</sup> August 2015 on **the CR 12 C.9788** contents, **Form 203A**, Articles and Memorandum of Association in the Defendants lists of documents dated 9<sup>th</sup> September 2016, the plaintiff is a private company with limited liability incorporated on 4<sup>th</sup> March 1971. That as such the Plaintiff has the capacity to sue and be sued in its name.

b. That for a private company like the Plaintiff to institute a suit and instruct counsel, the appropriate authorization organs, being the board of directors and or the shareholders, must authorize the action through resolution(s) as has already been held in the case of **Kenya Commercial Bank Ltd –V- Stage Coach Management Ltd** Milimani Commercial H.C.C.C No.45 of 2012, in which several decisions on the issue were cited. The Defendants have taken issue with the way the counsel who filed this suit on behalf of the Plaintiff was instructed. They have also submitted no resolution from the Plaintiff’s bonafide directors and shareholders to file this suit has been exhibited. That the court has noted that annexed to the supporting affidavit of 6<sup>th</sup> April 2016 is a handwritten copy headed “**Special General Meeting held at Chemelil Sugarbelt on 26<sup>th</sup> Mach 2016**”, which has six pages. That at page 1, the following are indicated as the directors;

1. Robert Otieno Okuku - Chairman
2. Benson B. Y. Konyango - Secretary
3. Elias Otura Ndege - Ass. Treasurer
4. Dickson Akodhe Oyiengo - Director
5. Thomas Lusi Apiyo - “

That it is also indicated that one Ezekiel Oduongo Okello, Vice Chairman was absent with apology. That the Plaintiff’s case is that the above listed persons were the directors of the Plaintiff and therefore the suit is properly filed.

That the Defendants have disputed that the persons named in the list above were the directors and have provided copies of **CR 12** and **Form 203A** which has the following as directors of the Plaintiff company as of 21<sup>st</sup> August 2015.

1. Sila Ombura
2. Jeremiah Odongo Ochieng
3. Robert Bonga
4. Killian Osur
5. Elisha Omer
6. Zephania Akelo
7. Unita Otene

That the seven are also shown on form 203A to have been appointed as directors from 31<sup>st</sup> March 2011. That the court notes that the Plaintiff has not rebutted the contents **of CR 12** and form **203 A** and it has no reason to doubt their genuiness and authenticity.

c. That flowing from (b) above the court finds that the persons listed in the minutes of 26<sup>th</sup> march 2016 as directors of the Plaintiff company, have not been registered with the Registrar of companies and had therefore no capacity to act for the Plaintiff, as they purported to do in filing this case and getting one of themselves to swear the statutory verifying affidavit to accompany the plaint. That the verifying affidavit sworn by Benson Yugi Konyango offends **Order 4 Rule 1(4)** of Civil Procedure Rules and the plaint should be struck out in terms of **subrule (6)** thereof.

d. That another issue of contention is that the persons who attended the meeting of 6<sup>th</sup> May 2005 and 26<sup>th</sup> March 2016 were not shareholders of the company and further that there had been no quorum to transact. The court notes from the minutes of 26<sup>th</sup> March 2016, at the last page is a list of the 18 people in attendance. The Defendants submission is that out of the 18, only **Thomas Lusi Apiyo**, at number 4, was a member and that one person cannot constitute quorum. The Defendants further submitted that the membership of the Plaintiff was capped at 50 (fifty) and therefore the quorum was 33 members. That however, none of the parties in the suit has availed any record of the Plaintiff containing all the shareholders to enable the court verify whether the entire 18 person in the list were genuine shareholders. That notwithstanding, the 18 people in the minutes cannot constitute quorum in terms of **clause 20** of the Article of Association of the company. That the resolutions at minute 3/03/2016 headed **“Resolutions”** was for the board of directors **“to get an active speedy lawyer to file an injunction in Kisumu High court”**. That even assuming that the resolution was by bona fide members, there is nothing availed by counsel acting for the Plaintiff to confirm that the counsel had been appointed to act by the board of directors. That the court finds that there was no proper authorization by the Directors and or shareholders of the Plaintiff to commence this suit and to appoint the counsel to act for the Plaintiff in this suit.

