Kiptoo alias Barnge'tuny Kiptoo & 3 others v Rono & 4 others (Environment & Land Case E024 of 2023) [2024] KEELC 4048 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEELC 4048 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE E024 OF 2023

JM ONYANGO, J

APRIL 29, 2024

BETWEEN

KIPLORI KIPTOO ALIAS BARNGE'TUNY KIPTOO ..... 1ST PLAINTIFF

SOKOME KIPTANUI ..... 2ND PLAINTIFF

FRANCIS KIPTUM CHEPKWONY ..... 3RD PLAINTIFF

KIMOROK FARM LIMITED ..... 4TH PLAINTIFF

AND

JOSEPH KIMUTAI RONO ..... 1ST DEFENDANT

EMMY CHEPKEMBOI KURGAT ..... 2ND DEFENDANT

HELLEN JEBOTIN MASINGO ..... 3RD DEFENDANT

AGNES KIMOOI MOI ..... 4TH DEFENDANT

STEPHEN KIPROTICH CHEPYATOR ..... 5TH DEFENDANT

RULING

1. The Plaintiffs commenced this suit by way of Plaint on 20th April, 2023 against the Defendants through the firm of Nyekwei & Company Advocates. The five Defendants sued herein are the Directors of the 5th Plaintiff Company. Alongside the Plaint, they filed a Notice of Motion seeking, among other prayers, leave to continue the claim as a derivative suit. On 9th May, 2023 the firm of Maritim & Company Advocates filed a Notice of Change of Advocates on behalf of the 4th Plaintiff company. This led to the Plaintiffs filing a Notice of Preliminary Objection dated 9th June, 2023 on the grounds that;

    a. The Notice offends the provisions of Sections 238 and 239 of the *Companies Act* No. 17 of 2015 regarding derivative claims or suits.

b. The firm of M/s Maritim & company Advocates are bereft of Authority to take over the conduct of the suit on behalf of the 4th Plaintiff.

c. The Notice of Change of Advocates by the firm of Maritim and Company Advocates is made in bad faith, actuated with malice and meant to scuttle the derivative claim herein.

2. The 1st to 4th Defendants also filed a Notice of Preliminary Objection dated 20th July, 2023 where they raised objections on the following grounds:

i. That the suit against the 1st to 4th Defendants is based on orders of a suit in Eldoret ELC 943 of 2012 Jeremiah Busienei & 2 Others vs Kimorok Farm Limited & Philip Serem.

ii. That the matter is Res Judicata having been substantially dealt in Eldoret ELC 943 of 2012 Jeremiah Busienei & 2 Others vs Kimorok Farm Limited & Philip Serem and Eldoret ELC E044 of 2022.

iii. That the Plaintiffs/Applicants do not have the requisite locus standi to institute this suit on behalf of the parties they claim to represent.

iv. That the Plaintiffs/Applicants are not shareholders of the 4th Plaintiff/Applicant.

v. That the shareholding and distribution of shares is a factor of Company law and the jurisdiction vests in the High Court and not the Environmental and Land Court.

vi. That the suit is defective having been instituted against the 1st to 4th Defendant/Respondents in their personal capacity.

vii. That this court lacks jurisdiction to entertain this Application/suit herein as it was vexatious and an abuse of the court process as litigation must come to an end.

3. On 12th July, 2023 the court directed that parties file and exchange their submissions to the two POs and all the parties filed their submissions.

The Plaintiffs Submissions

4. The Plaintiffs filed their submissions on 14th June, 2023 in respect of the P.O dated 9th June, 2023. Counsel submitted that the Notice of Change of Advocates offends Section 238 and 239 of the *Companies Act* No. 17 of 2015, which not only define but also set out the procedure for instituting a derivative suite. The provisions empower a member of the company or a shareholder to institute a derivative suits against the Directors of a company for acts and omissions which result in breach of duty and trust, as is the case here.

5. Counsel citedthe case of Ghelani Metals Ltd & 3 Others vs Elesh Ghelani Natwarlal & Another (2017) eKLR where the court held that:-

> "Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholders to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other office) or a third party, whose action has allegedly injured the corporation. The action is designated as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of representative suit filed by a shareholder on behalf of the corporation."

6. Counsel submitted that the suit herein was instituted on behalf of the 4th Plaintiff Company wholly against the Defendants and not the 4th Plaintiff, thus there could not be a separate claim between the

1st to 3rd Plaintiff as against the 4th Plaintiff. The 4th Plaintiff is part and parcel of the claim against the Defendants and cannot be separated from the other Plaintiffs as the Notice of Change Advocates purported to do. Counsel argued that the firm of Maritim & Company Advocates couldn't therefore purport to represent the 4th Plaintiff in a derivative claim such as this one. That to allow a change in the representation of the 4th Plaintiff would oust the derivative claim.

7. In addition Counsel submitted that there is no company resolution appointing the said firm and authorising them to represent the 4th Plaintiff, as the resolution attached to the Notice was not passed by the shareholders, neither were there minutes to prove that it was passed (Chemalal (Two) Farm Company Ltd vs Phylis Chepkoech Keino (2018) eKLR). Moreover, that even if they had a resolution, they would still be incompetent to represent the 4th Plaintiff as this is a derivative suit. It is Counsel's submission that the Notice of Change was filed maliciously and in bad faith with the intention to terminate or scuttle the derivative claim to the Plaintiff's detriment. Counsel urged the court to uphold the P.O and strike out the Notice of Change of Advocates filed by Maritim and Company Advocates.

