



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 218 OF 2016

ONESMUS KAUNA MWATI 1ST PLAINTIFF
JEREMIAH WILLIAM SILA..... 2ND PLAINTIFF
FLORENCE NDUKU MUINDI..... 3RD PLAINTIFF
CHRISTOPHER KYALO KIUAI..... 4TH PLAINTIFF
GABRIEL MATEI MUKUNGA.....5TH PLAINTIFF
JOSEPH MBITI KILONZO..... 6TH PLAINTIFF
ZIPPORAH MUKONYO KIMEU..... 7TH PLAINTIFF
LENAH SYOMBUA.....8TH PLAINTIFF
STEPHENE MUTISYA..... 9TH PLAINTIFF
VINCENT MWANTHI.....10TH PLAINTIFF
GABRIEL MUATHA.....11TH PLAINTIFF
ELIJAH MUTISYA.....12TH PLAINTIFF
ALBERT MUENDO.....13TH PLAINTIFF
SIMON MWANGANGI.....14TH PLAINTIFF
DAMIANA MUTISO..... 15TH PLAINTIFF
FREDRICK KIVUNZA.....16TH PLAINTIFF
TIMOTHY KILONZO.....17TH PLAINTIFF
JACKSON WAMBUA.....18TH PLAINTIFF
MWENDWA ONESMUS.....19TH PLAINTIFF
JOSEPH MUTIE.....20TH PLAINTIFF

VS

UKAMBA AGRICULTURAL INSTITUTE.....1ST DEFENDANT

STEPHENE NDAMBUKI MULI..... 2ND DEFENDANT

ERIC MUTINDA MUTISYA.....3RD DEFENDANT

MARY NDINDA KIMWELE.....4TH DEFENDANT

R U L I N G

1. Onesmas Kauna Mwati and 19 others, the Plaintiffs herein, filed this action against Ukamba Agricultural Institute hereinafter referred to as “UKAI” and 3 others vide the Plaint 17th August, 2016. In the aforesaid plaint the Plaintiffs sought for judgment in the following terms: -

- i. That all rent proceeds from all the properties of Ukamba Agricultural Institute (UKAI) starting September, 2016 be deposited into court pending proper elections in compliance with the company constitution.**
- ii. That 2nd, 3rd and 4th Respondents should be compelled to account for all rent and or proceeds received from tenants in respect of all Ukamba Agricultural Institute (UKAI) property within fifteen (15) days from the date of the Order.**
- iii. That 2nd, 3rd and 4th Respondents should be compelled to provide an audited financial accounts for all Assets and Liabilities of all Ukamba Agricultural Institute (UKAI) property within fifteen (15) days from the date of the Order.**
- iv. That the 2nd, 3rd and 4th Respondents and the rest of the Management Board be declared to be unlawfully in office**
- v. Elections of UKAI officials be carried out within 45 days of this order.**
- vi. General, exemplary and punitive Damages upon 2nd to 4th Defendants for breach of fiduciary obligations.**
- vii. Any other relief the court deems fit.**

2. The Defendants filed a defense to deny the Plaintiffs’ claim. The Plaintiffs have now taken out the motion dated 17th August, 2016, the subject matter of this ruling in which they sought for inter alia.

- a. That leave to be granted to continue this suit as a derivative action.**
- b. Spent.**
- c. Spent.**
- d. That all rent proceeds from all the properties of Ukamba Agricultural Institute (UKAI) starting from September, 2016 be deposited into court pending determination of this suit.**
- e. That 2nd, 3rd and 4th Respondents should be compelled to account for all rent and or proceeds received from tenants in respect of all Ukamba Agricultural Institute (UKAI) property within fifteen (15) days from the date of the Order.**
- f. The 2nd, 3rd, and 4th Respondents and the rest of the management board be declared to be unlawfully in office.**
- 9. That all the necessary and consequential orders and direction be given.**
- h. That the cost of this application be provided for.**

3. The motion is supported by the affidavit sworn by Onesmus Kauna Mwati.

4. When served with the aforesaid motion, the Defendant initially filed a notice of Preliminary Objection to resist the application. The Plaintiffs in response to the notice of preliminary objection filed on grounds of opposition and a replying affidavit. The Defendants further response to the motion, filed the replying affidavit of Eric Mutinda the 3rd Defendant to oppose the motion. When the aforesaid motion came up for interpartes hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.

5. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion.

6. I have further considered the grounds of opposition and the grounds enumerated in the notice of preliminary objection and the rival written submission. The Plaintiffs have inter alia sought for leave to continue with this action as a derivative suit on behalf of Ukamba Agricultural Institute Ltd.

