REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 388 of 2011

KYANZAVI FARMERS LIMITED……..…… PLAINTIFF

VERSUS

MIDDLE EAST BANK KENYA LIMITED…….. DEFENDANT

RULING

By its Notice of Motion dated 20th December, 2011, brought under the Inherent Power of the Court and Section 1A of the Civil Procedure Act, the Defendant has sought to strike out and have dismissed with costs the Plaintiff's suit on the grounds that it is an abuse of the process of the court, that it is misconceived and that the Plaint discloses no cause of action. It was noted in the Motion that:-

"And the Defendant will rely, to the extent necessary, on the Affidavit of Joseph Kinuthia sworn on 13th September, 2011 and already served on the Plaintiff's advocates."

Mr. Esmail, learned Counsel for the Defendant submitted that the application followed the decision of Hon. Justice Odunga made on 21st November, 2011, that the said decision had not been appealed against, that the findings of Odunga J are therefore binding on the parties, that this court cannot revisit what Odunga J had already found. Mr. Esmail referred the court extensively to the ruling of Odunga J and further submitted that at page 10 of the said ruling Odunga J had found that the parties in this suit are the same as in **HCCC No. 873 of 2010** save that in that suit some of the Defendants have been omitted in this suit, that the Honourable Judge made a finding that several suits were being instituted surrounding one suit and that the suit was against the spirit of Section 1A of the Civil Procedure Act.

Referring to the Replying Affidavit of Joseph Kinuthia sworn on 13th September, 2011 and in particular paragraphs 5, 6, 7, 8 & 9 of that Affidavit Mr. Ismail submitted that, notwithstanding the existence of consent orders in 101 of 2007, on 11th November, 2010, the Applicant was served with orders in **HCCC No. 873 of 2010** compelling the Bank to release titles to the Plaintiff, that the multiplicity of suits and applications by the Plaintiff against the Bank had made the bank incur legal costs and there was no sign as to when that will come to an end, that the certificate of urgency by the Advocate that the Plaintiff was unable to carry out business as a result of the bank refusing to allow the new directors of the Plaintiff to operate its account with the bank was misleading as the company had earlier

on swore in HCCC NO. 873 of 2010 that the company had other lenders who were willing to lend it facilities if securities were released to it by the bank. That in so far as the cause of action as pleaded in paragraphs 6 of the Plaint is based on the order in HCCC No. 873 of 2010, this suit was an abuse of the court process. He relied on the case of **Republic –vs- Kenya Revenue Authority Exparte Aberdare Freight Services Ltd (2004) 2 KLR 530** on the proposition that it was an abuse of the court process for a party to find a cause of action on a finding of an earlier suit. Counsel urged the Court to allow the application.

On the part of the Plaintiff, Grounds of Opposition and a Replying Affidavit sworn by James Muiya Muema were filed. The Plaintiff contended that at an AGM of the Plaintiff held on 13th April, 2011, the deponent and his co-directors were elected with him as the Chairman, he exhibited the minutes dated 14/04/2011 as "JMM1", that the returns of the said AGM were duly made to the Registrar of Companies and they have not been challenged or set aside he produced form CR2 dated 18th April, 2011 "JMM2", to prove that fact, that the Plaintiff has an account with the Defendant bank being Account Number 250306008, that despite the bank being notified of the Plaintiff's mandate to the deponent and his co-directors to operate the said account the Defendant had refused to recognize that fact, a letter dated 19th April, 2011 from the Plaintiff to the Defendant was produced as "JMM3", the Plaintiff complained that the Defendant was making transactions in the Plaintiff's said A/c No.250306008 and had made payments therefrom without any authority, consent of or reference to or any explanation to the Plaintiff. The Plaintiff further contended that such actions on the part of the Defendant was fraudulent and constituted a breach of the fiduciary duty on the part of the Defendant, that since there was no dispute as to the existence of A/c No.250306008, it cannot be claimed that the suit does not disclose a cause of action and that the suit should not be summarily dismissed as the Plaintiff had a legitimate cause of action.