4th Plaintiff's Submissions

8. The firm of Maritim and Company Advocates, whose presence in this suit is being contested, filed submissions purportedly on behalf of the 4th Plaintiff on 5th July, 2023. Counsel argued that the firm of Nyekwei & Company Advocates had not themselves demonstrated where they had obtained their instructions. Counsel argued that the suit was not sustainable for reason that derivative suits are filed in the High Court and not in the ELC, especially considering that the suit herein involves a question of the shareholding of the company. He relied on Mohamedin Mohamed & Another vs Ibrahim Ismail Isaak & Another (2012) eKLR and Amin Akberali Manji & 2 Others vs Altaf Abdulrasul Dadani & Another.

9. On the competency of the preliminary objection on representation, counsel argued that a P.O may only be raised on a point of law with no contest as to facts. According to Counsel, the P.O is incompetent and should be struck out with costs. Counsel relied on J.N. & 5 Others vs Board of Management St. G School Nairobi & Another (2017) eKLR and Mukisa Biscuits Manufacturers Ltd vs West End Distributors Ltd (1969) EA 696 on the definition of a preliminary objection. He submitted that the 1st to 3rd Plaintiffs can still articulate their claim without forcing the presence of the company as it had not given them instructions. On the issue of representation, Counsel cited Apia Quality Meats Limited vs Westfield Holdings Limited (2007) 3 LRC 172. In that case, the Supreme Court of Samoa held inter alia that an application for the removal of an advocate "had to be considered under the relevant legal principles on the courts exercise of inherent jurisdiction to control the conduct of the proceedings and those who appeared before counsel".

10. Counsel also relied on William Audi Odode & Another vs John Yier & Another, Court of Appeal Civil Application No. NAI 360 of 2004, where Justice O'Kubasu held that:-

> "...It is not the business of the courts to tell litigants which advocate should or should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in a matter, the parties must be allowed to choose their own counsel."

Defendant's Submissions

11. The 1st to 4th Defendants' submissions were filed on 27th July, 2023. Counsel submitted that going by Section 7 of the *Civil Procedure Act*, the suit is res judicata because there are former suits being

Eldoret ELC 943 of 2012 Jeremiah Busienei & 2 Others vs Kimorok Farm Limited & Philip Serem and Eldoret ELC E044 of 2022. Counsel cited Henderson vs Henderson (1843) 67 All ER 313 and The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR. Counsel submitted that these suits were determined by courts of equal and competent jurisdiction as this court. Counsel pointed out that the issues in this suit have been directly and substantially in issue in the previous suits, the parties are litigating under the same title, having been shareholders of the 4th Plaintiff. Further, that the matters herein were determined in the earlier suits.

12. As regards locus standi, Counsel argued that although the 2nd and 3rd Plaintiffs claimed to represent the portions held by their fathers, they had not presented letters of Administration to the relevant estates they were supposedly representing. They are therefore bereft of the necessary locus standi to institute, maintain and prosecute the suit, and for that reason it ought to be dismissed with costs. As to the allegation that the Plaintiffs are shareholders of the 4th Plaintiff, Counsel submitted that the 1st to 3rd Plaintiffs had not presented evidence to show this position. In addition, with regards to the 1st Plaintiff, there is no nexus between the name appearing on his ID card and any name on the register of shareholders, because whereas his ID reads Kiplori Kiptoo, that name was not on the register. The alias Brang'etuny Kiptoo was unknown and could not be identified. Counsel submitted that for these reasons, the 1st to 3rd Plaintiffs were naturally not shareholders of the 4th Plaintiff.

Plaintiffs' Supplementary Submissions

13. On 18th September, 2023 the Plaintiff's filed two sets of supplementary submissions both dated 15th September, 2023. The first were filed in reply to the submissions by Maritim and Company Advocates dated 20th June, 2023. In these submissions, Counsel argued that in purporting to rely on a List of Documents filed on 5th July, 2023 Maritim & Company Advocates were attempting to introduce minutes through the backdoor as the list was filed without leave of court and ought to be struck out itself. That the said List ought to have been filed together with the Notice of Change, and filing it after the Preliminary Objection had been raised was an attempt to evade/defeat the PO. Counsel added that the Directors, who are the Defendants sued in this claim, cannot appoint an advocate on behalf of the 4th Plaintiff, pointing out that there is no legal provisions requiring the Plaintiffs to seek authority.

14. On the issue of jurisdiction, Counsel submitted that since this is a derivative suit based on land, the ELC as established under Article 162(2)(b) has jurisdiction to deal with it. Under Section 13 of the ELC Act, the court is empowered to deal with disputes relating to the environment and land and he relied on Petro Somoni Motoki vs Jeremiah Matoke Nyangánywa (2021) eKLR. Counsel added that the 4th Plaintiff was set up as a land buying company, land being the predominant purpose herein, this is the competent court to deal with the suit (Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Ltd & Another (2016) eKLR). Counsel also cited Peter Wekesa Fwamba (Derivatively on behalf of Trans Nzoia Investments Company limited) vs Ronald Saenja Walubengo & 6 Others (2022) eKLR, where Justice Nyagaka held that the ELC had jurisdiction to hear a derivative claim relating to land.

