



461/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE NO.40'B' OF 2014

MARTIN KALOKI KYULE.....1ST PLAINTIFF

JOHN MULINGE.....2ND PLAINTIFF

VERSUS

SAMUEL MUSEMBI MUNYAMBU.....1ST DEFENDANT

JAMES MWANTHI KILONZO.....2ND DEFENDANT

TITUS WAMBUA NGOLOMA.....3RD DEFENDANT

JOSEPH KINUKU.....4TH DEFENDANT

MUTISYA MUSEMBI.....5TH DEFENDANT

MWEA FARMERS LTD.....6TH DEFENDANT

RULING

1. By way of a notice of motion dated the **14th August 2014**, the applicant/plaintiff prays for orders that: the respondents/defendants herein by themselves jointly and severally, their servants, agents or those claiming under them be restrained from transacting or representing themselves on behalf of the 6th respondent/defendant in any way or whatsoever until the determination of the application; any transaction in respect of **LR No.11930** owned by the 6th respondent be stopped until the determination of the suit; the operation of Bank account **No.9890196302274** in the name of the 6th respondent be frozen until the matter is determined; the directors of the 6th respondent/defendant be directed to call for an Annual General Meeting in accordance with the 6th defendant by-laws and costs of the suit be met by the defendant.

2. The application is supported by grounds that; the defendants assumed office against the laid down procedures, rules and by-laws of the company; the directors are disposing off properties of the 6th defendant and withdrawing money belonging to the company without authority from members of the company and without authority the Directors have assumed the role of members and directors.

3. The 1st applicant, **Martin Kaloki** swore an affidavit in support of the application. He deponed that; they (applicants) are members of the 6th defendant, per membership numbers **351** and **148** respectively; the respondents are illegally in office as they were never elected; transacting on behalf of the 6th respondent is a violation of procedures and rules laid down by the 6th respondent; the 6th defendant owns land parcel **No. LR N930** that has been alienated by the 1st – 5th respondents who are disposing it; a complaint has been raised to the National Land Commission by members of the company following illegal subdivision of the land and allocation; the 1st – 5th respondents have continued to operate the 6th respondent's account **No.9890196302274** held at **Ndithini Community Bank** without authority from the members which prompted members to take action; and the purported directors have continued to misappropriate funds and other members properties without authority.

4. The respondents filed a preliminary objection stating that; the suit is irretrievably defective, misconceived, inconsequential, null and void. No company in the name of **Mwea Farmers Limited** is registered by the Registrar of Companies; the suit has contravened the provisions of **Sections 131, 132 and 135** of the **Companies Act**.

5. The respondents also filed a replying affidavit deponed by the 2nd respondent having been authorized by the 3rd, 4th and 6th defendants. He deposes that the 6th defendant is unknown to them, as the only company they associate with is **Mwea Farmers Company Limited**, where they are directors. The 1st defendant/respondent is not a member of the **Mwea Farmers Company Limited**; the 1st respondent is neither a director nor a shareholder of **Mwea Farmers Company Limited**; the 5th respondent is deceased and therefore wrongfully enjoined; an Annual General Meeting was held on the **3rd September 2010** whereby Directors were elected namely:

1. James Mwanthi Kilonzo
2. Samuel Mwangangi Musembi
3. Titus Wambua Ngoloma
4. Olive Ndendwa Musyoki
5. Joseph Mulei Kinuku
6. Michael Mutisya Mwando

6. Further, he stated that the directors have been conducting the affairs of the company professionally and in strict compliance with the Memorandum and Articles of Association of the company.

7. This court is obligated to deal with the Preliminary Objection raised at the outset. It is argued that a limited liability company in the name of **Mwea Farmers Limited** does not exist at the Registrar of companies and the 5th defendant is not a director of the company and is deceased. No further affidavit was deponed to dispute the allegation. **Order 1 rule 9** of the **Civil Procedure Rules** states thus:

“No suit shall be defeated by reason of the misjoinder or nonjoinder 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.”

8. The suit would not fail due to the allegation that one of the parties sued is alleged to be dead and the other one is non-existent. In any case the respondents have relied on documents.

9. This brings us to the issue whether the suit is irretrievably, defective, misconceived, inconsequential, null and void.

10. The Preliminary Objection consists of a point of law which has by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. (*See Mukisa Biscuits Manufacturing Co. Ltd. Versus West End Distributors (1969) EA 696*).

