



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 17 OF 2008

**MATHINGIRA WHOLESALERS LIMITED.....PLAINTIFF/
RESPONDENT**

VERSUS

**KIMWATU KANYUNGU.....DEFENDANT/
APPLICANT**

RULING

The subject matter of this ruling is the Motion dated 23rd June 2009 in which Kimwatu Kanyungu, the Defendant/applicant herein sought for the following orders:

- 1. That this application be certified as urgent.***
- 2. That the service of the application be dispensed with in the first instance owing to the urgency of the matter.***
- 3. That the defendant's application dated 12th march, 2009 and scheduled for hearing on 6th July, 2009 be heard on or before 25th June, 2009 owing to the urgency of the matter.***
- 4. That the plaintiff be restrained by itself, its agents or servants from interfering with the owners/intended defendants' management/collection of rent from tenants on L.R. NO. NYERI MUNICIPALITY BLOCK 1/94 pending the hearing and determination of this application.***
- 5. That the plaintiff be restrained by itself, its agents or servants, from interfering with the owners/intended defendants' management/collection of rent from tenants on L.R. NO. NYERI MUNICIPALITY BLOCK 1/94 pending the hearing and determination of this suit.***
- 6. The costs of this application be provided for.***

The aforesaid Motion is supported by the affidavit of the Applicant. Mathingira Wholesalers co. Ltd., the Plaintiff/Respondent, filed grounds of opposition to resist the Motion.

When the Motion came up for hearing, Miss Mwangi, learned advocate for the Defendant, urged this court to grant the orders sought in prayers 5 and 6 of the Summons since the other prayers had been overtaken by events. Basically the Defendant/Applicant is asking this Court to issue an order to restrain the Plaintiff from interfering with the owners/intended defendants' management/collection of rent from the tenants on **L.R. NO. NYERI/MUNICIPALITY BLOCK 1/94** pending the hearing and determination of this suit. It is argued that the aforesaid Plot belongs to the Defendant and other 8 people who are not parties to this suit. The Defendant further argued that the Plaintiff Company was incorporated in 1983 and given the mandate to manage the said property as the agent of the defendant. The Defendant stated that on 28th February 2009, the Defendant and 8 others terminated the Plaintiff's agency and in its place appointed another agent to manage the aforesaid property. It is argued that despite the termination of agency relationship, the Plaintiff has continued to interfere with the management of the said property. The Defendant is of the view that unless the Plaintiff is restrained the intended 2nd – 5th defendants' management of the property will suffer irreparable loss. The Plaintiff opposed the application on the basis that the orders sought if given will run parallel to those issued by Lady Justice Kasango on 5th May 2008. Mr. Lompo, learned advocate for the Plaintiff, pointed out that the purported agency termination notice was addressed to the Plaintiff's advocates and not the Plaintiff itself. It is also stated that there is no formal appointment of Hill Park Agencies to replace the Plaintiff in managing the property.

I have considered the material placed before me and the rival oral submissions made by learned counsels from both sides. The substantive suit is expressed in the Plaint dated 27th February 2008 in which the Plaintiff sought for judgment against the Defendant in the following terms:

(a) Permanent injunction against the Defendant his agents, servants, employees and or any person whomsoever acting under his instructions, from misleading, confusing, receiving, collecting, transacting for and on behalf of the company interfering with the management of the Companies affairs without the authority of the board.

(b) Permanent injunction against the Defendant, his agents, servants, employees and or any person whomsoever acting under his instructions, be restrained from holding out as chairman of Mathingira Wholesalers Company Ltd and further interfering with the management, business, operation and affairs of MATHINGIRA WHOLESALERS COMPANY LTD without auth without authority of the board.

(c) A declaration that the Defendant is liable to account to the Company for the sum of Kshs.93,824.65 or such other sum as the court thinks sum as the court thinks fit.

(d) An order that the Defendant pay to the Company Kshs.93,824.65 or such other sum as court thinks fit.

(e) Mandatory injunction requiring the defendant to deliver up to the company the SEAL of the Company, the Company's Memorandum and Articles of Association, Equity Bank and Kenya Commercial Bank cheque books, audited accounts, certificate of registration of the Company, property files and receipts.

(f) Costs and interest.

(g) Any other order on relief this Honourable Court may deem fit to grant.