15. Counsel distinguished the two cases relied on by Maritim and Company Advocates [Mohamedin Mohamed & Another vs Ibrahim Ismail Isaak & Another (supra) and Amin Akberali Manji & 2 Others vs Altaf Abdulrasul Dadani & Another (supra)], claiming that they dealt with the issue of leave to file and/or to continue a derivative suit once filed. On the contrary, in the Plaintiffs' P.O, the court is asked to address whether the said advocates were properly on record for the 4th Plaintiff. Maritim and Company Advocates deviated from the P.O raised against them, and raised issues different from it. He added that a company automatically becomes a party to a derivative claim without asking the member lodging it to include it, and it cannot issue instructions where it is the directors who are being sued.

16. The second set of supplementary submissions by the Plaintiffs were filed in reply to the P.O. dated 26th July, 2023 and the submissions by the Defendants. Counsel denied the contention that the Plaintiffs' suit is res judicata. Counsel contended that the Parties mentioned in Eldoret ELC 943 of 2012 Jeremiah Busienei & 2 Others vs Kimorok Farm Limited & Philip Serem and Eldoret ELC E044 of 2022 are not the same as the parties herein, hence the reluctance by the Defendants to give a full catalogue of the parties in the previous suits. In addition, the previous suits not being derivative claims as per Sections 238 and 239 of the *Companies Act*, the directors were not sued in the previous suits and were not parties thereto, making this suit different from the earlier cases.

17. Counsel maintained that given the nature of reliefs sought in a suit of this nature, there is no way issues in a derivative claim as the instant one can be the same as those in a non-derivative claim like the previous suits. To add to that, counsel submitted that there is no evidence of the determination of the issues raised in the previous suits and without such a record, the plea remains a mere allegation. Counsel stated that for these reasons, the Defendants had failed to prove that the doctrine of res judicata applies herein and urged the court to find so.

18. On locus standi, Counsel proclaimed that the issue of letters of administration does not arise as the Defendants listed the 2nd Plaintiff as a shareholder. In addition, the Plaintiffs had furnished documentation to show that they are members of the Company, and that in any event, the issues of membership and shareholding were contested facts that could only be ascertained at the hearing through evidence and they were not points of law. Counsel explained that a member under Section 238(6)(b) of the *Companies Act* is defined to include a person to whom shares in the company have been transferred or transmitted to by operation of the law, and this is the position of the 2nd and 3rd Plaintiffs.

19. Counsel made reference to Wilmot Mwadilo Edwin Mwakwaya, Amos Nyatta & Patrick Mbinga vs Eliud Timothy Mwamunga & Sagalla Ranchers Ltd (2017) eKLR where the court dismissed a P.O. raised on lack of locus standi to institute a derivative suit for want of letters of administration. With regards to the 1st Plaintiff, Counsel was of the opinion that he had given his official name and an alias which is not disputed, and that the Defendant did not tender any evidence to show that the alias did not belong to him. Counsel pointed out that one does not need a deed poll for an alias and the objection to the 1st Plaintiff's name is frivolous and unfounded. Moreover, that the Defendants did not furnish any evidence to suggest that the 1st Plaintiff's alias from their records is a different person from the 1st Plaintiff. That on this issue also, the 1st Plaintiff would allay any doubts as to his official names and the alias at the hearing of the suit. Counsel concluded by saying that the P.O. was unmerited as it did not raise pure points of law. He cited Transcend Media Group Ltd vs Independent Electoral and Boundaries Commission (I.E.B.C) (2015) eKLR in urging the court to dismiss the P.O. with costs to the Plaintiff.

Analysis and Determination

20. Before the Court can determine if the objections raised are merited, it is useful to first define what a Preliminary Objection is. The Black's Law Dictionary defines a preliminary objection as "...an objection that, if upheld, would render further proceedings before the tribunal unnecessary". It goes on to list an objection to the court's jurisdiction as an example of a preliminary objection. In the now famous case of Mukisa Biscuits Manufacturers Ltd vs West End Distributors Ltd (1969) EA 696, the court defined a preliminary objection as follows:-

> "...so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of

the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

21. In Mwalungu Mwambui Nyiyo & 201 others v Total Oil Products (East Africa) Limited & another (2021) eKLR, the court held that:-

> " The above legal preposition has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-
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> > "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 has to be ascertained or if what is sought in 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"

22. Additionally, I have relied on the decision of Attorney General & Another vs Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

i. A Preliminary Objection raised a pure point of law, which is argued on the assumptions that all facts pleaded by other side are correct.

ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute."

23. What can be gathered from the above is that a P.O is a motion asking the judge not to entertain the matter or take into account the validity of the claims raised in the suit. A P.O can only be raised purely on a point of law and not to question the truthfulness of a fact in a case because then it would be a breach of rules of procedure and ought not be entertained by courts of law. In Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 others [2015] eKLR, the Supreme Court quoted with approval Law J.A in the Mukisa Biscuits Manufacturing Case (Supra), where the learned Judge observed that:

> " A 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 has to be ascertained or if what is sought is the exercise of judicial discretion."

