



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
LAND AND ENVIRONMENT DIVISION AT NAKURU
CIVIL SUIT NO. 532 OF 2013

SIMON KANDIE.....1ST PLAINTIFF
KIBICHI KIGEN CHEPLEGO.....2ND PLAINTIFF
KIPKOECH CHEBET CHERUTICH.....3RD PLAINTIFF
JOHN KIBIIEGON CHERUTICH.....4TH PLAINTIFF
SAMUEL KIPKLEI CHELELGO.....5TH PLAINTIFF
JACKSON CHEPKIENG TUITOEK.....6TH PLAINTIFF
SIMON KIPCHOMBA KANDIE.....7TH PLAINTIFF
(SUING AS MEMBERS OF SOLAI RUYOBEI FARM LIMITED)

VERSUS

RICHARDSON KIPKOECH BUNDOTICH.....1ST DEFENDANT
CHARLES OLARI CHEBET.....2ND DEFENDANT
JOSEPH KIPYEGON LENGINCH.....3RD DEFENDANT
KOILEL LARAMATAK SELF HELP GROUP.....4TH DEFENDANT
LARI NYAKINYUA (SOLAI FARM) LTD.....5TH DEFENDANT
JATA HOUSING COMPANY.....6TH DEFENDANT

RULING

1. The Plaintiffs instituted this suit against the defendants by way of plaint on 12th September, 2013 seeking two substantive orders;

a) that the court makes a declaration that any agreements entered into by the defendants

with any third parties are illegal, irregular and null and void

b) a permanent injunction restraining the defendants themselves, their agents, servants and or employees from further selling, alienating, transferring, registering any transfer, executing a transfer, charging, mortgaging to any third parties, entering. Occupying or in any way interfering with L.R No. 67258/1 ("suit land") until this suit is heard and determined.

2. Contemporaneously with the plaint, the plaintiff filed a notice of motion on even date seeking temporary orders of injunction to restrain the defendant in the manner stated above. They also sought an order to have the Company's documents including the title deed, Company seal, Company cheque books, Company registration documents deposited in court for safe custody to avoid further alienation.

3. **On 19th September, 2013** in the presence of counsel for 1st, 2nd and 3rd defendants, a temporary injunction was issued restraining the defendants from interfering with the suit land pending the hearing and determination of this application.

4. On **2nd October, 2013** counsel for the plaintiff brought to the attention of the court that the District officer Gilgil, had started resettling people on the suit land and that the instruments of the Company if left in the hands of the defendants were likely to be misused. He urged the court to extend the order granted on **19th September, 2013** to be served upon the District Officer and the instruments of the company to be deposited in court. To safeguard the company's instruments, the court ordered that the same be deposited in court pending inter parties hearing of the application.

5. Before this application could be set down for hearing, the 1st, 2nd and 3rd respondents filed a notice of preliminary objection dated **1st October, 2013** on the grounds that the plaintiffs application was bad in law, incurably defective and an abuse of the court process; that this court lacked jurisdiction and could not impose a resolution on the 1st, 2nd and 3rd respondent's company and its shareholders; that the supporting affidavit was undated and the deponent's signature was forged; that the plaintiffs lacked capacity to institute the suit as they did not have proper mandate and/ or authority and that the plaintiffs instituted this suit using a list of non members and deceased persons of Solai Ruiyobei farm.

6. On **3rd February, 2014** parties agreed that the preliminary objection would be disposed of by way of written submissions. The 1st, 2nd and 3rd defendants filed their written submissions on **10th February, 2014** while the plaintiffs filed theirs on **11th February, 2014**. The 4th, 5th and 6th defendants did not file any despite being given ample time to do so.

7. In their submissions, the 1st, 2nd and 3rd defendants submitted that Solai Ruiyobei farm Ltd is a body corporate, a legal entity having a right to sue and be sued; that the plaintiffs did not have *locus standi* to file suit against the 1st, 2nd and 3rd defendants being directors of the Company; that the alleged acts and / or violations were wrongs against the company therefore only the company could seek redress and not its members as laid down in the case of **Foss v Harbottle (1843) Hare 461**; that the instant case did not fit within the exceptions laid down in the case of **Edwards v Halliwell (1950) All E.R.-1064**, therefore the orders sought should not be granted.

8. They further submitted that no evidence had been adduced that a resolution had been passed by the shareholders of the company to institute this suit or that the shareholders if aggrieved had first exhausted the available mechanism laid down in the Companies Act by calling for a meeting under **Sections 131 and 134** of the Companies' Act instead of filing suit. It was also their contention that the plaintiffs had filed this suit with only one verifying affidavit which was undated as was the supporting affidavit, which bore forged signatures sworn by the 1st plaintiff contrary to **Order 4 Rule 1(2) (3)** of the Civil procedure Rules and there was no authority filed expressly authorising

the 1st plaintiff to swear the affidavit on behalf of the other plaintiffs.

9. They relied on the cases of **David Langat vs St Lukes Orthopaedic & Trauma Hospital Ltd and 2 others** Eld. ELC NO 56 of 2013 and **Julius Gichuhi Kamau & Others v Joseph N. Maina & Others** Nairobi HCC No 415 of 2007.

10. In reply, the plaintiffs submitted that the 1st, 2nd and 3rd defendants had not demonstrated how the suit and the application were incurably defective or an abuse of the court process. Further, the defendants having being sued as individuals, the issue of filing a resolution do not arise as this suit was neither a derivative or a representative suit.

