



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

CIVIL CASE NO 7 OF 2016

H. A. KATEMA

WALTER MWAWASI

KIRIGHA JONAS MKOSI.....PLAINTIFFS

VERSUS

NATHANIEL MRAMBA.....1ST DEFENDANT

JOHN MWAENI.....2ND DEFENDANT

FANUEL MWANDAWIRO.....3RD DEFENDANT

NEWTON MKALA.....4TH DEFENDANT

CRISPUS MBASHU.....5TH DEFENDANT

PHILIP MARAMI.....6TH DEFENDANT

REUBEN MWALUMA.....7TH DEFENDANT

MANUEL KITOLOLO.....8TH DEFENDANT

DAWSON MARAMI.....9TH DEFENDANT

MAUNGU RANCHING (D.A.) CO LTD.....10TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion application dated and filed on 15th December 2016 was brought under the provisions of Order 40 Rule 1, 2, 3 (**sic**) of the Civil Procedure Rules, Section 131(1) and Section 132 of the Companies Act and Section 3A of the Civil Procedure Act and all enabling provisions of the law.

Prayers Nos (1) and (2) of the said application were spent. It sought the following remaining orders:-

1. **Spent.**

2. **Spent.**

3. **THAT the Court do issue permanent orders barring the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendants from assuming the seats of Chairman, Secretary and Treasurer or dealing with any matters of the 10th respondent until this case is heard and determined.**

4. **Costs if this application be in the cause.**

THE PLAINTIFFS' CASE

2. The application was supported by the Affidavit of Kirigha Jonas Mkosi. The same was also sworn and filed on 15th December 2016. The Plaintiffs' Written Submissions were dated and filed on 15th March 2017.

3. The Plaintiffs stated that they were shareholders of the 10th Defendant (hereinafter referred to as "the Company"). Vide Notices dated 4th November, 2016, they said that the Company, through the then Secretary General, purported to call for an Extra-ordinary meeting that was to be held on 26th November 2016 at Mlundinyi at 10.00am. However, the said Notice was too short and poorly served as they were not advertised through the local media and local administration as had been recommended by a Task Force that had been set up to resolve wrangles in the Company.

4. It was their contention that the meeting was not properly called as a result of which many shareholders who resided outside Taita Taveta County did not receive the said Notice. It further stated that the procedure of how the elections was conducted was in contravention of the Company's Articles of Association as it purported to distribute the directorships in groups contrary to the Act (not specified which) and the Articles of Association.

5. It said that the said groups were as follows:-

1. **Wongonyi elected 1 director**

2. **Ghazi elected 3 directors**

3. **Ndome elected 3 directors**

4. **Tausa elected 1 director**

5. **Mraru elected 1 director.**

6. They reiterated the same facts in their Written Submissions and urged this court to find that the mode of the elections that was adopted by the Company was not proper. It was their averment that if this court did not intervene as it had sought in its application, the directors of the Company would be in office illegally causing the shareholders to suffer irreparably.

THE 1ST, 3RD, 4TH, 5TH, 6TH, 8TH AND 10TH DEFENDANTS' CASE

7. In response to the said application, on 10th January 2017, the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants filed Grounds of Opposition that were dated on 5th January 2017. The Grounds of Opposition were as follows:-

1. THAT the Plaintiffs had not met the requirements for the grant of an injunction as set out in the celebrated case of (sic) vs CASSMAN BROWN.

2. THAT the Plaintiffs had not specified which of the defendants were to be barred from which respective and specific positions.

3. THAT the plaintiffs lacked capacity to bring this suit.

4. THAT the application and entire suit was without merit and ought to be dismissed with costs.

5. THAT the plaintiffs had not complied with the provisions of rule 1(8) (sic) Civil Procedure Rules.

8. In addition, the 8th Defendant swore a Replying Affidavit on 5th January 2017 on behalf of the 1st, 3rd, 4th, 5th, 6th and 10th Defendants. The same was filed on 10th January 2017. The said Defendants also filed an Authority Notice on 19th January 2017 authorising the 8th Defendant to represent them in the proceedings herein.

9. Their Written Submissions and Notice of Preliminary Objection were both dated 18th April 2017 and filed on 21st April 2017. The grounds of the Preliminary Objection were as follows:-

1. THAT the Plaintiffs' suit was fatally defective as it contravened the express provisions of Section 19 of the Civil Procedure Act and Order 4 Rule 1(3) of the Civil Procedure Rules.

2. THAT the suit contravenes the provisions of Order 1 Rule 13 of the Civil Procedure Rules.

3. The suit contravened the letter and spirit of Sections 1A, 1B and 3A of the Civil Procedure Act.

4. THAT the plaintiffs lacked the capacity and locus standi to bring this suit.

5. THAT the suit was otherwise an abuse of the court process.

10. In their Replying Affidavit, they agreed with the Plaintiffs that a Task Force had been set up to resolve wrangles in the Company. They averred that the said Task Force recommended that an Extraordinary meeting be held to rectify the anomalies in the financial management. It was their contention that the Notice complied with the Paragraph (sic) 8 of Articles of Association which provided that an extraordinary meeting could be held upon issuance of the mandatory twenty one (21) days' notice and that in fact the meeting was held in line with Paragraph (sic) 8 of the Articles of Association.

