



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 162 OF 2015

NEW AKAMBA UNITY (NAU) a community based organisation

Suing through its chairman and secretary

General SMITH KIMETA MUNYAO and

JANET KAVINDU MUNYAO respectively.....1ST PLAINTIFF

SMITH KIMETA MUNYAO..... 2ND PLAINTIFF

- V E R S U S -

NEW AKAMBA UNITY (NAU) LIMITED..... 1ST DEFENDANT

REGISTRAR OF COMPANIES..... 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

SALOME SYOMWEU KINYILI 4TH DEFENDANT

RULING

1) This ruling is the outcome of four applications dated 17.04.2015,15.06.2016, 18.07.2016 and 31.08.2016.

In the motion dated 17.4.2015, New Akamaba Unity (NAU) through its officials namely Janet Kavindu and Smith Kimeta Munyao, the 1st and 2nd plaintiffs respectively are seeking for the following orders *inter alia*:

1. THAT a temporary injunction be issued restraining the 1st defendant/respondent whether by itself, offices, directors, servants and/or its agents or whomsoever is acting on its behalf from selling, advertising for sale, transferring and/or dealing with the following properties motor vehicles: KBN 661N (Purchased cash), a public service transport bus KBP 804B (Purchase thro cooperative bank loan a public service transport bus, KBP 4571Q (Purchase through Diamond Trust Bank loan) Public service transport bust, KBQ 412U (Purchased thro Cooperative bank loan) a public service transport bus KBQ 177P (purchased thro NIC bank) a public service transport bus, and KBT 848R (purchased thro Diamond Trust Bank) a public service transport bus.

2. Land: parcel no. 173, parcel no. 174, parcel no. 102, parcel no. 93, parcel no. 35, parcel no. 591, parcel no. 217, parcel no. 218, parcel no. 219, parcel no. 586, parcel no 118, parcel no. 222, parcel no. 262, parcel no. 482, parcel no. 483, parcel no. 207, parcel no. 233, parcel no. 556, parcel no. 80, parcel no. 273, parcel no. 365, parcel no. 405, parcel no. 315, parcel no. 316, parcel no. 243, parcel no. 244, parcel no. 147, parcel no. 160, parcel no. 293, parcel no. 407, parcel no. 417, parcel no. 301, parcel no. 388, parcel no. 52, parcel no. 7, parcel no. 117, parcel no. 319, parcel no. 280, parcel no. 382, parcel no. 45, parcel no. 164 – unurveyed parcel no. 206- unurveyed, parcel no. 241 – unurveyed, parcel no. 245 – unurveyed. Bank Accounts, Equity bank, Co-operative bank (2 accounts) prime bank, Fidelity Bank (2 accounts), pending hearing of this suit.

3. Cost of the application be in the cause.

2) This motion is supported by the affidavit of Smith Kimeta Munyao. When served, New Akamba Unity Ltd and Salome Syomweu Kinyili the 1st and 4th respondents respectively filed a notice of preliminary objection to oppose the motion. The 4th respondent also filed a replying affidavit she swore to oppose the application.

3) The plaintiffs also filed the motion dated 11.02.2016 and amended on 15.06.2016 whereof they sought for the following orders *inter alia*:

1. THAT this honourable court to order the 4th respondent to deposit in court the proceeds from the sale of motor vehicles KBP 914C, KBN 661N and KBQ 177P together with the sale agreement for the said transaction entered between herself and the purchasers.

2. Costs of the applicant be in the cause.

4) The motion is supported by the affidavit of Smith Kimeta Munyao. When served, the 4th defendant filed a replying affidavit she swore to oppose the motion.