24. To ascertain whether a point is pure law, the Supreme Court in Aviation & Allied Workers Union Kenya (Supra) held that;

> " the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record".

Therefore, a P.O must be raised on the assumption that all facts pleaded by the adverse party are correct. It must not raise substantive issues from the pleadings which must be determined by court upon perusal of evidence. No preliminary objection can be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

25. There are two P.O's filed raising various objections in respect of this suit. Upon reading the two P.Os as well as the rival submissions of the parties herein, the court is satisfied that the following issues as framed shall adequately deal with the objections raised to wit:-

a. Whether this court has jurisdiction to entertain a derivative suit

b. Whether the Plaintiffs have locus standi to institute, maintain and prosecute this suit

c. Whether the suit herein is res judicata

d. Whether the firm of Maritim and Company Advocates is properly on record

e. Who shall bear the costs?

Whether this court has jurisdiction to entertain a derivative suit

26. The Defendants have questioned this court's jurisdiction to determine the dispute before it. The question of jurisdiction is a question of law, it goes to the root of the case and whenever it is raised, it ought to be decided first. This is because jurisdiction of a court is everything, as was held in the case of The Owners of the Motor Vessel Lillian 'S' Vs. Caltex Kenya Limited (1989) KLR 1 the Court of Appeal held that:

> " It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given"

27. Article 162(2)(b) of *the Constitution* of Kenya vests this Court with jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. This is expounded in Section 13 of the *Environment and Land Court Act*, which stipulates as follows:

> " 13. Jurisdiction of the Court
>
> (1) The 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 this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—

i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

ii. relating to compulsory acquisition of land;

iii. relating to land administration and management;

iv. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

v. any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court."

28. In determining whether a particular case is a dispute about land and is properly before the Environment and Land Court or not, the court shall apply the pre-dominant purpose test as persuasively stated in the case of Suzanne Butler & 4 Others vs Redhill Investments & Another (2017) eKLR, where the court held that:

> "When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

29. *The Constitution* itself is clear that matters relating to land can only be determined before this court, as is further informed by Section 13 of the ELC Act. Going by the Plaint, the 4th Plaintiff is a land buying company, whose object appears to have been acquisition of land meant to be sub-divided and transferred to its members/shareholders. The dispute herein revolves around the sub-division and

transfer of the land currently being held in the name of the company to the shareholders/members and their beneficiaries, which actions the directors of the company have neglected and defaulted on. The dispute does not relate to the company in and of itself or indeed any aspect of company law. Even where the shareholding of the company has been raised, the only concern is the Plaintiffs' shares as beneficiaries in relation to the share of the land currently in the name of the company.

30. The issues raised by the Plaintiffs cannot be severed to be heard by the High Court and the ELC Court. The reliefs sought by the Plaintiffs are centred around survey and subdivision of the property known as L.R. No. 1866/14 as well as transfer of the resultant plots to the shareholders/members and their beneficiaries. These reliefs are of such a nature that they can only be issued and/or obtained from this court, and this court is guided by Paul Nderi Warui & 24 others vs Chrysogon Wang'ondu Nduhiu & 3 others (2021) eKLR where it was held that:-

> " 10. As indicated in paragraph 1 of the ruling, the Plaintiffs are seeking various reliefs in relation to the parcels of land which are said to have been irregularly and fraudulently alienated by the 1st and 2nd Defendants. The mere fact that the properties were initially owned by the company does not necessarily remove the case from the preview of Section 13 of the *Environment and Land Court Act* and make it a commercial dispute. The law recognizes that even limited companies are capable of holding land which can be the subject of legal disputes. The court is of the opinion that a suit claiming a declaration that the sale and transfer of the various suit properties was illegal and an order for cancellation of the 3rd Defendant's title squarely falls within Section 13 (2)(e) of the *Environment and Land Court Act* as "any other dispute" relating to land."

31. Ultimately, it is clear that the dispute revolves around land. Therefore, in line with the predominant purpose test, this court is clothed with the requisite jurisdiction to hear and determine it.

Whether the Plaintiffs have locus standi to institute, maintain and prosecute this suit

32. Closely tied to jurisdiction is the question of locus standi, which is defined as the right to bring an action or to be heard in a given forum. The Defendants have submitted that the Plaintiffs have no locus standi or capacity to institute, maintain and prosecute this suit. The Defendants claim that this is because the Plaintiffs are not members or shareholders of the company and as a result, they urge that the suit is incompetent and should be dismissed. In the case of Law Society of Kenya vs Commissioner of Lands & 2 others [2001] eKLR, the Court held that ;-

> " ... Locus-standi signified a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a Court of law. That was the holding in BV Narayana Reddy –vs- State of Kamataka Air (1985) Kan 99, 106 (*The Constitution* of India, ARD 226). I adopt the same as a correct proposition of the law and I so hold."

33. Further in the case of Alfred Njau & 5 others vs City Council of Nairobi[1983] eKLR, the Court also held that;-

> " The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding. Therefore, the effect of the judge's finding here, which was made after hearing the evidence, and not treated as an isolated issue,

the latter course being disapproved in the particular circumstances of that case by the House of Lords in IRC v National Federation of Self Employed and Small Businesses Ltd (supra), was that the appellant had no right to bring or to appear in this suit against the Council."