7. It is the submission of the Plaintiffs that no legitimate election of officials has been carried out since 2009. The Plaintiffs further argued

that the persons unlawfully holding office as Directors' of UKAI have failed to account for the resources and some are even facing criminal charges for loss of monies of UKAI and for defrauding others for personal gain in the name of UKAI among other charges.

8. The Plaintiff further pointed out that UKAI continues to suffer prejudice and harm and by the parties purportedly mandated to represent the company i.e. 2nd, 3rd and 5th Defendants respectively and who have failed to redress the grievances because they are the perpetrators.

9. It is the submission of the Plaintiffs that if they are given leave to continue with the derivative action, they would be able to preserve the assets of UKAI since the capacity of the Respondents to repay losses is unknown. The Plaintiffs also aver that they are members of UKAI and they accused the 2nd – 4th Respondents as the purported members of Management of UKAI for neglecting to present to members of UKAI audited accounts during the last Annual General Meeting held in the year 2008.

10. The Respondents were further accused of failing to conduct elections since 2008 contrary to the Articles of Association of UKAI which provides that elections be carried out annually, therefore, they (2nd – 4th Defendants) are unlawfully in office. That conduct is said to continue to prejudice UKAI and its shareholders.

11. The Plaintiffs aver that despite notices being given to the Respondents to provide a remedy for the grievances, the Respondents have not taken measures to offer a solution, therefore, making the 1st Respondent Company to suffer irreparable loss.

12. In an attempt to get solutions for the challenges facing the 1st Defendant, the Plaintiff aver that they were prompted to file Nairobi High Court Judicial Review No. 414 of 015, against the Registrar of Companies for failing to organize elections and or recognize them as the lawfully elected officials.

13. The Plaintiffs further argued that the faction they represent have never been involved in any elections purportedly organized by the Respondent. It was also pointed out that UKAI's constitution permits officers to be in office for a maximum of 6 years but the 2nd – 4th Respondents have been in office for nearly 10 years i.e. from 2008 upto date.

14. The Plaintiffs accused the 2nd - 4th Respondents for failing to take action to protect the interests of UKAI and for putting their personal interest first.

15. It was further pointed out that the Defendants attempted to withdraw **Milimani, Chief Magistrate's Criminal Case No. 2021 of 2015 Republic Vs Stephen Ndambuki Muli & 2 Others** using fake resolutions. For this reason, the Plaintiffs urged this court to find that there is need for this derivative action and for the grant of interim orders of injunction.

16. The 2nd – 4th Respondents have urged this court to dismiss the motion, arguing that the Plaintiffs made false averments in the plaint and in the verifying affidavit to the effect that there are no previous or pending proceedings in any court between the parties over the same subject matter yet there is evidence that several cases had been filed vizly: -**Judicial Review Miscellaneous application No. 414 of 2016, Judicial Review Miscellaneous Application No. 277 of 2010, Chief Magistrate Civil Case No. 508 of 2015 and Chief Magistrate Civil Case No. 4786 of 2015.**

17. This court was beseeched to strike out the whole suit for failure to comply with the provisions of Order 4 Rule 1(i) (f) of the Civil Procedure Rules. This court was also asked to strike out the application and the suit for being *res judicata*.

18. In response to the above arguments, the Plaintiffs admitted that they had filed previous suits which could not be regarded as *res judicata* or *res subjudice*. They pointed out that they deponed and averred in the suit and verifying affidavit that they never filed a derivative action before a competent court to determine the same, therefore this suit cannot be said to be *res judicata*.

19. It was pointed out that Judicial Review Miscellaneous application No. 277 of 2010 and Judicial Review Miscellaneous Application No. 414 of 2015 were suits filed against the Registrar of Companies which suits were determined on the basis that the court lacked jurisdiction to entertain the same.

20. The Plaintiff's further submitted that Chief Magistrate Civil Case No. 4785 of 2015 was an action filed by the Defendants against the 1st Plaintiff only hence it did not involve the other Plaintiffs and in any case the Defendants sought for injunctive orders and not a derivative action, therefore this case cannot be regarded as *res judicata*.

21. I feel obliged at this stage to determine the question as to whether or not this suit should be struck out for failure to comply with the provisions of Order 4 Rule 1 (i) (f) of the Civil Procedure Rules. The aforesaid provision expressly states that the Plaintiff shall contain an averment which is to the effect that there is no suit pending and that there have been no previous proceedings in any court between the parties over the same subject matter.

22. In paragraph 18 of the plaint the Plaintiffs state as follows: -

“18. The Plaintiff avers that there is no other suit pending and there have been no previous proceedings in nay court between the Plaintiff and the Defendant over the same subject matter.”

