



REPUBLIC OF KENYA



Mwilu (Suing as the Director and Shareholder of Mikululo Ranching) v Nduulu (Environment & Land Case E009 of 2022) [2024] KEELC 4479 (KLR) (29 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E009 OF 2022**

TW MURIGI, J

MAY 29, 2024

BETWEEN

**RUTH KALONDU MWILU (SUING AS THE DIRECTOR AND
SHAREHOLDER OF MIKULULO RANCHING) PLAINTIFF**

AND

BENEDICT MUTUKU NDUULU DEFENDANT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 1st July 2022 raised by the 1st -3rd Defendants on the grounds that:-
 - a. No resolution was passed by the Board of Directors or through the AGM authorizing the filing of this application and suit.
 - b. That the court lacks jurisdiction to entertain the application and the suit in view of Section 238, 239 and 240 of the *Companies Act* Number 17 of 2015 since this is not a derivative claim.
 - c. That this suit is subjudice as there are various suits over the same issues and same suits being:-
Nairobi Court of Appeal Civil Appeal No. E-548 of 2021 KWS v Mikululo Ranching (Directed Agricultural) Company Limited.
Makindu ELC Application No. E001 of 2022- Mikululo Ranching (Directed Agricultural) Company Limited vs Benedict Mututku Nduulu & Others.
Makindu ELC E55 of 2021- Joseph Musili & Others vs Mikuluo Ranching (Directed Agricultural) Company Limited
Makindu PMCC 394 of 2009 Mikululo Ranching (Directed Agricultural) Company Limited v Ndeti Nganga Musili Kyule & Daniel Maithya.



2. The parties were directed to canvass the preliminary objection by way of written submissions.

The 1st, 2nd and 3rd Defendants Submissions

3. The 1st, 2nd and 3rd Defendants submissions were filed on 18th October 2023.
4. On their behalf, Counsel identified the following issues for the court's determination:-
 - a. Whether this suit is a derivative action?
 - b. If not, whether a resolution was passed before the institution of this suit?
 - c. Whether the application dated 14/4/2022 and suit is subjudice?
5. As regards the first issue, Counsel submitted that a derivative action is a mechanism which allows shareholders to litigate on behalf of the corporation against either a director, majority shareholder or other offices or a third party whose action has allegedly injured the corporation.
6. It was submitted that under the Common Law one had to fall under the exceptions to the rule in *Foss v Harbottle* that a company is a separate legal personality and that its only one that can sue if it suffers a wrong. That the exception to the rule was mainly where there was fraud on the minority caused by the majority shareholders.
7. Counsel submitted that under Section 239 of the *Companies Act*, a member of a company must obtain permission from the court before he/she can institute a derivative suit. Counsel contended that the instant suit is not a derivative claim since the Plaintiff did not seek permission from the court before instituting the same.
8. Counsel relied on the provisions of Section 238(3) of the *Companies Act* to submit that a derivative suit may be brought in respect of a cause of action arising from an actual or proposed act or omission involving negligence, breach of duty or breach of trust by a Director of a company.
9. Counsel further submitted that the conditions to be satisfied in a derivative suit were set out in the case of *Joseph Munyoki Nzioka v Raindrops Limited and 3 others* (2019) eKLR as follows:-
 - i. He must be a member of the company.
 - ii. The proceedings must be in respect to a cause of action vested in the company.
 - iii. The applicant must seek leave to act on behalf of the company.
 - iv. The proceedings must be for protection of members against unfair prejudice brought under the *Companies Act*.
 - v. The proceedings are 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.
10. Counsel argued that the Plaintiff has not satisfied the grounds set out in Section 238(3) as she is seeking for personal reliefs. It was further argued that the Plaintiff is a member of Mikululo (Directed Agricultural) Company Limited is not seeking reliefs on behalf of the company and has not particularized any wrong doing on the part of the Defendant. According to Counsel, the Plaintiff appears to be using this suit to settle a personal vendetta or pursue personal claims.
11. On the second issue, Counsel submitted that it is trite law that a resolution has to be passed by a board of directors before a suit is filed on behalf of a company. It was submitted that the present suit



is defective for the reason that the Plaintiff did not annex the resolution to her supporting affidavit to show that this suit was filed after a resolution was made by the company to that effect. To buttress this point, Counsel relied on the holding in *Kenya Commercial Bank Limited v Stage Coach Management Ltd* [2014] eKLR where the court quoted with approval *Petition no. 600 of 2013 East Afrcan Portland Cement Ltd v The Capital Markets Authority & 5 others* where the court stated as follows:-

“.....the upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all.....”