34. Undoubtedly, locus standi is the right to appear and be heard in Court or other proceedings and literally, it means 'a place of standing'. If a party is found to have no locus standi, then it means they cannot be heard even if they have a prima facie case. Locus Standi also touches on the jurisdiction of the court, in that if the Plaintiff lacks locus standi, the Court lacks jurisdiction to determine the matter before it. Consequently, such a finding may dispose of the suit, as is the nature of a P.O, without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone. See also Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2014) eKLR; and Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama (2014) eKLR).

35. Although not standard procedure to consider documents outside pleadings in determining a P.O, the court has also considered the authority of Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga vs Eliud Timothy Mwamunga & Sagalla Ranchers Limited (2017) eKLR, cited by the Plaintiffs, where it was held that:-

> " 26. A close reading of the instant Defendant's Preliminary Objection relating to the locus standi of the Plaintiffs herein, this court is only limited to establishing whether or not they have satisfied this court if they are members of the Affected Party and if they are not, that the shares in the Affected Party have been transferred or transmitted to them by operation of law.
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> 27. As was rightly pointed out by the Plaintiffs, a court ought not to examine and pore over documents before hearing and determining the substantive matter with a view to striking out the proceedings in limine. Indeed, Article 50 of *the Constitution* of Kenya, 2010 provides that every person has a right to access a court of law for the determination of a dispute. Notably, Article 159(2)(d) of *the Constitution* of Kenya also mandates courts to administer justice without undue regard to procedural technicalities.
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> 28. However, this court was tasked with duty of determining whether or not the Plaintiffs' failure to demonstrate that had locus standi to institute the proceedings herein, if at all, was a defect that could be overlooked so that the court could delve into the merits or otherwise of their derivative action against the Defendant, who is a majority shareholder of the Affected Party.
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> 29. Indeed, as the issue of the locus standi of the Plaintiffs goes to the root of the matter, poring over and examining of their documents cannot be avoided as this court will have to be satisfied that they had jurisdiction to institute the proceedings herein. Indeed, no busy bodies ought to be permitted to occupy the court's time if indeed they are not closely related to a matter. Judicious time is precious and must be guarded jealously."

36. The objection raised on this point is that the Plaintiffs are not members or shareholders of the company and therefore are not entitled to institute a derivative suit under Section 238 of the *Companies Act*.

From a reading of Section 238(1), a derivative suit is a legal action filed by the member of a company to address any harms or wrongs done to the company. Section 238(6)(b) defines a member as follows:-

> " (b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law."

37. This court has taken time to peruse the lists of shareholders provided by both the Plaintiffs and the Defendants. Regarding the 1st Plaintiff, the Defendants have not denied that they have in their membership a person by the name Barng'etuny Kiptoo. The Defendants have attached a list of 155 members, on which the name Barng'etuny Kiptoo appears at No. 59. The bone of contention, however, is that they see no connection between the 1st Plaintiff's name appearing on his National Identity Card, Kiplori Kiptoo, and the purported alias of Barng'etuny Kiptoo as appears in their list of members. The law on evidence is clear that he who alleges must prove. The question of whether or not the 1st Plaintiff is who he claims to be can only be determined at the hearing, where the Defendants will have an opportunity to provide evidence to prove their allegation that the 1st Plaintiff is in fact not their shareholder, Barng'etuny Kiptoo.

38. However, at this point, no evidence has been placed before this court to propose otherwise. Moreover, an alias is not an official name, and in fact the Black's Law Dictionary (11th Edition) defines an alias as an assumed or additional name that a person has used or is known by, or a name that a person is otherwise called or named. With regards to the Defendants' allegation that the 1st Plaintiff did not present a Deed Poll on the name of Barng'etuny Kiptoo, there is no law requiring a person to have a Deed Poll with respect to an alias. To this end, there is no reason for the court to believe that the 1st Plaintiff is not who he claims to be at this point, and that the 1st Plaintiff has locus standi to institute this suit as a shareholder of the 4th Plaintiff.

39. With regards to the 2nd, she has indicated that she is claiming under her deceased husband, Kiptanui Cherono, who appears in the Defendants' list of shareholders at No. 150. The Plaintiffs have provided a list alleged to have been availed by the surveyor. On that list, the said Kiptanui Cherono is listed at No. 5 of a list with the heading "Non-Shareholders and are Occupying Parcels of Land in the Farm", a clear contradiction to the records of the Defendants who are the Directors of the Company. On the List by the Surveyor, the 2nd Plaintiff (Sokome Kiptanui) is indicated as one of the beneficiaries of Kiptanui Cherono. The Defendants have not contested the list presented by the Plaintiffs, which apart from the noted anomaly, appears to have been signed by one Director and the Company Secretary of the 4th Plaintiff. It is important to note that she does not claim to be his legal representative or the administrator of his estate but a beneficiary. There is no explanation of who a beneficiary is within the operations of the Company, and this court will be guided by the definition found in the Black's Law Dictionary (11th Edition) which is:

> " Someone who is designated to receive the advantage from an action or change, especially one designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, e.t.c.) or to receive something as a result of a legal arrangement or instrument."