5) The plaintiffs further filed the motion dated 18th July 2016 whereof they sought for *inter alia*:

1. THAT this honourable court be pleased to order the 4th defendant to deposit in court the original title deed of thirty two (32) parcels of land being Athi River/Athi River Block 5/

1. Parcel No.173

2. Parcel No.174

3. Parcel No.102

4. Parcel No.35

5. Parcel No.591

6. Parcel No.218

7. Parcel No.586

8. Parcel No.118

9. Parcel No.222

10. Parcel No.482

11. *Parcel No.483*
12. *Parcel No.233*
13. *Parcel No.556*
14. *Parcel No.80*
15. *Parcel No.273*
16. *Parcel No.365*
17. *Parcel No.315*
18. *Parcel No.160*
19. *Parcel No.293*
20. *Parcel No.417*
21. *Parcel No.301*
22. *Parcel No.52*
23. *Parcel No.7*
24. *Parcel No.117*
25. *Parcel No.280*
26. *Parcel No.45*
27. *Parcel No.475*
28. *Parcel No.164*
29. *Parcel No.206*
30. *Parcel No.241*
31. *Parcel No.141*
32. *Parcel No.59*

2. THAT the costs of the application be in the cause.

6) It would appear from the affidavit of service of Danson Mbote that the motion dated 18.7.2016 was served upon the defendants but the same did not elicit any response.

7) The plaintiffs further took out the chamber summons dated 31st August 2016 in which they sought for inter alia:

1. THAT this honourable court be pleased to grant leave to the applicants to apply for contempt proceedings against the 4th defendant/respondent SALOME SYOMWEU KINYILI former secretary general of New Akamba Unity.

2. THAT the said SALAOME SYOMWEU KINYILI former secretary general of New Akamba Unity be arrested and committed to prison for a term not exceeding six (6) months;

3. THAT this honourable court be pleased to order that the said SALOME SYOMWEU KINYUII former secretary general of new Akamba Unity not be heard by the court until she purges the contempt;

4. THAT this honourable court be pleased to order that the 4th respondent retract the statement she made in her letter dated 17th July 2015 addressed to the chairman, Akamba clans of elders alleging that the court has been compromised so as to delay the judgment in this instant suit.

5. THAT this honourable court be pleased to order the 4th respondent to refrain from making further defamatory statements.

6. THAT the costs of and occasioned by this application be costs in the cause.

8) The aforesaid summons is supported by the affidavit of Smith K. Munyao. When served, Salome Syomweu Kinuili, the 4th defendant filed a replying affidavit to oppose the summons.

9) After a careful perusal of the motions and summons, it is apparent that the orders sought in the amended motion dated 15.06.2016 and those sought in the motion dated 18.7.2016 are basically similar. I will therefore deal together with those applications. Let me first determine the motion dated 17.04.2016. I have already set out the orders sought by the plaintiffs. Basically the plaintiffs are seeking for an order of injunction to restrain New Akamba Unity (NAU) Ltd ten 1st defendant from selling, advertising for sale, transferring and or dealing with the motor vehicles, parcels of land and money in bank accounts listed in paragraph 4 of the affidavit sworn by Smith Kimeta Munyao. It is the submission of the plaintiffs that New Akamba Unity (NAU) is a community Based Organization (CBO) duly registered by the ministry of Gender, Culture, Sports and Social Services to assist its members numbering over 400,000 individuals and self help group to establish income generating activities and wealth creation ventures. It is further argued that at all times the 1st defendant was delegated by the committee as the overall accounting officer of the CBO for all its investments and properties with little supervision from the committee. The plaintiffs also aver that the CBO acquired the properties mentioned in paragraph 3 of this motion on behalf of its members. It is the further the submission of the plaintiffs that as a result of acquisition and accumulation of the aforesaid assets, it became necessary to incorporate a limited liability company to hold those properties in trust of the members of the CBO hence the 1st respondent was incorporated. The 1st and 2nd plaintiff and 4th defendant being the chairman and secretary general respectively of the CBO and by virtue of their offices were appointed directors of the 1st defendant to hold the aforesaid properties in trust for the members of the CBO. The plaintiffs stated that they conducted a search at the department of the Registrar General and discovered that the list of the names of the directors of the 1st defendant were altered. Some names were removed and others added without a resolution from the company directors or members. It is stated by the plaintiffs that the executive committee and the governing council of the CBO conducted investigations which unearth preliminary findings of misuse of properties of the CBO, mismanagement, unauthorised transfer of members' properties to the 4th defendant. It is also alleged that the investigations revealed that there was embezzlement of funds belonging to the CBO and unaccounted title documents for the CBO. The plaintiffs further argued that the new directors of the 1st defendant have initiated a process to start disposing the land and assets held in trust by the 1st respondent for the members of the CBO. The plaintiffs also alleged that the 4th defendant offered for sale motor vehicle registration no. KBQ 177P to a third party for ksh. 2 million, a motor registered in the name of the 4th respondent in trust for the CBO. It is said that the proceeds were not remitted to the accounts of the CBO. The plaintiffs further argued that the 1st and 4th defendants have already surrendered 8 title deeds measuring approximately 4 acres to a financial institution as security. It is the submission of the plaintiffs that the directors of the 1st defendant are breaching the trust bestowed upon them by failing to act in good faith for the benefit of the members