Mr. Gikera, learned Counsel for the Plaintiff submitted that since the Defendant's application was due to the invitation of Odunga J in his ruling of 21/9/2011 the same was an afterthought, that the findings of Odunga J as to the suitability of the Plaintiff's suit was not binding on this Court, that the application was bad in law for being supported by an Affidavit of Joseph Kinuthia filed in Court on 13th September, 2011, that it is improper for the Affidavit to have been filed four (4) months before the application was filed, that HCCC No. 873 of 2010 had served its purpose and is closed and that the orders sought in this suit are different from the other suits. He referred the court to the case of **Proxides Wekesa –vs- Donald Kipkorir (2005) e KLR** in the proposition that striking out a suit is a draconian power which should be exercised cautiously. Counsel urged the Court to reject the application.

I have considered the Affidavits on record, submissions of Counsel and the authorities cited.

The law on striking out of pleadings has been settled by the Court of Appeal in the case **of D.T Dobie & Company Ltd –vs- Muchina & another (1982) KLR 1** wherein the court stated:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of the case before it."*(Emphasis mine.)*

In the D.T Dobie case, the Court analyzed a litany of cases on the issue of summary determination of proceedings and the principles that come out are that the power to strike out a pleading in a summary manner is a draconian remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleading in question on the face of it is unsustainable, it is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised. However, that power can and should be exercised in appropriate cases to save the precious judicial time.

Before I consider the application on merit there is a point of law that was raised by the Plaintiff that I think I should deal with frist. Mr. Gikera, learned Counsel for the Plaintiff submitted that the Notice of Motion was misconceived, incompetent and an abuse of the court process for the reason that it was supported by an Affidavit of Mr. Kinuthia sworn and filed in Court in September, 2011, four (4) months

before the application was made. To him, it is not proper in law for an application to be supported by an Affidavit made four (4) months before such an application is filed. Mr. Esmail, learned Counsel for the Defendant submitted that there was nothing in Order 50 of the Civil Procedure Rules that barred the Applicant from relying on Mr. Kinuthia's Affidavit.

On my part, I will agree with Mr. Esmail that there is nothing in Order 51 that bars a party in an application to rely on an Affidavit that has already been filed in the proceedings before court. This position in my view is fortified by Order 19 Rule 8 which provides that:-

"8) Unless otherwise directed by the Court an Affidavit shall not be rejected sorely because it was sworn before the filing of the suit concerned."

This rule applies to procedures in suits. I believe that the procedure applicable in suits is likewise applicable to interlocutory proceedings such as the one before me by virtue of Section 89 of the Civil Procedure Act which provides:-

"89. The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any Court of civil jurisdiction."

My opinion is therefore that there was nothing wrong in the Applicant relying on the Affidavit of Mr. Kinuthia that had been filed hitherto in September, 2011. I reject the Plaintiff's objection on that ground.

Be that as it may, I have noted that the application is expressed to be brought under the inherent power of the Court and under Section 1A of the Civil Procedure Act. Neither Mr. Esmail nor Mr. Gikera addressed the Court on the appropriateness of the application being brought under those particular provisions of the law. That notwithstanding, this being a Court of law, I cannot ignore the fact that rules of procedure are hand maids of justice, they are enacted to be complied with. Unless they are followed, frivolity would not be avoided and the overriding objective of the law of practice and procedure under Section 1A of the Civil Procedure Act may not be achieved. In my view, the rules of procedure were enacted for orderliness and certainty in approaching the court and for that reason they must be followed as far as it is practically possible.

As regards the procedure decided by the Defendant in this case, I am afraid that neither the inherent power of the Court nor Section 1A of the Civil Procedure Act gives this Court the jurisdiction to grant the orders sought. I say so because, it is trite law that the inherent power of the Court cannot be invoked where there a is clear procedure provided for in the law or in rules.

In **Halburys Laws of England 5th Edition Vol.II, 2009 paragraph 15,** it is observed:-

"…… a claim should be dealt in accordance with the rules of the Court and not by exercising the court's inherent jurisdiction……"

And in **Mulla on the Code of Procedure Act V of 1908 15th edition at page 923,** the learned authors state:-

"Inherent jurisdiction must be exercised subject to the rule that if the code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked. Such provisions need not be express, they may be implied or even implicit from the very nature of the provisions made for the contingencies to which they relate."