12. In light of the above, Counsel submitted that the Plaintiff is improperly before the court as no resolution and/or minutes was filed at the commencement of this suit to show that the Plaintiff has authority to file this suit on behalf of the company.
13. Counsel submitted that the application dated 14/4/2022 is subjudice as the orders sought therein are similar to the orders sought in *Makindu ELC E001 of 2023*. While citing the provisions of Section 6 of the *Civil Procedure Act*, Counsel submitted that the rationale behind the subjudice rule is to prevent conflicting orders emanating from different courts over the same issue. To buttress this point Counsel relied on the following authorities:-
 1. *David Ndii & Others v Attorney General & Others* [2021] eKLR
 2. *Kenya Bankers Association v Kenya Revenue Authority* [2019] eKLR
14. Concluding his submissions, Counsel submitted that this court lacks jurisdiction to hear and determine this suit since it involves a director suing another director on behalf of the company. Counsel submitted that the Applicant did not seek leave of court to institute this suit as required under Sections 238, 239 and 240 of the *Companies Act* 2015. To buttress his submissions Counsel relied on the authorities annexed to the submissions.

The Plaintiff’s Submissions

15. The Plaintiff’s submissions were filed on 29th November 2023.
16. On her behalf, Counsel submitted that Article 50 of *the Constitution* guarantees every person the right to have any dispute resolved in a court of law.
17. Counsel further submitted that Article 159(2)(d) of *the Constitution* mandates the court to administer justice without undue regard to procedural technicalities.
18. On the first ground, Counsel submitted that the law that a suit cannot be invalidated on the grounds that a board resolution was not obtained is well settled. Counsel submitted that the absence of a resolution to institute a suit or authority to swear an affidavit is not fatal to a suit. To buttress this point Counsel relied on the following authorities:
 - i. *Kenya Agricultural and Livestock Research Organization v Okoko & Another* [2022] KEHC 3302.
 - ii. *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR
 - iii. *Makupa Transit shade Limited & Another v Kenya Ports Authority & Another* [2015] eKLR.
19. Counsel argued that it was imperative for the Defendants to demonstrate to the court that the Plaintiff is not a director and did not possess the requisite authority to swear the affidavit to institute the proceedings herein.



20. On whether the court lacks jurisdiction to entertain the suit and application by dint of Sections 238, 239 and 240 of the *Companies Act*, Counsel relied on the definition of a derivative suit as set out in the case of *Samson Mukeku Mututku v David Kioko Musau*[2020] eKLR where the court held that:-
- “A derivative action is an action commenced by a shareholder and is an exception to the general rule laid out in *Foss v Harbottle* (1843) 2 Hare 461 that a company is the only proper plaintiff to sue the wrongs done to it.....”
21. In defining a derivative suit, further reliance was placed on Section 238(1) of the *Companies Act*.
22. Counsel contended that the instant suit is not a derivative suit as the cause of action is on a minority shareholder and /or director and not on the company. Counsel submitted that it is the fraudulent actions of two directors that have necessitated the filing of the instant suit. Counsel further submitted that the Plaintiff does not require leave to institute this suit because she has pleaded the particulars of fraud and misrepresentation which by itself amounts to an exception to the rule of a derivative claim. To buttress this point Counsel relied on the holding in the case of *Samson Mukekeu Mutuku vs David Kioko Musau* (supra).
23. On whether the instant suit is subjudice on account of various suits involving the same issues and pending in different courts, Counsel argued that the issue involves disputed facts and as such it cannot be raised in a preliminary objection. Counsel asserted that a preliminary objection can only be raised on a pure point of law and not on disputed facts. To buttress this point Counsel relied on the following authorities:
- i. *Cyrus Mucebiu Irungu v Martha Wanjiru Irungu & Another* [2022] eKLR
 - ii. *Margaret Wachu Karuri v John Waweru Kibiro* [2021]eKlr

Analysis And Determination

24. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.
25. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated as follows:-
- “So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
26. Further on Sir Charles Newbold JA stated:-
- “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 demurrer. It raises a 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.”

27. In *Oraro v Mbaja* [2005] eKLR Ojwang J (as he then was) described it as follows:-

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

28. The 1st -3rd Defendants Preliminary Objection is based on the grounds that the Plaintiff did not file a board resolution authorizing her to institute this suit on behalf of the company. The Defendants contended that by dint of Sections 238, 239 and 240 of the *Companies Act* 2015, this court lacks jurisdiction to hear and determine the application and the suit herein. In addition, it was contended that the instant suit is subjudice on account of similar suits pending for determination in various courts. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case.