40. Without any evidence to the contrary, this court can only presume that the term beneficiary as appears on that lists refers to a person to 'whom shares in the company have been transferred or transmitted by operation of law'. This definition, coupled with the definition of a member given under Section 238

of the *Companies Act*, would clothe the 2nd Plaintiff with sufficient locus standi to institute this suit as a member of the company.

41. The 3rd Plaintiff, Francis Kiptum Chepkwony, is claiming as a beneficiary of his deceased father, one Michael Chepkwony, who is also indicated in the list presented by the Plaintiffs as a "Non-Shareholders and are Occupying Parcels of Lnad in the Farm". The beneficiary of Michael Chepkwony on that list is one Judy Jepkorir Chepkwony and not the 3rd Plaintiff. This being the case, the court cannot deem him a member of the company. Not being a beneficiary, his claim would stand if he had shown that he was indeed an administrator of the estate of his deceased father. Currently, he is neither an administrator nor a named beneficiary, therefore the court agrees with the Defendants that he had no locus standi to institute the suit.

42. That notwithstanding, the 3rd Plaintiff's lack of locus standi cannot be reason enough to condemn the other three Plaintiffs unheard. Moreover, Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit and reads as hereunder:-

> " 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

43. This provision of the Civil Procedure Rules protects the Plaintiffs' suit herein against dismissal for misjoinder or non-joinder of parties. This honourable court has the discretion to deal with the misjoinder under Order 1 Rule 10(2) of the Civil Procedure Rules which provides that:

> " (2). The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

44. It is not in dispute that there exists a misjoinder and for that reason, the Defendants have asked that the whole suit be struck out and/or dismissed. However, going by the above provisions a misjoinder of parties to a suit cannot defeat the whole case. Consequently, since the Court has discretion to order the name of a party improperly joined, whether as plaintiff or defendant struck out, the court shall save the Plaintiffs' suit and, in the same vein, direct that the name of the 3rd Plaintiff be removed from these proceedings.

Whether the suit herein is res judicata

45. Aside from jurisdiction, another objection raised is that the suit herein is res judicata. The plea of res judicata is anchored on Section 7 of the *Civil Procedure Act*, 2010 which provides that:-

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

46. From the definition of a P.O. given earlier in this decision, it becomes very clear that it is bad practice to raise the plea of res judicata as a preliminary objection within the jurisprudence of Mukisa Biscuits Manufacturing Case (Supra). Whenever a party pleads res judicata, a court has to look at the decision claimed to have settled the issues in question, the entire pleadings and record of that previous case. The court places them against the new case to ascertain whether they are the same in the subsequent case. It is therefore indeed bad practice by counsel to raise such a weighty issue requiring evidence by way of a Preliminary Objection. Nevertheless, the court of Appeal in John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others (Civil Appeal No. 42 of 2014) (2015) eKLR had this to say with regards to the manner in which the plea of res judicata may be raised:

> " We are also not aware of any legal edict that an objection to a suit taken on the basis of res judicata must be so taken on a formal application. The appellants did not cite to us any such authority. In any event, the respondents had in their various pleadings raised the issue and this was long before the hearing of the application and the appellants were therefore put on notice in good time."

47. For this reason and for reason that the plea of res judicata would have implications on the jurisdiction of this court to determine the matter herein, this court will consider this objection. For starters, this court needs to determine whether all the elements in the test of res judicata have been met. The Court of Appeal in the case of The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR, set out the criteria for determining whether or not a suit is res judicata thus;

> " Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.'
>
> The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

48. The Defendants are referring this court to earlier decisions in Eldoret ELC 943 of 2012 Jeremiah Busienei & 2 Others vs Kimorok Farm Limited & Philip Serem and Eldoret ELC E044 of 2022 which

were not annexed to the P.O. The Defendants did not present any of the decision claimed to have settled the issues in Eldoret ELC E044 of 2022 and seem to expect the court to source for evidence of the same, which is against the procedure for determination of a P.O. As for ELC 943 of 2012, the same appears to have been compromised by the parties recording a consent on 5th February, 2020. In the consent order attached to the Plaintiffs' list of documents, the parties agreed that:-

> " By consent of the parties this suit be partially compromised in the following terms;-
>
> a) That prayer 1b of the amended plaint which is that parcel of land No.186614 measuring 1936 acres be surveyed and distributed according to the shares held by each shareholder or persons claiming under them.
>
> b) That County Land Registrar and County Surveyor Uasin Gishu County together with the Directors of the 1st Defendant do effect subdivision and transfers of land parcel number LR. NO. 186614 to the shareholders or persons claiming under them.
>
> c) That the matter be mentioned within 90 days to confirm compliance.
>
> d) That the matter do proceed for hearing on whether or not the 2nd Defendant was rightfully sued."