e. That the submission by counsel and the documents filed by both the defendants and Plaintiff point to a scenario where there exist disputes as to who the bona fide directors and shareholders of the Plaintiff are. That issue has to be settled in another forum and not before this court. That this court is also not the forum to determine the legality or otherwise of the meetings said to have been held on 6<sup>th</sup> May 2005, 26<sup>th</sup> March 2016 and the resolution thereof. That notwithstanding, the court agrees with the Defendants counsel’s submissions that the Benson Yugi Konyango, who swore the verifying affidavit, is not one of the directors registered with the Registrar of companies in view of the contents of the **CR 12** and form **203A** availed by the Defendants. That there is nothing to show that the said deponent had been authorized to swear the verifying affidavit in support of the suit on behalf of the Plaintiff as provided for under **Order 4 Rule 1(4)** of Civil Procedure Rules and the same is struck out.

f. That in respect to prayers (b) and (c) of the plaint dated 6<sup>th</sup> April 2016, this court would have jurisdiction to hear and determine the questions that would lead to those orders being issued or denied in a suit that is properly before it. That in this suit, the verifying affidavit has been struck out and the court has found that the person or persons who instructed counsel to file suit were not the bona fide directors or shareholders of the Plaintiff. That the suit has been commenced through instructions from organs not recognized in the running of the affairs of the Plaintiff. That it follows that the suit and the notice of motions are non-starters for those reasons.

g. That on the service of the summons, the court has gone through the record and there is no evidence of any summons having been issued and or served. That what appear to have been served from the affidavit of service filed are the certificate of urgency, notice of motion, supporting affidavit and annexures. That **Order 5 rule 1 (5)** of Civil Procedure Rules requires the Plaintiff or his advocate to prepare the summons and file them with the Plaintiff so as to be signed in accordance with **sub rule**

**(2)** That **sub rule (6)** requires the summons to be **“collected for service within thirty days of issue or notification whichever is later, failing which the suit shall abate”**. That as there is no evidence of summons having been presented with the plaint or issued thereafter for service then the court finds that the suit has abated notwithstanding the fact that some of the Defendants had filed their defence.

h. That for reasons set out above the court is satisfied that the grounds raised in the preliminary objection by the Defendants are issues of law within the definition of the celebrated case of **Mukhisa Biscuits Manufacturing Co. Ltd –V- West End Distributers** (1969) E.A 696 and is upheld.

6. That having upheld the preliminary objection raised by counsel for 2<sup>nd</sup> to 3<sup>rd</sup> Defendants, the suit commenced through the plaint dated 6<sup>th</sup> April 2016 and the notice of motion under certificate of urgency of even date are hereby struck out with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF NOVEMBER 2016**

In presence of;

Plaintiff Present

Defendants 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants present

Counsel Mr Odhiambo for Plaintiff M/S Sadra for Kimanga for 1<sup>st</sup> Defendant and Mr. Makanga for Arikhio for 2<sup>nd</sup> to 4<sup>th</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**30/11/2017**

30/11/2017

30/11/2016

S.M. Kibunja Judge

Oyugi Court Assistant

1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant present

Mr Odhiambo for Plaintiff

M/S Sadra for Kimanga for 1<sup>st</sup> Defendant

Mr Makanga for Biko for 2<sup>nd</sup> to 4<sup>th</sup> Defendant present

No Appearance for 5<sup>th</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**30/11/2017**

Court: Ruling dated and delivered in open court in presence of Mr. Odhiambo for Plaintiff, M/s Sadara for Kwanga for Defendant and Mr. Makanga for Biko for 2<sup>nd</sup> and 4<sup>th</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**30/11/2017**