In the case of **Muchiri –vs- Attorney General & 3 others (1991) KLR 516 at page 530** Bosire J (as he then was) held:

"Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be

***anchored*, or where the invocation of the rules of procedure will work an injustice."**

It is obvious that the power to strike out pleadings in our law is provided for under Order 2 of the Civil Procedure Rules and for that reason, Inherent Power of the Court should not have been invoked in the application before me. For the foregoing reasons, the Defendant could not purport to approach the court by invoking the inherent power of the court to make the present application for striking court.

I hold so because in every procedure provided for by the law, there are pertinent principles that apply when the court considers applications brought before it as provided under those rules. Therefore, my view is that in failing to approach the Court under the rules provided, an application may be considered without the court applying the requisite principles applicable thereby causing prejudice.

At this stage, I should point out that I am alive to the provisions of Order 51 Rule 10 of the Civil Procedure Rules which provides that:-

"10. 1) Every Order, Rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

Be that as it may, I hold the view that the law should and will not allow a party to bring an application and defeat express provisions of the law. In this regard, I am guided by the fact that, the principle reason why the Inherent Power has been enacted in Section 3A is to give the court a residual power to correct an injustice which might result either by the absence of any procedure or by the application of the rules.

Since I have found that there is an express provision in our law for striking out pleadings, I propose to consider the application under that law and procedure. This is so because, the Applicant has set out three (3) grounds upon which it has brought the motion, that is:-

a) That the suit is an abuse of the process of the court (Order 2 Rule 15 (1) (d))

b)That the Plaint discloses no cause of action (Order 2 Rule 15 (1) (a)) and

c) That the suit is misconceived.

Under Sub rule 2 of Rule 15, no evidence is admissible on an application brought under sub rule 1 (a) – that is where the allegation is that the pleading sought to be struck out discloses no reasonable cause of action or defence. As I have already set out above, one of the grounds upon which the motion before me was grounded on was that the Plaint discloses no reasonable cause of action.

In my view, having sought to strike out the Plaint for disclosing no cause of action, it was not open for the Defendant to rely on evidence as it did in this case. The Motion stated in its body that:-

"And the Defendant will rely, to the extent necessary on the affidavit herein of Joseph Kinuthia sworn on 13th September, 2011 and already served ……"

Indeed Mr. Esmail, Counsel for the Defendant did extensively refer to paragraphs 5, 6, 7, 8 and 9 of the said Affidavit. To my mind, therefore, in so far as the application was based on the evidence of Mr. Joseph Kinuthia as contained in the said Affidavit the same is fatally defective and on that ground alone is susceptible for dismissal.

In the case of **Olympic Escort International Co. Ltd & 2 others –vs- Perminder Singh Sandhu & another (2009) e KLR** the Court of Appeal when considering an application made under our former Order VI Rule 13(a) held that:-

"We think for our part that <u>it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not</u>. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6 Rule 13 (1) (a) was in contravention of Sub rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score."

I will here add that, since our legislature in its wisdom decided that the grounds in rule 15(1) of Order 2 are in the alternative and that three (3) out of four (4) of them, that is Rule 15 (1) (b) (c) and (d) may be based on evidence whilst the one under Rule 15 (1) (a) should not, I do hold that whilst a party can bring an application combining the grounds in Rule 15 (1) (b) (c) and (d) – such an application cannot and should not be brought with a ground under Rule 15 (1) (a). This is so because, if those grounds are combined, there would definitely be prejudice in that the court would have to look at the evidence produced in support of the grounds under sub rule (1) (b) (c) and (d) yet sub rule (2) has specifically barred the Court from considering any evidence once an application under Rule 15(1) (a) is up for consideration. Applying the rule of interpretation that a latter provision amends or varies an earlier provision, I hold that the intention of the legislature in enacting Rule 15(2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application. That is so even if any of the grounds thereon are under Order 15 Rule (1) (b) (c) and (d). In my view, prejudice must be guarded against and it will be very difficult for the court to consider the other grounds based on the evidence produced then disabuse itself of that evidence when considering the ground of disclosing no reasonable cause of action under Rule 15 (1) (a).

