



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL CASE 149 OF 2007

KENYA RAILWAYS CORPORATIONPLAINTIFF

VERSUS

NYANZA PETROLEUM DEALERS DEFENDANT

RULING

The preliminary objection by the plaintiff dated 27th March 2012 prays for the following orders:-

- (1) The application is incompetent as the defendant as described in its defence no longer exist and yet no application has been made by the 1st defendant under Order 8 (3) and**
- (2) The documents exhibited in support of the application establish that the 1st defendant is in contempt of the court Order dated 29th February 2001 wherefore it ought to purge its contempt before being heard.**

The said preliminary objection is in opposition to the applicant/defendant application dated 28th July 2012 seeking to discharge the injunction orders in favour of the plaintiff.

Mr. Okero for the plaintiff argued that the application cannot stand as the applicant **Nyanza Petroleum Dealers Ltd** has been changed to **Auto Express Ltd** per the certificate of change of name dated 26th June 2008. It further transferred the suit property into that name on 8th June 2009.

The above changes were not objected to by Mr. Odeny but his argument is that the same does not oust the ability of the new company to make suit application.

Mr. Okero further argued that by undertaking such fundamental changes the defendant were in fact in contempt of the orders they are seeking to discharge.

After carefully hearing the parties herein I am persuaded that the change of name of the 1st defendant and the subsequent transfer of the suit property fundamentally changed the landscape. There ought to be an amendment to the pleading. It is not true as argued by Mr. Odeny Advocate that both are one and the same. Although the directors could be the same, (no evidence tendered though) the two are separate and distinct legal entities. Execution for example cannot be levied against Nyanza petroleum Dealers Ltd anymore. Neither can Auto Express Ltd be executed in place of Nyanza Petroleum Dealers Ltd.

The question of whether the defendant/applicant is in contempt or not is an issue of fact to be raised

through an appropriate proceedings but not by way of a preliminary objection.

In the premises I do allow prayer (1) of the preliminary objection. The application dated 28th July 2011 is dismissed with costs. Meanwhile undertaking into consideration the age of this matter the parties should move the court within the next 60 days from the date of the delivery of this Ruling to have the same heard.

Dated, signed and delivered at Kisumu this 15TH day of OCTOBER 2012

**H. K. CHEMITEI
JUDGE**

In the presence of:

.....Advocate for the Plaintiff

.....Advocate for the defendant

HKC/aao