11. They stated that the 3rd Plaintiff did not annex a copy of the Notice as proof that he received the same late. They pointed out that the Plaintiffs did in fact admit in their Supporting Affidavit that they attended the meeting that was held 26th November 2016. They further contended that the Plaintiffs did not indicate which of the Company's shareholders they were bringing the suit on behalf of and had therefore satisfied the requirements of filing a representative suit.

12. In their Written Submissions, they argued that the Plaintiffs had failed to demonstrate that they had established a *prima facie* case with a probability of success to warrant the granting of the orders they had sought as they attended the meeting that was held on 26th November 2016. They submitted that the procedure of electing the directors was the same one that the Plaintiffs had been appointed as directors and this court could not therefore interfere in the day to day running of the Company, a task that had been left to the Articles of Association.

13. They were emphatic that the deponent of the Supporting Affidavit had no authority to swear the said

Affidavit in their behalf. They relied on the case of **Ndungu Mugoya & 473 Others vs Stephen Wang'ombe & 9 Others[2005] eKLR** where Kimaru J held as follows:-

“The authority shall be in writing signed by the party giving it and shall be filed in the case.”

14. They therefore urged this court to dismiss the Plaintiffs' application with costs to them.

THE 2ND, 7TH AND 9TH DEFENDANTS' CASE

15. The 7th Defendant filed a Replying Affidavit on his own behalf and on behalf of the 2nd and 9th Defendants. It was sworn on 23rd January 2017 and filed on even date. They each filed separate Written Submissions dated 28th March 2017 on even date. The content of the said Written Submissions was, however, the same.

16. In their Replying Affidavit, their case was simply that a Task Force had recommended that the Company hold an Extra-ordinary meeting but that the publication of the Notices was not done properly as some shareholders did not get the Notices in time.

17. In their Written Submissions, they contended that the wrong procedure was adopted as the directorships were done in groups, which they said was not permitted under the Companies Act and the Company's Articles of Association.

18. They therefore urged this court to direct that fresh elections be done in line with the Company's Articles of Association. Evidently, the 2nd, 7th and 9th Defendants were supporting the Plaintiff's case.

LEGAL ANALYSIS

19. When the matter came up in court on 24th April 2017, the parties asked this court to rely on their respective Written Submissions. The Ruling herein is therefore based on the said Written Submissions which she relied upon in their entirety.

20. However, before delving into the substantive issues of whether or not the Plaintiffs had demonstrated a *prima facie* case warranting them to be granted an injunction, this court deemed it prudent to address the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants Notice of Preliminary Objection dated 18th April 2017 and filed on 21st April 2017 to the effect that the Plaintiffs had not complied with Order 1 Rule 8 of the Civil Procedure Rules, 2010 relating to representative suits. Unfortunately, the Plaintiffs did not submit on this issue.

21. In determining the said issue, this court had due regard to the case of **Appex International Ltd & Anglo leasing & Finance International Ltd vs Kenya Anti-Corruption Commission 2012eklr** citing with approval **Goodwill & Trust Investments Ltd & Another vs Will & Bush Ltd (Supreme Court Of Nigeria)** where the court held:-

“It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in *limine*. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned.”

22. Order 1 Rule 8 of the Civil Procedure Rules provides as follows:-

1. Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or

more of them as representing all or as representing all except one or more of them.

2. The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

23. Evidently, the procedure to be adopted in representative suit had changed since the decision of **Ndungu Mugoya & 473 Others vs Stephen Wang'ombe & 9 Others** (Supra). This court's position is supported by Kaniaru J in his case of **Gabriel S Imbali & 2 others v John S JChabuga [2016] eKLR** where he held as follows:-

“A look at the preliminary objection shows that the plaintiff is faulted for not seeking leave before filing what the defendant believes is a representative suit. The law is clear that leave is no longer required to file such suit.”

24. The said Order 1 Rule 8 of the Civil Procedure Rules merely provides that the person representing other plaintiffs must give notice of the suit either by personal service and if such service is not practically possible, by public advertisement.

25. The Plaintiffs Kirigha Jonas Mkosi purported to represent were only two (2). It was therefore possible to effect personal service which service would have been evidenced by the filing of an affidavit of service. In this particular case, there was no proof that H.A. Katema and Walter Mwawasi were aware of the suit herein.

26. The importance of notification of proceedings in a court cannot be underscored for the reason that there was likelihood of people finding themselves in suits without their knowledge and/or consent. The danger of this state of affairs would mean there would be risk of such persons finding themselves liable for costs in unsuccessful cases they were not aware of. It was therefore the view of this court as there was no proof of the said H.A. Katema and Walter Mwawasi having notice of the suit herein, this court could not for a fact state that they were aware of the proceedings herein.