The Defendant denied the Plaintiff's claim by filing a defence. The aforesaid defence was amended on 8th October 2009 where of the Defendant was allowed to enjoin Kiiru Gachuiga, Gadson Gitonga, Kebera Gatu and Samuel Githinji Kibaki to this suit as the 2nd to 5th Defendants respectively. The amended defence further introduced a counter claim in which the Defendants sought for judgment against the Plaintiff in the following terms:

- (a) A declaration that between 1983 and 28th February 2009, the Plaintiff served as an agent of the Defendants in collecting rent from the tenants on L.R. No. Municipality Block 1/94 and running the bar-cum-butchery business on the same.**
- (b) A declaration that the Plaintiff is obliged to account to the Defendants their respective shares of the rent and revenue yielded by L.. No. Nyeri Municipality Block 1/94 and the business of bar-cum-restaurant-cum-butchery business on the same.**
- (c) An order that the Plaintiff do account to the Defendants their respective shares of the rent and revenue yielded by L.R. No. Nyeri Municipality Block 1/94 and the business of bar-cum-restaurant cum-butchery business on the same.**
- (d) The costs of the counter-claim.**

It is important to point out at this stage that the application was filed before the amended defence was introduced to this suit. The pleadings have therefore substantially changed hence there was need for the Applicant to amend the application but leave to amend was never sought. The main objection raised by the plaintiff to oppose the Motion is that the orders if given will negate the orders given by Lady Justice Kasango on 5th May 2008. Miss Mwangi was of the view that the issues raised in the current Motion are totally different from those dealt with in the ruling of Lady Justice Kasango. It is convenient at this stage to examine the ruling of Lady Justice Kasango delivered on 5th May 2008. By a Notice of Motion dated 27th February 2008, the Plaintiff herein applied for two main orders namely:

- (i) An order of injunction to restrain the defendant from holding himself out as the chairman of the plaintiff company and from further interfering with company's management, business operations and affairs pending the hearing and determination of this suit.**
- (ii) an order of mandatory injunction to compel the defendant to release and deliver up the Plaintiff's Seal, Memorandum and Articles of Association, Cheque books, audited accounts, certificate of registration, property files and receipts.**

The application was opposed. It was heard by Lady Justice Kasango. She granted the aforesaid orders on 5th May 2008. The question is whether the orders sought in the current Motion will run parallel to the orders of Lady Justice Kasango? It is important to note that in paragraph 7 of the affidavit of James Kanyi Waiganjo sworn on 27th February 2008 and filed in support of the Motion dated 27th February 2008, that the issue touching on the management and collection of rent in respect of **L.R. NO. NYERI MUNICIPALITY/BLOCK 1/1/94** was averred as follows:

“7. That on 12.02.2008 the Respondent, without any authority purported to contract M/S Hill Park Agency as a rent collection agency on behalf of the company, and subsequently notified tenants of the company's rental premises situated in Nyeri town and known as Nyeri Municipality block 1/94”.

The Defendant avers that the Plaintiff's agency contract with the Defendants was terminated on 28th

February 2009. Annexed to the affidavit of Kimwatu Kanyugu sworn on 23rd June sworn on 23rd June 2009 is the letter dated 28th February 2009 which states that the oral management agency given to the Plaintiff had been terminated. In prayer (a) of the counter claim, the Defendants are seeking for a declaration that between 1983 and 28th February 2009, the Plaintiff served as an agent of the Defendants in collecting rent from the tenants on **L.R. No. NYERI MUNICIPALITY BLOCK 1/94**. In response to this prayer, the Plaintiff stated in its reply to the defence and defence counter-claim that its relationship with the Defendants was not meant to be an agent of the Defendants but it was done on the basis of a constructive trust to the extent that the current shareholders of the Plaintiff are also the owners of the said property. In my estimation, it would appear the issue as to whether or not the Plaintiff's relationship with the Defendants was that of management agency would have to be decided at the trial of this suit. The decision to terminate the Plaintiff's services from collecting rent or managing the premises standing on **L. R. NO. NYERI MUNICIPALITY BLOCK 1/94** was done during the pendency of this suit. By that time, the orders issued by Lady Justice Kasango had restored to the Plaintiff the powers to manage and collect rent from the tenants occupying **L.R. NO. NYERI MUNICIPALITY BLOCK 1/94**. The Defendants are now before this court seeking to have their resolutions passed on 28th February 2009 effected. In my view though the circumstances of the case have changed since the inception of the suit, the issue touching on the relationship of the parties is yet to be decided. If the orders are given as sought by the Defendants, I fear, the same will negate the gains given by the ruling of Lady Justice Kasango. The court cannot countenance parties seeking to defeat the court's orders through the backdoor. In fact if the orders sought are given, there will be nothing to go for trial save for the peripheral matters touching on the supply of accounts. With respect, I agree with the submissions of Mr. Lompo, that the orders sought should be denied because it will go against the order given by Lady Justice Kasango. The best way to determine the dispute is for the substantive suit to be heard and determined on priority basis.

In the end I dismiss the Motion dated 23rd June 2009. Costs shall abide the outcome of the substantive suit.

Dated and delivered at Nyeri this 17th day of June 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Maatwa holding brief Lompo for the Plaintiff. No appearance for the Defendant.