



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI HIGH COURT
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 47 OF 2016

NYAKINYUA INVESTMENTS LTD & ANOTHER.....PLAINTIFFS

VERSUS

MONICA NDUTA NDIRANGU & OTHERS.....DEFENDANTS

RULING

1. For the determination of the Court was the application by the Plaintiffs dated 18th February 2016 and filed on 19th February 2016. The application was brought under the provisions of Sections 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act, Order 40 Rules 2(1), (2), 3(1), 3(3) & 4 and Order 51 Rules (1), (3) & (4) of the Civil Procedure Rules. The basic orders that the Plaintiffs sought was for an injunction restraining the Defendants from conducting any business on behalf of the 1st Plaintiff or purporting to be the 1st Plaintiff's authorized officials pending the hearing and determination of the instant application.
2. Further, the Plaintiffs sought orders restraining the 5th Defendant from effecting any changes to the 1st Plaintiff Company records pending the hearing and determination of the instant application and the substantive suit. The application was predicated upon the grounds that the 1st-4th Defendants were running a parallel office of the 1st Plaintiff and conducting business purporting it to be the 1st Plaintiff and that by these actions, the 1st-4th Defendants are fraudulently misrepresenting the 1st Plaintiff and the general public, and as such, stand to suffer irreparable loss and damage.
3. The application was also supported by the affidavit of Henry Kinyua Mkura sworn on 18th February 2016. The deponent reiterated the grounds as stated in the application. The application was opposed through the Grounds of Objection filed by the 1st-4th Defendants dated 1st March 2016. Therein, it was contended that the 2nd Plaintiff did not have the authority to institute the suit on behalf of the 1st Plaintiff, and further, that the entire suit and application were *res judicata*, the issues herein having been heard and determined before the Court on several previous occasions and suits.
4. It was further averred that the 2nd Plaintiff has never been elected to hold office of director, and that therefore, had no authority to institute the instant suit against the 1st-4th Defendants. The 1st-4th Defendants further filed an affidavit deposed to on 2nd March 2015. In re-affirming the grounds of opposition, the 1st-4th Defendants reiterated that the issues raised in the instant matter had been heard and determined in HCCC No 625 of 2009 and HCCC No 367 of 2010.

5. Further, it was deposed to that the same issues were raised in HCCC No 42 of 2012 and HCCC No 589 of 2015, which matters were still pending hearing and determination. It was the 1st-4th Defendants contention that the last elections that had been held were on 22nd May 2010, in which they were the elected directors of the 1st Plaintiff, and that ever since due to the numerous court cases, elections had never been held in which the 2nd Plaintiff was elected as an official and/or director in the Company.
6. It was alluded that there were no records and documents filed at the Registrar of Companies indicating that there had been a change of directors and secretaries since the last court mandated elections of 22nd May 2010, and that therefore, the 2nd Defendant had no mandate to institute the instant suit.
7. The Court has considered the application, the response filed in objection thereto and the dispositions made by the parties. It would be imperative at this juncture for the Court to first consider the issues of (1) authority to institute suit by the 2nd Plaintiff and (2) whether the instant suit and application are indeed *res judicata* as alleged by the 1st-4th Defendants.
8. The 2nd Defendant relied on the case of **United Assurance Co. Ltd v Attorney General SCCA No 1 of 1998** in which a Ugandan Court had held inter alia;

“It is now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct counsel to file proceedings on behalf and in the name of the company. Any director who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act behalf of that company.”

9. The Court in its determination of an application in **HCCC No. 625 of 2009**, dismissed an application that had been made against the Defendant on the grounds that they were purportedly acting against the interests of the Company, The Court, in dismissing the application, stated that there was no evidence that had been placed before the Court to establish that the actions made by the Defendants were prejudicial to the Plaintiff and its shareholders. Further, the Court reiterated that there was no evidence that the Defendant were ousted from office and that they were therefore carrying out their mandate as directors of the Company.
10. Further, in **HCCC No 367 of 2010**, the Court in dismissing a similar application stated thus;

“The documents filed in reply to the notice of motion clearly and unequivocally rebuts all the averments contained in the supporting affidavit of Isaac Nderitu the depositions of which are not supported by any documentary evidence. His claim to be the Chairman of the two Plaintiffs is not supported. Neither has he proved any authority to act on behalf of the companies or their shareholders. The position established by the ruling of the Hon. Mr. Justice Mwera on 16th February 2010 (annexure “IN-5”) to the effect that Isaac Nderitu and six others “are not directors or officials of the Plaintiff companies with the capacity to sue or litigate on behalf of the two (2) companies at all” remains unchanged. In view of this fact, the application is incompetent and cannot be maintained. Given the facts, as demonstrated by the replying affidavit filed by the Respondents, who have proved themselves to be the legal office bearers of the Plaintiff companies, I see no possibility of the suit against them as, instigated by the said Isaac Nderitu, ever succeeding, since the company itself has no quarrel with the Respondents. Quite clearly, a case for an injunction has not been established at all and no cause of action, even on a prima facie basis has been demonstrated against the 3rd Defendant/Respondent. I see no need to venture into the submissions made herein, save to say that the attempt by Mr. Njoroge, learned counsel for the purported Applicants, to introduce evidence from the bar should be discouraged. I must state however state that the present application ought to have been filed in the pending suit HCCC No 625 of 2009 as was submitted by Mr. Kimani learned counsel for the Respondents. In view of my above findings, the notice of motion dated 7th June 2010 is hereby dismissed, it being an abuse of the court process.”

11. The authority in **United Assurance Co. Ltd v Attorney General** (supra) is not binding upon this

- Court, but merely persuasive. However, the same has not persuaded this Court on the issue of authority. As reiterated and determined in both HCCC No 625 of 2009 and HCCC No 367 of 201, none of which has been appealed against, the 2nd Plaintiff has not presented any evidence that would contradict the position that has been established by the 1st-4th Defendants, that they are indeed the duly elected officials and office bearers of the 1st Plaintiff.
12. They were duly elected in the Annual General Meeting held on 24th May 2010. No other evidence contrary to what has been presented by the 1st-4th Defendants has been placed before the Court for consideration, save for the two (2) letters dated 26th October 2015 and 24th June 2015, which gave the list of directors as per the returns filed on 5th June 2010 and 31st December 2012 respectively. It is of note that these returns were filed by a person(s) who were not duly elected as officials on 24th May 2010, and as succinctly reiterated by the 1st-4th Defendants, the filings of returns is not conclusive evidence of authority and mandate bestowed upon the 2nd Plaintiff, and further, that there was no general meeting of the company preceding the filing of the annual returns, ostensibly due to the pending cases between the Plaintiffs and the Defendants.
13. In consideration of the foregoing, and after careful evaluation of the evidence presented before the Court, the 2nd Plaintiff had no authority or mandate to institute the instant suit against the Defendants, and further, that there was pending an order of the Court in **HCCC No 42 of 2012**, in which Ogolla, J issued an order maintaining the *status quo*, pending the hearing and determination of the application dated 25th January 2012 filed against the parties herein as Defendants. Having considered that the 2nd Plaintiff did not have the requisite authority to institute the instant application and suit against the Defendants, the Court would not therefore belabor itself in considering the issue as to whether the matter is *res judicata*.
14. Having considered all the facts and evidence before the Court, it is hereby found that the application is unmeritorious, that the same is an abuse of the process of the Court and is dismissed with costs attendant awarded to the 1st-4th Defendants, which costs shall be borne personally by the 2nd Defendant.

DATED AT NAIROBI THIS 31ST DAY OF MAY, 2016.

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C. KARIUKI

JUDGE

READ, DELIVERED AND DATED AT NAIROBI THIS 31ST DAY OF MAY, 2016.

O. SEWE

JUDGE