11. On the issue of the forged documents and defects in the plaint, the plaintiffs submitted that these were issues of the fact which needed to be proved by documentary evidence being adduced and expert witnesses being called during trial.

12. The *locus classicus* on preliminary objections is the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** (1969) EA 696, where **Newbold, V.P** held,

"Preliminary Objection is in the nature of what used to be a demurrer. 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 fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

13. Applying the principles laid down in the **Mukisa Biscuits case**, I am of the view that the grounds raised in the objection do not fit the criteria set out in the aforementioned case as I will demonstrate shortly.

(1) Whether this court has jurisdiction to entertain this matter

14. The Environment and Land Court is a special court established under **Article 162 (2) (b) and Section 4 (1) of The Environment and Land Court Act (No.9 of 2011)** to deal with matters concerning the Environment, use and occupation of and title to land. **Section 13(1)** of the Environment and Land Court Act sets out the mandate of the court as follows:-

"the Environment and Land Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of the Act or any other written law relating to environment and land."

15. It is clear from the Constitution and the Environment and Land court Act what the jurisdiction of this court is. According to counsel for the applicant, Solai Ruyobei Farm was incorporated, " **to purchase and sale land for the benefit of its members and to buy and allocate to shareholders land according to the paid up shares held by members**". The plaintiffs filed this suit opposing the sale, or planned sale of parcel No. 67258/1, one of the properties owned by the company. This court was set up to deal with matters concerning the environment, use and occupation of and title to land. The matter at hand relates to a decision made by the directors of the company on how to deal with a parcel of land owned by the company. It is my view that this court being mandated to deal with issues affecting that parcel of land owned by the company cannot close its eyes and or refuse/ fail to deal with decisions made by the directors of that company or its members affecting that parcel of land.

16. It is for the above reason that I find and hold that this court has jurisdiction to deal with this matter which jurisdiction is derived from **Article 162** of the Constitution and **Section 13(1)** of the Environment and Land Court Act as stated in the case of **Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others** [2012] eKLR where the supreme court held;

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law....."

(2). Whether the Plaintiffs have locus standi to institute this suit

17. It is the applicant's contention, that the Plaintiffs have no *locus standi* to institute a claim as against the company and they are in breach of the principles laid out in the case of **Foss v Harbottle** (supra). In one of the cases relied on by the applicants, **David Langat v St Luke's Orthopaedic & Trauma Hospital Ltd** Eld. E & L Case No 56 of 2013 Munyao J. restated the two principles in **Foss v Harbottle** (supra). He laid down the principles to be that only a company could file suit on a wrong done to it not its shareholders and secondly if the wrong was confirmed or ratified by a simple majority then the minority shareholders could not bring an action unless the company had acted *ultravires* or those in control of the Company were perpetrating a fraud.

18. Exceptions to the **Foss Vs Harbottle** case were laid down in the case of **Edwards v Halliwell** (supra) from which **Munyao J.** quoted with approval as follows;

((.....situations will inevitably arise where the appropriate organ of the company is unwilling to sue even where it will be in the interests of the company to do so. This is likely to be the case when the wrong complained of, against the company has been done by the very persons who are in control of the company.

The power to sue is therefore capable of being misused to serve personal ends to the detriment of the company. It is through a recognition of these circumstances that the common law allowed certain exceptions to the Rule in *Foss v Harbottle* and permitted a shareholder to institute suit, known as the derivative suit, on behalf of the company. The case of *Edwards v Halliwell* is taken to be the locus classicus that laid out these exceptions. Jenkins L.J stated as follows :-"The cases falling within the general ambit of the rule are subject to certain exceptions. It has been noted in the course of argument that in cases where the act complained of is wholly ultra vires the company or association the rule has no application because there is no question of the transaction being confirmed by any majority. It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority share holders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue. Those exceptions are not directly in point in this case, but they show, especially the last one, that the rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice"

19. This is such a matter as the one contemplated by the authority cited above. The plaintiffs as shareholders of Solai Ruiyobei farm, brought this suit against the 1st, 2nd and 3rd defendants and others, because they believed that the 1st, 2nd and 3rd defendants being directors of Solai Ruiyobei farm had without the consent and/or approval of the shareholders started disposing off portions of the suit property. The 1st, 2nd and 3rd defendants are the ones bestowed with the power to manage the affairs of Solai Ruiyobei farm. They can not be expected to bring this suit in the name of the company being the ones undertaking the alleged actions. In this case, I am satisfied that the plaintiffs have earned the right to bring a claim on behalf of the company and I find and hold that the Plaintiffs have locus to institute the suit.

(3) Whether the issues raised about the verifying, supporting affidavits and forgeries are points of law

20. Finally the applicants have raised issue with the verification of the contents of the complaint. They allege that the plaintiffs have forged signatures in the verifying affidavit and other accompanying documents. To my mind, these are issues of fact which should be proved by evidence and should not be raised in a preliminary objection.

21. I think I have said enough to show why the Notice of Preliminary Objection dated **1st October, 2013** must fail and the same is hereby dismissed with costs to the plaintiffs.

22. Interim orders are extended for 90 days within which period the Notice of Motion dated **10th September, 2014** should be set down for hearing.

Dated, signed and delivered in open Court at Nakuru this 17th day of October, 2014.

L N WAITHAKA

JUDGE

PRESENT

Ms Njoroge holding brief for Mr Olonyi for the defendant/ Respondent

Ms Gachanja holding brief for Mrs Ndeda for 4th respondent

N/A for the plaintiff

L N WAITHAKA

JUDGE