of the CBO. It is for these reasons that the plaintiffs sought for temporary orders of injunction.

10) The 4th defendant vehemently opposed the motion by relying on the replying affidavit she swore. She stated that Smith Kimeta Munyao is a former chairman of the CBO and a former director of the 1st defendant having been voted out because he misused the members' funds. She confirmed the plaintiffs' assertion that the 1st defendant was incorporated for purposes of holding and managing the assets of the CBO and that she has been managing the assets of the CBO with due care and diligence. She pointed out that Smith Munyao was removed as a director of the 1st defendant in an AGM held on 3.6.2014. The 4th defendant further alleged that Smith Munyao took from the CBO 12 title deeds, a cheque book, company registration certificate and a licence certificate without authority. The 4th defendant stated that there was an attempt to reconcile them but in vain. The 4th defendant further stated that on 3.6.2014 members of the 1st defendant elected new directors and voted out Smith Kimeto Munyao as a director of the 1st defendant. It is the submission of the 4th defendant that that due process was followed in removing Smith Munyao as a director of the 1st defendant.

11) The 4th defendant stated that she and her colleagues are not planning to dispose of any assets of the CBO nor that of the 1st defendant.

12) The 4th defendant further pointed out that she did not dispose of motor vehicle registration no. KBQ 177Q but the same was repossessed by NIC for non payment of the hire purchase sum. The 4th defendant denied further that she and others surrendered 8 title deeds to the National Bank of Kenya as collateral. The 4th defendant pointed out that paragraph 52 of the memorandum of association of the 1st respondent indicates that any dispute arising in the 1st defendant's company should be referred to arbitration which the plaintiff declined to adhere to.

13) Having considered the rival submissions and the material placed before this court, it is clear to me that the court dealing with an application for injunction. The principles applicable in determining such application are well settled. However, there is one cardinal point which was raised by the 4th defendant which needs serious attention. The 4th defendant has argued that the plaintiffs have side stepped an important channel in determining this dispute. In paragraph 52 of the memorandum of association of the 1st defendant, it is clearly stated that the first call to go when disputes between members of the 1st defendant arise is the arbitration process. I have perused the clause and I am convinced that it is the correct exposition of the law. The plaintiffs have not controverted this assertion. In the circumstances it cannot be said that this applications and the suit are competently before this court. In the circumstances, I do not find that the plaintiffs have shown a prima facie case with a probability of success before this court. On this ground alone, I find the motion dated 17.4.2016 to be incompetently before this court. It is ordered struck out with costs.