29. The first issue for determination is whether this suit is a derivative claim.

30. By a Plaint dated 14th April 2022, the Plaintiff prays for judgment against the Defendants for:-

- a. That this Honourable court do issue an order compelling the 1st - 3rd Defendants herein to reimburse and surrender the original title deed to the 4th Defendant for safe custody until an AGM is held.
- b. That this Honourable court do issue an order compelling the 4th Defendant herein to register an inhibition pursuant to Section 68 of the *Land Registration Act* to the suit property pending until an AGM is held.
- c. A declaration that the power of attorney granted to the 1st Defendant cannot be sufficient to allow him collect the title deed on behalf of the company.
- d. A declaration that the title deed can only be kept in safe custody by the current company secretary Harun Kipkemei Mosop pending the company holding an AGM and appointing a new company secretary.
- e. A declaration that a company secretary can only be appointed during an AGM but cannot be hand-picked by a few individuals who are neither shareholders nor directors.
- f. Costs and interest of this suit.
- g. Any other prayer that this Honourable court may deem fit to grant in the circumstances.

31. Section 238 of the *Companies Act*, 2015 defines a derivative claim as follows:-

“In this part, a 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.”



32. The 1st-3rd Defendants contended that the Plaintiff has not met the requirements set out in Section 238(3) of the *Companies Act* which provides as follows:-
- “ 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 company”.
33. They further contended that the instant suit is not a derivative claim since the reliefs as sought are not on behalf of the company. In addition, they argued that the suit is not derivative claim since the Plaintiff did not seek permission from the court before instituting the same.
34. On one hand, the Defendants contend that the court has no jurisdiction to hear and determine this matter since the Plaintiff did not seek leave to institute this suit and on the other hand they insist that the suit is not a derivative claim.
35. In their defence dated 6th May 2022 the 1st -3rd Defendants raised a preliminary objection and pleaded as follows in part:- 4. That this is not a derivative claim and therefore the suit offends the provisions of Section 238, 239, 240, 241 and 242 of the *companies Act*.
36. Parties are bound by their own pleadings. The Plaintiff conceded that the present suit is not a derivative claim and relied on paragraph 8 and 10 of the *Plaint*.
37. From the pleadings, the evidence on record and the respective submissions, it is crystal clear that the instant suit is not a derivative claim.
38. As regards the second issue, Counsel submitted it is trite law that before a suit is filed on behalf of a company, a resolution has to be passed by the board of directors to that effect. According to the 1st – 3rd Defendants, the Plaintiff did not annex a resolution in the affidavit in support of the application dated 14/4/2022.
39. The Plaintiff on the other hand submitted that a suit cannot be invalidated on the grounds that a board resolution was never obtained to institute the suit. It was argued that failure to annex the resolution is not fatal to the case.
40. Order 4 Rule 1(4) of the Civil Procedure Rules provides as follows:-
- “ Where the Plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the Company duly authorized under the seal of the company to do so”.
41. It is settled law that where a suit is to be instituted on behalf of the company, there should be a company resolution to that effect. The requirement is intended to protect companies from unauthorized court processes.
42. The question that begs to be answered is whether it is mandatory to file a resolution of a company alongside with the *Plaint*.
43. The issue has been settled by the court of appeal in several decisions where it has been held that failure to file the resolution by the board of directors is not fatal to the suit as the same may be filed any time before the suit is fixed for hearing.



44. In the case of Leo Investment Ltd vs Trident Insurance Company Limited(2014) EKLK the Court held that:-

“... such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is therefore not fatal to the suit”.

45. This court is in agreement with the above decisions. The mere fact that the Plaintiff did not file a resolution authorizing her to file the suit on behalf of the company is not a ground for invalidating the suit.

46. The Defendants submitted that the application dated 14/4/2022 is sub judice as the Applicant is seeking orders which are similar to orders sought in various suits.

47. Section 6 of the Civil Procedure Act provides as follows:-

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such a suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

48. The Defendants contended that the orders sought in the application dated 14/4/2022 are similar to the orders sought in Makindu ELC No. E001 of 2022.

49. The Defendants did not annex the pleadings in Makindu ELC E001 of 2022, Makindu ELC 55 of 2021, Makindu PMCC 394 OF 2009 and Nairobi Civil Appeal No E58 of 2021, to demonstrate that the issues in the suits are directly and substantially the same.

50. In the end, I find that the preliminary objection dated 1st July 2022 is devoid of merit and the same is hereby dismissed with costs to the Plaintiff.

.....

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF MAY, 2024.

IN THE PRESENCE OF:

Mutava holding brief for Ms. Mutuku for the 1st -3rd Defendants

Musya for the plaintiff.

Court assistant Alfred

