REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 55 OF 2004

KARAMAINI INVESTMENTS CO. LTD. ………….1ST PLAINTIFF

CHARLES GITHINJI …………………………….... 2ND PLAINTIFF

-VERSUS-

NJERU MWANIKI……….………………………….. DEFENDANT

RULING

1. The defendant/applicant through an application pursuant to Rules 6A and 13 (d) of the Civil Procedure Act sought that the plaintiff's plaint dated 15th June 2004 be struck out for being an abuse of the court process with costs. The application is based on five (5) grounds on the face of the application interalia; but there is no authority by the 1st plaintiff to institute these proceedings; that the 2nd plaintiff's claim, if any, can only be brought within the purview of winding up proceedings; that the claim is bad in law for misjoinder of causes of action; that the plaint is bad in law and incompetent and that the suit is a gross abuse of the court process.

2. The application is supported by supporting affidavit of the applicant dated 31st August 2009 in which the applicant has deponed interalia; that the 2nd plaintiff and himself are co-directors and shareholders of the first plaintiff; that as a director he is not aware that a resolution had been made by the 1st plaintiff authorizing the filing of this suit in court; that the 2nd plaintiff has no capacity or authority to drag the 1st plaintiff into the proceedings without a resolution giving such authority; that the plaintiffs' suit offends a cardinal principle of company law that a company cannot sue or defend proceedings without a resolution authorizing such an action; that the plaintiffs are seeking two substantive prayers as it is not indicated how he defamed the 1st plaintiff; that there is no commonality of causes of action between the 1st plaintiff and the 2nd plaintiff and that the claim is bad in law; and that the orders sought can only be within the ambit of winding up proceedings and not in the instant suit; and this suit is an abuse of the court process and the application should be disallowed.

3. The plaintiffs are opposed to the defendant's application and in doing so have countered the application through a replying affidavit dated 9th November, 2009 in which it has been deponed inter alias that the 2nd plaintiff is also a director of the 1st plaintiff; that the application is incompetent – without merits and calculated to delay the hearing of the main case; that on 1st October, 1997 at a meeting of directors of the 1st plaintiff it was resolved that the 2nd plaintiff has

power to institute court proceedings on behalf of the 1st plaintiff as per annexure **"CGM";** that on 1st October 2003 at a meeting of the 1st plaintiff it was resolved that matters in dispute of accounts of coffee proceeds of the company in respect of land parcels Baragwi/Raimu/1136,1137,1138 be taken to court as per attached resolution marked **"CGM2";** that it is not true the claims before the court are bad in law for misjoinder of causes of action; that the 2nd plaintiff is properly before the court in terms of Order 11 rule 2 of Civil Procedure Rules where a plaintiff is allowed in law to unite in the same suit several cause of action against same defendant; that in law it is open to an aggrieved party to choose what cause of action to take and that the time for choosing a cause of action for proceedings of winding company has yet to be reached**.**

4. On 27th June 2012 the applicant sought court's leave to file supplementary affidavit after having been served with the plaintiff's replying affidavit dated 9th November 2004. The court granted leave to file supplementary affidavit but todate none has been filed. On 19th May 2015 when the matter came up for hearing the applicant's Counsel relied on the ground at the face of the application and sought a ruling date. The counsel for the plaintiff though served did not appear.

5. I have very carefully considered the pleadings and annextures thereto and the issue for consideration in my view is whether the plaintiff's suit should be struck out for being an abuse of the court process?

6. The applicants' application is based on the ground that there is no authority by the 1st plaintiff to institute these proceedings and the 2nd plaintiff's claim, if any can only be brought within the purview of winding up proceedings; that the claim is bad for misjoinder of causes of action and that the plaint is bad in law, incompetent and a gross abuse of the court process.

7. The plaintiffs countered the defendant's application through a replying affidavit to which several annextures were attached. The plaintiffs attached a resolution of the 1st plaintiff annexture "**CGM1"** supporting the 2nd plaintiff to institute court process dated 1st October 2003 and annexture **"CGM2**" dated 1st October 2003 resolving that matters in dispute of accounts of coffee proceedings of the 1st plaintiff in respect of Land parcel Baragwi/Raimu/1136,1137,1138 be taken to court. The applicant sought leave to file a supplementary affidavit but todate he has not done so. He has not controverted the contents of the 2nd plaintiff's affidavit dated 9th November 2009. In view of that fact I am satisfied that the 1st plaintiff gave authority to institute these proceedings through the 2nd plaintiff.

8. The defendant contended that the 2nd plaintiff's claim, if any can only be brought within the purview of winding up proceedings. In civil claims where an aggrieved party is at liberty to choose what cause of action to be taken and what relief he or she can seek it is not open for the culprit or wrongdoer to suggest and insist on what she or he deems to be the right cause of action or relief to be sought. The aggrieved party is at liberty to prefer any cause of action without seeking suggestion of the wrongdoer. The applicant therefore has no justification in suggesting to the plaintiffs the cause of action that they should take or should have taken against him. On the issue of misjoinder of causes of action a party to a suit is at liberty and is allowed by law to unite in the same suit several causes of action against the same defendant **Order 1 Rule 1 (3) and (9) of Civil Procedure Rules provides :-**

> ***"(3). All persons may be joined as defendants against whom any right for 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 separate suits were brought against such person any common question of law or fact would arise."***
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> ***"(9). No suit shall be defeated by reasons of the misjoinder or non-joinder of parties,***

and the court may in a every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it."

9. In view of the above it is my view that the plaintiffs claim is proper and is not bad in law for misjoinder of causes of action nor is it bad in law and incompetent. The plaintiff's claim I am satisfied is not an abuse of the court process. I find that the defendant's application was filed with intention to delay the hearing of the main case.

10. Having come to the conclusion that I have, I find no merits in the defendant's application dated 31st August 2009. The same is therefore dismissed with costs to the plaintiffs.

DATED at Meru on this 25th day of June, 2015.

J.A MAKAU

JUDGE

25.6.2015

Delivered in open court in presence of:

Mr. M.Kariuki for defendant/applicant

M/s. Macharia Muraguri & Co. for plaintiff/Respondent

Court clerks – Penina/Mwenda

J.A. MAKAU

JUDGE

25.6.2015