27. Notably, this court found it prudent to address the issue of representation as the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants raised the same. However, as was stated hereinabove, the Plaintiffs did not rebut or controvert the said assertions. Be that as it may, the Plaintiffs may have opted to file one suit as they were seeking the same reliefs as envisaged in Order 1 Rule 1 of the Civil Procedure Rules that provides as follows:-

“All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”

28. In such a case, the plaintiffs who are representing co-plaintiffs must file authority of the co-plaintiffs as envisaged in Order 1 Rules 13 of the Civil Procedure. The same stipulates as follows:-

1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

2. The authority shall be in writing signed by the party giving it and shall be filed in the case.

29. It is this authority that must be filed at the time of filing the plaint and verifying affidavit as contemplated in Order 4 Rule 3 of the Civil Procedure Rules which states that:-

“Where there are several plaintiffs, one of them, with written authority filed with the

verifying affidavit, may swear the verifying affidavit on behalf of the others.”

30. Accordingly, as was rightly pointed out by 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants, failure to attach the said authority by H.A. Katema and Walter Mwawasi authorising Kirigha Jonas Makosi rendered the plaint incompetent *ab initio* as Kimaru J held in **Ndungu Mugoya & 473 Others vs Stephen Wang'ombe & 9 Others**

31. Having said so, the question that next arose was whether or not the Plaintiffs' suit ought to be struck out for failing to annex the authority by H.A. Katema and Walter Mwawasi authorising Kirigha Jonas Makosi to act for them. Post the promulgation of the Constitution of Kenya, 2010, there has been a shift towards not striking out matters on technicalities as it is a draconian move and must be used only as a last resort. Indeed, Article 159(2)(d) of the Constitution of Kenya mandates courts to administer justice without undue regard to technicalities.

32. Notably, Order 9 of the Civil Procedure Rules states that:-

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

33. The court was therefore of the considered view that the Plaintiffs ought to be given an opportunity to file the requisite authorities. In the case of **Daylight Drycleaners Limited v Samchi Telecommunications Limited & another [2015] eKLR**, this very court granted leave to the plaintiff therein to file a board resolution authorising the filing of the suit within seven (7) days of the date of its decision. It rendered itself as follows:-

“(24)...courts have moved from striking out suits where verifying affidavits do not conform to the mandatory provisions of the law. The primary objective of courts has been to seek to sustain rather than terminate suits by striking out irregular affidavits and instead exercising their wide and unfettered discretion to order that fresh verifying affidavits that comply with the law be filed within a given time. This is to ensure that they achieve the objectives of Section 1B of the Civil Procedure Act that seek to further the timely dispose of proceedings before them....

(26) Similar to the view that was taken by Mukunya J in the case of Mulgold Limited vs Maimuna Abdullahi Mohamed & 5 Others [2014] eKLR, this court found and held that it could exercise its wide and unfettered discretion to permit the Plaintiff to issue an authority under its seal to regularise the verifying affidavit that would be sworn on its behalf.”

34. Odunga J took a similar position in the case of **Mavuno Industries Limited & 2 Others Vs Keroche Industries Limited [2012] eKLR** when he gave the plaintiff therein seven (7) days to file verifying affidavits and the requisite authority.

35. Accordingly, having considered the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants' Grounds of Opposition and Preliminary Objection, this court came to the firm conclusion that although the Plaintiffs' suit was incompetent, it was not incurably defective. It could be revived by the filing of the requisite notices as envisaged in Order 1 Rule 13 and Order 4 Rule 3 of the Civil Procedure Rules.

36. However, as the suit was incompetent and could not be heard and determined as filed, this court also found the Plaintiffs' Notice of Motion application dated and filed on 15th December 2016 could not be heard and determined as filed as the same was equally incompetent. This court did not therefore address its mind to the question of whether or not the Plaintiffs had demonstrated that it had a *prima facie* case with a probability of success.

37. As an *obiter*, the Plaintiffs are hereby urged to describe themselves in the headings of their future

pleadings as 1st, 2nd and 3rd Plaintiffs for ease of reference by the court and Defendants.

DISPOSITION

38. For the foregoing reasons, Grounds Nos (1), (2) and (4) of the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants' Notice of Preliminary Objection dated 18th April 2017 and filed on 21st April 2017 were upheld.

39. In the premises foregoing, the Plaintiffs' Notice of Motion application dated and filed on 15th December 2016 was incompetent and the same is hereby dismissed with costs to the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants. No costs were awarded to the 2nd, 7th and 9th Defendants as they were supporting the Plaintiffs' said application.

40. The Plaintiffs are hereby directed to file requisite authorities within the next seven (7) days from the date of this Ruling failing which their Plaint dated and filed on 15th December 2016 will stand as dismissed with costs to the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants.

41. It is so ordered.

DATED and DELIVERED at VOI this 27TH day of JUNE 2017

J. KAMAU

JUDGE