14) Having disposed of the motion dated 17.4.2016, let me now turn my attention to the motions dated 15/6/2016 and 18/07/2016. I have already stated that in both applications the plaintiffs are seeking for near similar orders. In the amended motion dated 15.6.2016, the plaintiffs have urged this court to issue an order directing the 4th defendant to deposit in court the proceeds of the sale of motor vehicle registration no. KBQ 177Q, KBP 914C and KBN 661N together with the sale agreements. In the motion dated 18.7.2016, the plaintiffs are seeking for an order to compel the 4th defendant to deposit in court 32 title deeds in respect of parcels of land excised from L.R. no. Athi River/Athi River Blocks. It is said that in seeking to transfer the aforesaid assets, the 4th defendant fraudulently forged signatures of other directors in order to facilitate the transfers hence there is need to issue an order for injunction to prevent the 4th defendant from unfairly enriching herself. The 4th defendant strongly opposed the motion by filing a replying affidavit she swore to oppose. The 4th defendant denied that any of the aforementioned titles are registered in her name. She also denied fraudulently forging signatures of the other directors to facilitate transfer of any property. She further denied representing to the public that she was in a position to transfer any property to third parties.

15) The 4th defendant has categorically stated that the plaintiffs have already registered caveats and cautions against the properties hence it makes no sense to make an order directing the title to the properties to be deposited in court. After a careful consideration of the rival submissions, it is clear to me that both the plaintiffs and the 4th defendant at some point served as officials of the CBO. There is one issue which was raised by the 4th defendant which is to the effect that the plaintiffs have already registered cautions and caveats against all the parcels of land and therefore there is no imminent danger that those titles would be transferred to third parties therefore there is no need to issue an order directing the ownership documents to be deposited in court. The assertion by the 4th defendant is not controverted and I have no reason to doubt the veracity of the averments of the 4th defendant. The 4th defendant denied under oath as representing to the public that she was in a position to dispose the properties stated in the plaintiffs application. I am persuaded by the averments of the 4th defendant that the two motions do not have merit. There is no credible evidence showing that the 4th defendant is in the process of disposing of the assets listed by the plaintiffs. For the above reason I decline to grant the orders sought in the amended motion dated 15.6.2016 and the other dated 18.7.2016. both motions are ordered dismissed.

16) The final application to be determined is the summons dated 31st August 2016. I have already outlined the sort of orders applied for by the plaintiffs. The plaintiffs have made averments to the effect that the 4th defendant wrote a letter dated 17.7.2015 alleging that the court had been compromised to delay in delivering judgment in this case. It is the plaintiffs' submission that the contents of the letter eroded the dignity and public confidence in the court system therefore the 4th defendant ought to be punished by committing her to jail. The 4th defendant vehemently opposed the summons arguing that the same is frivolous and vexatious and is meant to delay the conclusion of this suit. The 4th defendant admitted that she wrote the aforesaid letter and added the same did not undermine the dignity of the court. She stated that she merely expressed an opinion on the delay in delivery of judgment. I have carefully considered the averments made by both sides. It is not in dispute that the 4th defendant wrote the letter dated 17.7.2015 in which she complained of the delay in the delivery of judgment in this suit. In the letter, the author expressed her opinion that the court may have been compromised to delay delivering of the judgment. The plaintiffs/applicants are seeking for leave to have the 4th defendant cited for contempt and to be punished thereafter, in my humble view, the letter cannot be said to have lowered the dignity of the court. The 4th defendant merely expressed her frustrations to the chairman of Akamba Clans Council of Elders over the delay in the delivery of judgment. There is absolutely no reason why the 4th defendant should be cited for contempt.

17) Consequently the application for leave to commence contempt Proceedings against the 4th defendant is declined.

18) In the end, the four applications i.e the motions dated 17.4.2015, 15.06.2016, 18/07/2016 and the summons dated 31.8.2016 are ordered dismissed. In the circumstances of this case, I direct that each party meets its own costs.

Dated, Signed and Delivered in open court this 24th day of February, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant