



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND AND ENVIRONMENT COURT
HCC. NO.17 OF 2008

MATHINGIRA WHOLESALERS LTD.....PLAINTIFF

VERSUS

KIMWATU KANYUNGU & 5 OTHERS.....DEFENDANTS

RULING

On the 26th of February 2013 Mrs Mwai for Plaintiff and Mrs Mwangi for Defendants appeared before me and agreed that this matter was ready for hearing and asked for a nearer hearing date. The Court granted their request and gave them the 16/5/2013 as the most suitable early hearing date.

On the 16th May 2013, Lucy Mwai for plaintiff and Miss Gacheri holding brief for Gibson Kamau Kuria for Defendants appeared before the court. Miss Gacheri informed the court that the former president Hon. Mwai Kibaki was interested in the matter and prayed that he be enjoined in the suit M/s Mwai was ready to proceed with the hearing of the suit however, the court allowed the application for adjournment by the defendants only on one ground that the immediate former president was interested in being enjoined in the suit as a defendant.

The application for joining the former president was allowed with a condition that the amended defence be filed within 14 days. The plaintiffs were granted leave to re-amend the plaint if they so wished within 14 days of service.

On the 18/6/2013 Maina for Lucy Mwai advocate for the plaintiff appeared in the registry and took a hearing date of the suit in the absence of the defendants. The record shows that the date was taken pursuant to the invitation dated 6th June 2013 by the firm of Lucy Mwai & Co Advocates to the firm of Kamau Kuria & Kiraitu advocates.

On the 20th September 2013 in compliance with the court order made on 16th May 2013 the amended defence was filed accompanied with the witness statement of the 6th Defendant. However, the two documents were filed out of time thus more than 4 months after the court directed the same to be filed in breach of the aforesaid order.

When the matter came for hearing today, the 6th Defendant applied for extension of time to enable the two documents to be deemed as duly filed. M/s Lucy Mwai was not opposed to the application but asked for 14 days to enable her file the plaintiffs further reply to the amended defence. Both requests were allowed by this court by consent.

The 6th Defendant made another application under order 18 rule 9 asking the court to exercise its power

to examine a witness immediately.

This section provides that where a witness is about to leave the jurisdiction of the court, or other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately the court, may upon the application of any party or of the witness at anytime after the institution of the suit, take the evidence of such witness in manner provided for in sub-rules 2 & 3.

The application herein is made orally with the statements of the counsel for the Defendants made from the bar and therefore this court has no benefit of supporting affidavits or documents to enable it make a determination as to the competency of this application. There is no evidence that the 6th Defendant is about to leave the jurisdiction of this court and therefore the court is left with the option of relying on sufficient cause to its satisfaction as to why the former president's evidence should be taken immediately. The reasons given for the taking of the evidence immediately is that of the status of the 6th defendant in terms of his age and as a former president.

Dr. Gibson Kamau Kuria did not elaborate on how the age of his client would require this court to exercise its discretion under Order 18 Rule 9 of the Civil Procedure Rules and therefore the court is unable to determine whether it should take his evidence immediately on account of age. He asks the court to take judicial notice of this fact however this is not a matter of judicial notice as the applicant is supposed to prove that there is some hardship and therefore should be given priority.

On the status of the 6th Defendant, the court respects the former president as a former president and as a champion of the new Constitution. However, Article 159 (2) (a) guides this court to do justice to all irrespective of status and therefore considering the application on basis of the status of former president will be re-writing the law.

Applying the *Ejusdem Generis* rule of statutory interpretation of general words especially when particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. This rule reflects an attempt to reconcile incompatibility between specific and general words in view of the other rules of interpretation that all words in a statute are given effect if possible that a statute has to be construed as a whole and that no words in a statute are presumed to be superfluous. The term sufficient cause is not to be considered superfluously, it should be considered alongside the terms ***“where one is about to leave the jurisdiction of the court”***. With due respect to the 6th Defendant, status is not a sufficient cause contemplated under order 18 rule 9. The 6th Defendant has failed to demonstrate that there is a sufficient cause for this court to exercise its powers under the provision of this rule.

The upshot of this is that the application is not allowed. Costs in the cause. The suit to follow the normal procedure as provided for in the Civil Procedure Rules. Orders accordingly.

Dated, signed and delivered at Nyeri this 23rd day of September 2013.

A. OMBWAYO

JUDGE