On the foregoing ground alone, the Defendant's application fails.

If I am wrong on the foregoing, is the Defendant's application meritorious? It is no doubt that the finding of Odunga J in his ruling of 21st November, 2011 contributed to the bringing of the present application. Indeed Mr. Esmail, Counsel for the Defendant made extensive reference to the same. Whilst it's true that the findings of my brother Justice Odunga have not been appealed against, his findings are only persuasive but not binding on me. My brother Judge was of the view that the present suit was untenable and an abuse of the process of the court for the reason that there were three other suits i.e. HCCC 101 of 2007, HCCC 452 of 2008 and HCCC 872 of 2010. It is for the said reason that the Defendant has contended that this suit is an abuse of the court process and should be struck out. Since that issue has been raised and falls for my consideration, I should state that I am not sitting on appeal on the findings of Honourable Odunga J. of 21/11/2011.

With utmost respect, I do not agree with the Defendant's contention that this suit is an abuse of the court process on the basis of Odunga J's ruling of 21st November, 2011. This is because of the following reasons:-

a) Firstly, none of the pleadings for the said HCCC Nos. 101 of 2007, 452 of 2008 or 872 of 2010 were ever produced by any of the parties either before Odunga J or before me so as to conclusively hold that they are similar or relate to the same subject matter as this suit and therefore disbar any of the parties herein. Under Section 107 of the Evidence Act, the party who alleges that the subject matter in this case is the same as in any of the other aforesaid cases is enjoined to prove the same. No court of law can hold that the issues are the same just by reading a long Affidavit that is devoid of evidence. To my mind, in so far as none of the Plaints or any pleading in the aforesaid suits was produced in these proceedings or in the injunction application that resulted in the Ruling of 21st November, 2011 that I am being urged to follow, I cannot properly and conclusively hold that the issues in this suit are similar to any of those previous suits.

b) Secondly, if I am wrong on (a) above, I am of the view that there can be no orders in existence in HCCC No. 101 of 2007 which are binding on the Defendant that can forbid it from recognizing the new directors of the Plaintiff and therefore the new instructions of the Plaintiff regarding mandate on its A/c No.250306008. I hold so because, court orders are and MUST be hinged on a suit. It is common

knowledge that HCCC No. 101 of 2007 was withdrawn. If it was withdrawn, as it is agreed by the parties, how can there be orders in existence hinged on it? In my view any orders made in that suit discipated upon such withdrawal and could not thereafter exist in a vacuum. Indeed Hon. Warsame J held on 19th May, 2008 that:-

"On 21st May, 2007, Mr. Mogire, learned Counsel for the Plaintiff/applicant and Mr. Sehmi for the defendant/respondent appeared before this court and recorded a consent and one of the terms to the said consent was that:

'By consent the suit herein dated 23rd February, 2007 and filed on the same day and the chamber summons dated and filed on 23rd February, 2007 are hereby withdrawn and marked as settled.'

Since that order was recorded, none of the parties made an application to review and/or reinstate the suit for purposes of obtaining further orders and/or seeking further intervention of this Honourable Court."

My opinion is that once a suit is withdrawn every order therein goes with such withdrawal. A suit cannot be withdrawn and an order in it remain in force. There is no suit on which such an order can be hinged on. Accordingly, once the said suit was withdrawn, any purported subsequent orders were a nullity as they could not cling to or exist in a withdrawn suit. Orders MUST hinge on an existing suit but not on a withdrawn suit. They become extinct, nonexistent and superfluous. Accordingly, to my mind, there are no and cannot be any orders in existent that direct the Defendant on how A/c No.250306008 is to be operated. In so far as those orders are based on HCCC No. 101 of 2007 that was withdrawn, to my mind they are non-existent.

c) Thirdly, the Defendant's argument that there cannot be new directors since the Plaintiff was restrained in HCCC No. 452 of 2008 from convening an extra ordinary meeting or any other meetings until the final determination of the suit does not hold. That order was made on 8th August, 2008 on an interlocutory application.