23. In paragraphs 3 and 4 of the verifying affidavits Onesmus Kauna Mwati avers as follows: -

“3.. That the facts stated in the plaint are true, correct and within my knowledge.

4. That I swear this affidavit in verification of the correctness of the averments contained in the plaint filed herewith.”

24. The Plaintiffs have argued that they averred in the plaint that no previous derivative action was pending before a court of competent jurisdiction. With respect, I am not convinced by the Plaintiffs' argument. It is abundantly clear, from the averments made in paragraph 18 of the plaint dated 17th August, 2016 that the Plaintiffs clearly stated that there were no previous pending cases over the same matter between the parties. It has now been exposed that by the time this suit was being filed that there were pending and previous suits filed between the parties over the same issue.

25. It is clear to me that the Plaintiffs intentionally made a false averment meant to mislead the court. In my view, that is a fatal mistake which the Plaintiffs have been unable to justify. In the circumstances, this court has the right to strike out a pleading which is premised on false averments.

26. Having considered the preliminary objection, I now turn my attention to the merits of the motion. The main prayer is that in which the Plaintiffs are seeking for leave to continue this action as a derivative action. The other prayers will basically be determined upon concluding the main prayer. I have already stated the grounds put forward in support and against the prayer.

27. Sections 238 – 241 of the Companies Act provides for derivative actions and the circumstances and conditions necessary in instituting the same.

28. Section 238(3) provides that a derivative claim 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.

29. The 2nd – 4th Defendants have objected to the Plaintiff's act of suing the company alongside the directors. It is clear in my mind that the law does not envisage a situation where the company is being sued alongside the directors or member as happened in this case. However, that mistake alone is not fatal because the court can still be moved or may act *suo moto* and make an order striking out the company from being a party to the suit.

30. I adopt the definition of a derivative provided by the late Justice Onguto in the case of **Ghelani Metals & 3 Others Vs Elesh Ghelan & Another [2017] eKLR** as follows: -

“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.”

31. In the case before this court, the Plaintiffs have stated that the 2nd – 4th Defendants have stolen monies from UKAI, obtained monies by false pretences in the name of the company, obtained monies from the public and well-wishers in the name of UKAI and converted the same to their personal use, therefore making UKAI lose monies, profits and goodwill.

32. The Plaintiffs have also pointed out that the 2nd - 4th Defendants are illegally in office as directors of UKAI and have failed to organize for elections since 2009.

33. The material placed before this court shows that the Plaintiffs and the 2nd – 4th Defendants are factions fighting over the control of UKAI. Both sides accuse the other of acting inappropriately and against the interest of the company.

34. The Plaintiffs have been accused of not being members of UKAI, therefore having no locus of filing this suit against the Defendants while the Defendants have been accused of acting to the utter detriment of the company.

35. What has emerged from the material placed before this court is that there is a serious dispute as to whether or not the Plaintiffs are members of UKAI. It is on record that the Registrar of Companies had directed that the register of members for the year 2008/2009 be used in conducting the company's meeting but the same could not be used because the 1st Plaintiff had raised an objection thus causing a paralysis.

36. It is not in dispute that the company has its internal mechanisms in resolving the current stalemate using the office of the Registrar of Companies. It would appear that the parties prefer to use the courts despite having such an alternative method. This court cannot countenance nor encourage such a practice.

37. I have already stated that the parties to this dispute have made accusations and counter accusations against each other but the bottom line is that each faction seeks to control the management of UKAI.

38. The question as to whether or not the 2nd – 4th Defendants have acted against the interests of UKAI cannot be answered through the current motion but it can only be done via a trial.

39. It is also not clear whether or not the Plaintiffs are shareholders or members of UKAI. Both sides have presented conflicting lists which cannot be used to ascertain the true position. In my view, the most appropriate method to resolve the dispute between the parties herein is that provided for by the UKAI's Articles of Association and the Companies Act.

40. On the basis of the above reasons, I am not convinced that the Plaintiffs have met the conditions necessary to grant leave to proceed with

this suit as a derivative action. Having failed to convince this court to grant the order, it goes without saying that the Plaintiffs have failed to establish a prima facie case for the grant of the other prayers.

41. In the end, I find no merit in the motion dated 17th August, 2016. The same is ordered struck out and dismissed. In the unique circumstances of this case, I direct that each party meet its own costs of the motion.

Dated, signed and delivered in Nairobi this 16th day of August, 2018.

.....

J K SERGON

JUDGE

In the presence of

..... **for the Plaintiffs**

..... **for 1st Defendant**

..... **for 2nd – 4th Defendants**