



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 218 OF 2016**

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

MWENDWA ONESMUS.....19<sup>TH</sup> APPLICANT

JOSEPH MUTIE.....20<sup>TH</sup> APPLICANT

**VERSUS**

UKAMBA AGRICULTURAL INSTITUTE.....1<sup>ST</sup> RESPONDENT

STEPHENE NDAMBUKI MULI.....2<sup>ND</sup> RESPONDENT

ERIC MUTINDA MUTISYA.....3<sup>RD</sup> RESPONDENT

MARY NDINDA KIMWELE .....4<sup>TH</sup> RESPONDENT

**RULING**

1. The Plaintiff on 17<sup>th</sup> August, 2016 filed this suit together with the Notice of Motion seeking orders *inter alia* that leave be granted to continue with this action as a derivative action. That the dispute herein revolves *inter alia*, around the properties of the 1<sup>st</sup> Defendant, Ukamba Agricultural Institute Ltd (UKAI) and whether its management Board is lawfully in office.

2. The Defendants filed a Notice of preliminary objection dated 29<sup>th</sup> September 2016 and objected to the Plaintiff's suit and the notice of motion as the following grounds

**“a. That this suit and notice of motion application thereto contain the same parties and claim as Judicial Review Miscellaneous Application No. 414 of 2015 currently proceeding before Justice Odunga, out rightly offending the provisions of Section 6 of the Civil Procedure Act.**

**b. That the Plaintiffs as members of the 1<sup>st</sup> Defendant were also enjoined as interested parties in Judicial Review No. 277 of 2010 where Korir J give a judgment that canvassed the allegations that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants were unlawfully in office. The Plaintiffs were also parties to a Civil Suit No. 4786 of 2015 in the lower court dealing with the same subject matters raised in this suit. The suit and application herein are therefore *Res judicata* as itemized by Section 7 of the Civil Procedure Act and should not be tried by this Honourable court.**

**c. That the suit is for that matter, scandalous, vexatious, frivolous, and an abuse of the court process. It ought to be forthwith struck off.**

3. The Plaintiff filed the grounds of opposition dated 9<sup>th</sup> November, 2016 in response to the preliminary objection. The said grounds are as follows:

**1. The application as filed is misconceived, bad in law and an abuse of court process.**

**2. The company Ukamba Agricultural Institute is suffering prejudice and harm and the parties mandated to represent the company have failed/neglected/ignored to redress the grievances because they are the perpetrators compelling the Plaintiff/Applicants to bring this derivative action on behalf of the company.**

**3. That the Applicants/Members are entitled under the Constitution of UKAI and the Companies Act to pursue the derivative action herein.**

**4. The 2 Judicial Review matters mention by the Defendant are a separate cause of action from a derivative action and by their nature seek reliefs against a Public body or person**

acting in such capacity none of which is party in this suit.

5. As a matter of fact when the prayers herein were sought in Judicial Review Miscellaneous Civil Application No. 414 of 2015 at Nairobi Odunga, J. recused himself for lack of Jurisdiction as they are not within the ambit of Judicial Review.

6. The cause of action in CMCC. 4786/2015 UKAI vs Onesmus Mwati seeks to restrain 1<sup>st</sup> Applicant from interfering with management of UKAI and does not bear a derivative action element as herein.

7. In any event the High Court has exclusive jurisdiction to determine derivative suits as per High Court Company Rules at the time and therefore any Orders in CMCC 4786/2015 UKAI v Onesmus Mwati do not apply and are in fact *null and void ab initio*

4. The Defendants also filed a replying affidavit in opposition to the preliminary objection and in support of the notice of motion dated 17<sup>th</sup> August, 2016.

5. The preliminary objection canvassed by way of written submissions which I have duly considered.

6. The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. in **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) Ea 696**. At page 700, Law, JA stated that:

**“...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.”**

Sir Charles Newbold P. added as follows at page 701:

**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.”**

7. In case at hand, the preliminary objection raises matters of fact that require to be ascertained through evidence e.g who were the parties in the other suits referred to in the preliminary objection? What was the cause of action in the said suits? Judicial Review proceedings are not a bar to the filing of a civil suit. The issues of *subjudice* and *Res judicate* require the probing of evidence. Consequently, I find no merits in the preliminary objection and herein dismiss the same with costs

Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of March, 2017

**B.THURANIRA JADEN**

**JUDGE**