



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 222 OF 2018

DAYKIO PLANTATIONS LIMITED.....APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST RESPONDENT

ALFRED MBALI KILONZO.....2ND RESPONDENT

JOSEPH NJOROGE NDUNGU.....3RD RESPONDENT

RULING

The matter for determination is the **Notice of Preliminary Objection** dated **16th August 2018**, brought by the 1st Respondent on the grounds that;

(a) THAT the Applicants lacks locus standi to lodge the Application

(b) THAT the Application is fatally defective in substance and in form, incompetent, lacks merit as it seeks to shift the burden of proof.

(c) THAT the Application and the suit are otherwise frivolous vexatious and an abuse of Court process.

The Application was canvassed by way of written submissions and the 1st Respondent through the **Law Firm of Irungu Kangata & Company Advocates**, submitted that there is no evidence of ownership of the suit property by the Applicant being a juristic person and that only the Registration of the Applicant can confer rights to it to institute the instant suit. Further that the Applicant has not demonstrated that the proprietor of the suit land is incapable of instituting the suit in its name or that it is acting as a member of, or in the interest of a group or class of persons and as such it lacks *locus standi*. It was further submitted that the Applicant has not met the constitutional considerations of capacity to institute legal proceedings hence the Application is incurably defective.

It was further submitted that *locus standi* is a point of law that touches on jurisdiction of the Court and that it should be resolved at the earliest opportunity. The Applicant relied on various provisions of law and decided cases amongst them the case of **Mumo Matemu ...Vs... Trusted Society of Human Rights Alliances & 5 Others (2014)eKLR**, where the Court held that;

“It is proper to note that the evaluation of locus ought to be based upon the constitutional consideration of capacity (Articles 3, 22 and 258, the nature of the suit and the enforceability of the orders sought. These considerations inform the enforcement mechanisms and coherent clarity of the following inquiries. Who will the orders be enforced against" Who bears the costs of litigation if at all" Who represent the parties in Court”.

The Applicant through the **Law Firm of Chege Kibathi & Company Advocates** submitted that the **Preliminary Objection** as filed by the 1st Respondent lacks sufficient information and characteristic of a **Preliminary Objection** and that it is meant to delay the expedient determination of the matter and confuse issues herein. It was further submitted that the Applicant's locus is derived from being the beneficial owner of the suit property premised on the law of trust as it mistakenly transferred the title to the 2nd Respondent and as such, the 1st Respondent received the title as a resulting trustee. As such the objector's preliminary point that the Applicant lacks *locus standi* is devoid of merit.

It was the Applicant's submission that a preliminary Objection should be raised purely on a point of law or procedure and it cannot be sustained if any fact is contested and has to be ascertained. The Applicant relied on various decided cases amongst them the case of **Bashir Haji Abdullahi ...Vs...Adan Mohammed Nooru & 3 Others (2004)eKLR**, where the Court held that;

"We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the Court to know exactly the nature of the Preliminary points of law to be raised. To state that 'the Application is bad in law' without saying more does not assist the other parties to the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush. Such practice of course ought to be discouraged".

The Court will first have to determine whether the objection raised by the 1st Respondent qualifies to be a **Preliminary Objection** as described in the case of **Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End**

Distributors Ltd (1969) EA 696, where Law J A stated that;

"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 the pleadings and which objection point may dispose the suit".

Further the Court stated;

"A preliminary objection raises a pure point to 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".

The Respondents have submitted that the Plaintiff has no *Locus Standi* or capacity to institute this suit. That due to the lack of the said capacity, the suit is incompetent and should be struck out. In the case of **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, the Court held that :-

"Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law". Further in the case of **Alfred Njau and Others ..Vs.. City Council of Nairobi (1982) KAR 229**, the Court also held that;-

"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

It is therefore evident that *locus standi* is the right to appear and be heard in Court or other proceedings and literally, it means 'a place of standing'. Therefore if a party is found to have no *locus standi*, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no *locus standi*, then the Applicant cannot be heard and that point alone may dispose of the suit. In the case of **Quick Enterprises Ltd ...Vs... Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999**, the Court held that:-

"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone".

Having now considered the objections raised by the 1st Respondent, the Court finds that lack of *locus standi* can dispose of the

matter preliminarily without having to resort to ascertaining of facts. The **Preliminary Objection** raised by the Defendants fits the description of **Preliminary Objection** as stated in the *Mukisa Biscuit case (Supra)*.

While the Court has already held and found that the issue of **locus standi** is a **Preliminary Objection** rightly raised, in this instant suit, the Respondents have averred that the Applicant having filed this suit have no interest whatsoever over the suit property as it has not produced any documentation that shows any interest it may have they have over the suit property and have not shown any reason why the owner of the suit property could not file the suit by themselves.

However this Court notes that the Applicant is claiming beneficial interest over the suit and that the 2nd Respondent was holding the suit property in trust for it. That means therefore that the issue as to whether or not the Applicant has any proprietary interest over the suit property has to be ascertained through evidence. The Court would be required to interrogate evidence produced before it and ascertain the facts in order to come into that conclusion. See the case of *Presbyterian Foundation & Another ...Vs...East Africa Partnership Ltd & Another*[2012]eklr

“The fourth issue is that the 2nd Plaintiff has no proprietary interests in the subject properties and is hence not entitled to the orders under Order 40 of the Civil Procedure Rules. That may be so. However, that determination can only be made at the hearing of the application as it goes to the merit of the application itself. Since I cannot make any conclusive findings with respect to the 2nd Plaintiff’s position vis-à-vis the 1st plaintiff, I cannot say that the 1st Plaintiff’s suit is non-existent. It is further submitted that since the Church has registered officials and the 1st defendant has directors, a suit on their behalf can only be brought by the said agents. That submission is largely correct since a suit which is brought without the blessing of the said entities is a non-starter. Whereas the Church is not a party to this suit and therefore the issue of its filing suit does not arise, with respect to the 1st plaintiff, whether or not it sanctioned the filing of the suit is a matter of evidence. If the suit was filed without the 1st plaintiff’s authorization, that would be something else. However, that is not an issue that, properly speaking, can be the subject of a preliminary objection.

Had this objection been raised by way of a formal application supported by an affidavit, that would have been a different story since the plaintiff would have had an opportunity to explain the discrepancies raised whose failure would have possibly led to a finding in favour of the defendants. In the result it is my view and I so hold that the issues raised in the notice of preliminary objection dated 28th June 2012 do not meet the threshold for Preliminary Objections. The same are accordingly dismissed with costs to the Plaintiffs..”

Taking into account the above findings of the court, this Court finds that since the Applicant’s suit is based on beneficial interest over the suit property, making a determination as to whether or not they hold such interest over the suit property at this stage will be draconian as the Applicant suit would have been determined via a **Preliminary Objection** and it would mean that the Court would not have had an opportunity to ventilate on the issues that would have been raised by the Plaintiff. Further it is the Court’s holding that the instant issue while it goes to the Jurisdiction of this Court, certain facts must be ascertained and therefore the issue at hand cannot be determined via a **Preliminary Objection**, as the Court will have to take evidence to determine the same. See the case of *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga ...Vs...Eliud Timothy Mwamunga & Sagalla Ranchers Limited* [2017] eKLR, where the Court held that:-

“Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.

Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”.

Consequently, the Court finds and holds that at this juncture, it would be imprudent to dismiss the Applicant’s Application as the suit ought to be heard and facts ascertained to arrive at a just determination.

The upshot of the foregoing is that the 1st Respondent’s **Preliminary Objection** is not merited and the same is dismissed entirely with costs being in the cause.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of December 2019.

L. GACHERU

JUDGE

In the presence of

.....for Applicant

.....for 1st Respondent

.....for 2nd Respondent

.....for 3rd Respondent

.....Court Assistant.

L. GACHERU

JUDGE



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