11. In raising the Preliminary Objection the respondents envisaged the suit being disposed at this stage. The locus standi of the applicants/plaintiffs to institute the suit has been questioned by the respondent. This is a matter that must be interrogated by this court. Locus standi signifies the right to be heard. A person must have sufficient interest to sustain his standing to sue in a court of law (*See Law Society of Kenya –versus- Commissioner of Lands & Others (2001) KLR (E&L) 1*). In the affidavit jointly sworn in support of the application, the applicants aver that they are members of the 6th defendant therefore competent to institute the suit. They adduced affidavit evidence with annexures to establish the fact of membership. They gave their membership numbers as **148** and **351** respectively and attached an annexure, a list of plot allocation Control Board dated the **30th June 1993** with a stamp impression of **Mwea Farmers Company Limited** and a certification of the **Land Registrar, Machakos**.

12. In disputing the membership of the 1st plaintiff, the respondents/defendants filed evidence tending to prove change of ownership to a third party. The witness statement dated **18th September 2014** and the agreement dated **30th June 1978** show there was a sale and transfer of shares numbers **37** and **255**. Per the evidence of the list of plot allocation filed by both the applicants and respondents these numbers belong to different person. The list has shares members **148** and **351** which belong to the applicants. This, therefore, proves that the two (2) are shareholders, the two applicants therefore had direct interest in the company.

13. What must then be considered is whether the suit is premature and an abuse of the court process?

14. No evidence was adduced by either party when exactly the company was incorporated. They are, however, handwritten minutes not disputed dated the **3rd September 2010** for an Annual General Meeting. The Deputy Registrar of companies and Assistant Registrar representing the Registrar were in attendance and so were other government officials. The Registrar conducted elections and the following people were elected as Directors of **Mwea Farmers Company Limited**:

1. James Kilonzo – Chairman
2. Titus Ngoloma – Secretary
3. Olive Musyoki – Treasurer
4. Samuel M. Musembi – Director
5. Joseph M. Kinuku – Director
6. Julius Mulinge – Director
7. Michael Mwando – Director

The directors were nominated to conduct the affairs of the company in accordance with the Companies Act. It is submitted that the directors have been conducting the affairs of the company professionally and in strict compliance with the Memorandum and Articles of Association of the company.

15. **Article 27 of the Articles of Association of the Mwea Farmers Company Limited** states that:

“The directors shall remain in office until removed by the memorandum in writing signed by the holders of the majority value of the issued share capital for the time of the company ... or by a special resolution of the company.”

16. The directors having been elected/appointed pursuant to the law, they are in office legally.

17. It is alleged that the directors have misappropriated funds belonging to the company in **Ndithini Community Bank Account No. 9890196302274**. If this allegation is established it would be just for orders preserving the property to issue.

18. In this case, a complaint was made to the National Land Commission. The directors were not handling the subdivision of the **LR No.11930** properly. There was also an allegation that boundaries of the land parcels already allocated to members were being changed. The complaint formed the basis of the letter dated **13th February, 2014 (Annexure "MKK1")** whereby the commission undertook to investigate grievances of some of the members.

19. The company having been incorporated under the Companies Act existed pursuant to the law. On the **24th April 2014** some members of the company namely:

1. John Mulinge
2. Pasitio Matheka
3. Munanda Ngui
4. John Nthuli
5. D.K. Ngaanga

Purportedly held a meeting with a view of raising funds to file a court case against directors of the company. The minutes are not approved. Per the list adduced in evidence membership of the company comprises of approximately 364 individuals.

20. Assuming that some members were indeed aggrieved – and they are seeking a relief that:

“An order for an Annual General Meeting be held and the election of Directors to be held.”

What would prompt the court to make such an order?

21. Affidavit evidence adduced shows that Annual General Meetings were held annually since **2010 to 2014 April**. According to Articles of Association of the company there ought to have been a memorandum of majority shareholders or a special resolution of the company to have directors removed from the office. There is no suggestion that an attempt was made by the applicants to comply with Articles of Association.

22. What has been alleged by the applicants is an unusual matter that may be very important to the company even if no proof was tendered. This would call for an extra-ordinary meeting of the company. As members of the company they would have requested other members of the company to join them to form one-tenth of the entire membership to request for an extraordinary meeting (***See Section 132 of the Companies Act.***)

23. Without evidence that the applicants attempted to call for any meeting as required by the law, it would be premature for this court to order the meeting of the company to be called.

24. In the premises the applicants have not established a prima facie case with a probability of success as set out in the case of ***Giella versus Cassman Brown and Company Ltd [1973] E.A. 358.***

25. Consequently, the Preliminary Objection raised has merit. The same is upheld. Therefore, I do strike out the suit with costs to the respondents.

DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of DECEMBER, 2014.

L.N. MUTENDE

JUDGE