49. There is no doubt that the court that determined the former suits had competent jurisdiction to hear and determine the matters therein. Secondly, although the Defendants did not provide the court with copies of the pleadings in the former suit(s), the subject matter of both the current and former suits is the same, that is L.R. No. 1866/14. However, apart from these similarities, a party needs to also show that there a commonality of issues, the parties and the cause of action. The commonality in the cause of action is expounded at Explanation 4 of Section 7 in the following words:

> " Explanation 4: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

50. The cause of action in the former suit is that the Plaintiffs in the ELC 943 of 2012 sought to have the same surveyed, subdivided and transferred to the shareholders. The earlier suit was determined by way of a consent recorded by the parties in the terms outlined above. The cause of action herein is the reluctance by the Directors to abide by the terms of the consent order issued in the earlier suit. It is this very action that gave rise to the alleged omission or failure to act by the directors in the current derivative suit.

51. Furthermore, at the time of the earlier suits, there had been no survey done on the suit property, hence order No. 1 of the Consent. On 9th June, 2021 however, the Directors caused the suit property to be surveyed with a view to transferring the suit property to the shareholders. The instant suit therefore also arises from the anomalies noted after the survey and subdivision exercise. These two issues clearly distinguish the issues in this former suits from the issues herein dealing with the Plaintiff's proprietary rights.

52. In addition, these factors bring about an exemption to application of the doctrine of res judicata. Where it is shown that there has been a development of these fresh circumstances, then the suit is exempted from the application of the doctrine of res judicata. For the exemption to apply, a distinction is to be drawn between the discovery of new evidence and development of fresh circumstances as was

explained in Siri Ram Kaura vs M.J.E. Morgan, CA 71/1960 (1961) EA 462, where the Court held that:-

> " The general principle is that a party cannot in a subsequent proceedings raise a ground of claim or defence which has been decided on which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata... The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before... The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

53. Logically speaking, neither the failure to comply with the consent order nor the anomalies that arose after the survey and subdivision exercise could have been raised in the former suit(s). These events had not taken place yet and are circumstances not in existence at the time of the former suits, therefore even if the parties could have joined the former suits, they still could not have been able raised these issues at the time. It follows therefore that the instant suit is by these facts exempted from the application of the doctrine of res judicata. The objection on that point also fails.

Whether the firm of Maritim and Company Advocates is properly on record

54. The Plaintiff's P.O on representation is to the effect that the Notice of Change of Advocates is contrary to Section 238 and 239 of the *Companies Act*. Section 238 provides that:-

> " 238. Interpretation: Part XI
>
> (1) In this Part, "derivative claim" means proceedings by a member of a company—
>
> (a) in respect of a cause of action vested in the company; and
>
> (b) seeking relief on behalf of the company.
>
> (2) A derivative claim may be brought only—
>
> (a) under this Part; or
>
> (b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.

(3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

(4) A derivative claim may be brought against the director or another person, or both.

(5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

(6) For the purposes of this Part—

(a) "director" includes a former director;

(b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law."

55. Section 238 gives a platform for a shareholder or member of the company to institute an action for the protection of the Company or its members against unfair actions by third parties. In some instances, however, the persons complained of control the Company such as the major shareholders, the directors and former directors. The actions complained of must be in relation to an act or omission involving negligence, default, breach of duty or breach of trust by a director or former director of the company as provided for by Section 238(3) of *Companies Act*. The instant matter falls squarely within the parameters of Section 238 *Companies Act* and is a derivative suit.

56. In Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwariai & Another (2017) eKLR, the Court stated;

> " 37. Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation."

57. The issue of representation of the company by the firm of Maritim and Company Advocates arose when a Notice of Change of Advocates was filed by the said firm on instructions from the directors of the 4th Plaintiff. An advocate employed or retained by an organization represents the organization, which ordinarily acts through its duly authorized officers, in this case the directors. In the ordinary course of business, when a suit is instituted against a company, the directors pass a resolution to instruct an advocate to represent the company. In this instance however, the suit was instituted against the directors for wrongs allegedly done to the Company, and these Directors are the Defendants herein. The very same directors who are alleged to have been acting to the detriment of the Company and the shareholders are the ones who appointed the firm of Maritim and Company Advocates to act for the 4th Plaintiff.

58. It is the Plaintiffs' case that the named directors were conducting the affairs of the 4th Plaintiff Company to the detriment of the company and the shareholders. The question that arises is, how could the same directors then appoint an advocate to act for the same company in the circumstances? It is not conscionable that a Defendant can instruct an advocate to represent a Plaintiff and it goes without saying that such a scenario would pose a grave conflict of interest. The Defendants have not denied that they are not the ones who instituted the instant suit, even in the minutes attached to the List of Documents dated 20th June, 2023 at MIN 1/01/2022 the directors noted that a case had been filed in the name of the Company without authority being given. It is at MIN 2/01/2022 that they resolved to appoint the firm of Maritim & Company Advocates to represent the company in this suit.

59. In Chemalal (Two) Farm Company Limited vs Phyllis Chepkoech Keino (2018) eKLR, the court reiterated the words of Lord Denning M. R in Moir vs Wallerstainer (1975) 1 All ER 849 at pg. 857, where he stated that:-

> "It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in Foss V. Harbottle (1843) 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue."

60. Lord Denning in the Moir case (supra) posed the appropriate question: -

> "...But suppose (the company) is defrauded by insiders who control its affairs – by directors who hold a majority of the shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorize the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue themselves. Yet, the company is the one person who is indemnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress..."