In my view, that injunction lapsed one year after December, 2010 when the Civil Procedure Rules, 2010 came into force. Order 40 Rule 6 provides that:-

"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant of the injunction shall lapse unless for any sufficient reason the court orders otherwise."

That provision read together with Order 54 of the Civil Procedure Rules means that such an order would not exist 12 months after those rules came into force. My view therefore is that, since that interlocutory injunction was in existence as at the time of coming into effect of the 2010 Civil Procedure Rules, the same lapsed upon expiry of one (1) year after those rules came into force. This is so because the rules did not apply retrospectively but prospectively by dint of Sections 27 and 28 of the General Provisions and Interpretation Act Chapter 2 Laws of Kenya as well as order 54 of the Civil Procedure Rules, 2010. Unless the person in favour of whom such injunction moves or had moved the court to order otherwise, twelve months after their coming into effect, such injunction lapsed. I hold so because, I believe that the intention of parliament in enacting Order 40 Rule 6 was to limit the life of any interlocutory injunction to a maximum of twelve (12) months. That being the case, my view is that the order of 8th August, 2008 made in 2008 lapsed on or about December, 2011 and may not be a basis upon which the Defendant can refuse to recognize or obey/comply or act on the instructions of the plaintiff as regards its new directors.

In any event, can directors of a company survive and run a company in eternity? I think not. They are subject to be removed as and when a company legally holds an AGM to replace and or appoint its directors. Accordingly, this is an issue which is triable in this suit.

d) Fourthly, there is no evidence on record to show that the issues in this suit are directly the same as those in HCCC NO. 873 of 2010. As already held, under Section 107 of the Evidence Act, he who alleges must prove. Since there is no prove on record that the issues in HCCC 873 of 2010 and this suit are the same, this court cannot infer or speculate on the same. Nothing forbade or barred the Defendant from producing the Plaint in that suit to help the Court consider and hold that the two suits are similar. In any event, the Plaintiff has denied that allegation.

Considering all the foregoing, can the Plaintiffs suit be said to disclose no reasonable cause of action, is misconceived or is an abuse of the court process.

Lord Person in **Drummod – Jackson –vs- British Medical Association (1970) 2 WLR 688** at page 676 defined a cause of action as:-

" a cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint."

In paragraph 5 and 7 of the Plaint, the Plaintiff has pleaded thus:-

"(5) The Defendant has failed and/or refused to acknowledge the new signatories to the account held at its bank as per the resolution passed on 19th April, 2011.

(7) The Defendant's refusal to allow the new signatories to operate the accounts is causing irreparable damage to the Plaintiff as it is unable to perform any of its duties"

In my view, I can clearly see a cause of action as being a breach of a fiduciary duty to comply with instructions. I am not prepared to hold that the Plaint discloses no cause of action.

As regards the contention that the suit is an abuse of the court process, the English White Book Service 2003 Volume 1 has defined an abuse of the court process to be:-

"Using that process for a purpose or in a way significantly different from its ordinary and proper use ….. it is an abuse to bring vexatious proceeding i.e. two or more set of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make him fight the same battle more than once with the attendant multiplication of costs, time and stress. In this context, it is immaterial that the proceedings are brought concurrently or serially."

As I have already held, it has not been shown that the subject matter of A/c No. 250306008 is the same in all the suits alluded to i.e. HCCC 101 of 2007, HCCC No. 452 of 2008, HCCC 873 of 2010 as well as this suit. Even if that was the case, it has not been shown that the issue of allowing the mandate to operate the said account by so called new directors of the Plaintiff is the subject matter of all the said suits. That being so, I am unable to hold that this suit is an abuse of the process of the court.

As to whether the suit is misconceived, the misconception of the suit as well as that of the Plaintiff to bringing the suit has not been demonstrated by the Defendant.

Accordingly, I am of the view and so hold that the Defendant's Notice of Motion of 20th December, 2011 is unmeritorious and is hereby dismissed with costs to the Plaintiff.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of March, 2012.

……

A MABEYA

JUDGE