61. The idea that a party who has been sued as a Defendant may appoint an Advocate to represent one of the Plaintiffs in that same suit is not only inconceivable but is also legally unsound. Allowing the Defendants herein to appoint an Advocate for the 4th Plaintiff in a suit they did not institute would be giving them power to compromise the case yet it was instituted against them in the first place. Going by the reasoning in the Moir Case (Supra), there would be nothing to stop the Defendants, who in this case are the alleged wrongdoers, from using this as a loophole to defeat the derivative suit instituted against them for the wrongs they are alleged to have committed. Not to mention the massive conflict of interest that arises from the very act of the Defendants appointing Counsel for the 4th Plaintiff, yet they are accused of acting against its interest.

62. The Court of Appeal in Delphis Bank Ltd vs Channan Singh Chatthe & 6 others (2005) eKLR laid out the test which must be demonstrated when a court is considering the disqualification of an advocate from representing a litigant. The Court of Appeal held that: -

> "The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which

> may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships... The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result. The authorities we allude to are King Woolen Mills Ltd & Anor vs. M/S Kaplan & Stratton [1993] LLR 2170 (CAK), (C.A 55/93) and Uhuru Highway Development Ltd & others vs Central Bank of Kenya Ltd & others (2), [2002] 2 EA 654.

63. Section 238 allows a member of the company to institute proceedings to seek reliefs against directors of a company or a third party for wrong(s) committed to a company. The intention of the lawmakers was to give the minority shareholders a tool with which to protect the company from the decisions of the majority. Since a derivative suit is initiated to protect the company, there is no reason why the Company should not be included as a party to the suit. Bearing this in mind, it goes without saying that the company cannot be included as a Defendant, as to do so would mean that the suit is brought not for, but against the company. Further, to allow the wrongdoers to appoint an advocate for the Company would amplify the mischief that the derivative suit is meant to cure.

64. In the instant suit, the reliefs are being sought against the Directors who are named as Defendants. For these reasons, this court finds that the Directors had no authority to appoint an Advocate to take over the conduct of the suit on behalf of the 4th Plaintiff. To do so would render the derivative action herein useless. The firm of Maritim & Company, Advocates having been instructed by a party who had no authority to do so, is thus not properly before this court.

Who shall bear the costs?

65. By virtue of Section 27 of the *Civil Procedure Act*, it is trite law that costs follow the event. Section 27 of the *Civil Procedure Act* provides that:-

> "(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

66. As described by Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95, that the words 'the event' means the result of all the proceedings incidental to the litigation. What it means is that a successful party is entitled to costs unless they are guilty of any misconduct, or there exists some other good reasons and or cause for not awarding them their costs. The award of costs is therefore not automatic but at the discretion of the court. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited vs Evrest Enterprises Limited (2014) eKLR the court noted that;

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that "Cost follow the event" was driven by the fact that there could be no "one-size-fit-all" situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by

and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

67. This discretion must be exercised judiciously to ensure that courts do not deprive deserving litigants of their costs without justifiable reasons. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes that:

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."

68. Courts must therefore be guided not only by the conduct of the parties in the actual litigation, but also other matters including likely consequences of the order for costs. In the instant suit, the Plaintiffs have succeeded in their P.O. In awarding costs in this regard, this court will rely on the case of Bugerere Coffee Growers Limited vs Sebaduka & Another [1970] E.A. 147, it was held that:-

> " ...the general principle is that where an advocate has brought legal proceedings without authority of the purported Plaintiff, the advocate becomes personally liable to the Defendants for the costs of the Action."

69. The reason for condemning an advocate to costs is that the advocate is like a doctor, and they ought to know whether they are administering the right dose in their client's situation and circumstances. In other words, due to the nature of the suit herein, the Advocate ought to have known that they could not act for the 4th Plaintiff. The Advocates failure and/or refusal to exercise good judgment can only result in their being condemned to costs.

70. The Defendants have only partially succeeded in their P.O. in that they only succeeded in having the 3rd Plaintiff's name struck off from the suit. For that reason, they will be liable for ¾ of the costs of their P.O dated 20th July, 2023.

Orders

71. In the circumstances, this court makes the following orders: -

a. The Plaintiffs' Notice of Preliminary Objection dated 9th June, 2023 succeeds in its entirety.

b. With regards to the Defendants' Notice of Preliminary Objection dated 20th July, 2023 the court finds that:-

i. This court has jurisdiction to hear and determine the instant suit.

ii. The 1st and 2nd Plaintiff have the requisite locus standi to institute this suit on behalf of the 4th Plaintiff.

iii. The 3rd Plaintiff has no locus standi to institute this suit on behalf of the company and his name be struck off these proceedings.

iv. The suit herein is not res judicata.

c. The Defendants and the firm of Maritim and Company Advocates shall bear the costs of the Plaintiff's P.O. dated 9th June, 2023

d. The Defendants shall bear ¾ of the Costs of their P.O. dated 20th July, 2023.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF APRIL, 2024.

.....

J. M. ONYANGO

JUDGE

In the presence of;

1. Mr. Nyekwei for the Plaintiff

2. Mr. Keter for the 1st – 4th Defendants

3. Miss Rotich for Me. Martim for the 5th Defendant

Court Assistant: Mr. Brian K.