



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT NO.2163 OF 2001

THINDIGUA COMPANY LTD.....PLAINTIFF

VERSUS

FRANCIS P. GITAU NJUNGE.....1ST DEFENDANT
JOSEPH KIMANI.....2ND DEFENDANT
NDAGWATHA KIARIE.....3RD DEFENDANT
BERNARD KARANJA NDUNGU.....4TH DEFENDANT
BERNARD KINYANJUI PETER.....5TH DEFENDANT

RULING

1. By a notice of motion dated 24th February, 2011, Ndagwatha Kiarie, who is the 3rd defendant moved this court for an order of injunction restraining the plaintiff Thindigua Company Ltd, its servants or agents, from trespassing, occupying, alienating, building, constructing, selling, transferring or in any manner interfering or dealing with all those land parcels known as plot LR No.76/397 and LR No.76/398 formerly plot No.314 pending the hearing and determination of this suit and the counter claim filed by the 3rd defendant.

2. The plaintiff has raised a preliminary objection to the application on the following grounds:

(i) That the said application of the 3rd defendant and counterclaim is misconceived, incompetent, fatally defective and bad in law as it is between a shareholder/contributory of a company and a company and should be under the Companies Act Cap 486 Laws of Kenya or the Companies Winding Up Rules and is therefore wrongly instituted and wrongly entitled.

(ii) The plaintiffs averred that the 3rd defendant's application is *res judicata* and shall pray that it is struck off.

(iii) That the suit is an abuse of the court process and the same should be struck out with costs.

3. The matter proceeded by way of written submissions which were filed by the 3rd defendant, 1st defendant and the plaintiff. It was submitted that the application dated 24th February, 2011 is incompetent as it is between a shareholder of a company and a company, a matter which should be dealt with under the Companies Act Cap 486 Laws of Kenya. It was noted that the suit was a suit in which the shareholder of a company was seeking to access and enforce his rights. It was submitted that the questions raised by the 3rd defendant would require examination of the company's memorandum and

articles of association and the relevant resolutions of the company. Therefore the matter was a commercial dispute and should not have been filed as a land dispute.

4. It was submitted that Rule 4 of the Companies High Court Rules has not been complied with. Finally it was submitted that the 3rd defendant had filed a previous suit against the plaintiff's directors which suit was struck out. Since the issues the 3rd defendant was raising in the application and the counterclaim were the same issues he had raised in the previous suit, the application was *res judicata* and an abuse of the court process.

5. The 1st defendant objected to the plaintiff's application contending that it was a gross abuse of the court process. It was pointed out that it was the plaintiff who had filed the suit in this court and the 3rd defendant had merely raised a counterclaim. It was argued that if the 3rd defendant's counterclaim was not properly before the court, then the plaintiff's suit was equally not properly before the court. It was further submitted that the preliminary objection was not raised on a pure point of law as it needed ascertainment of facts.

6. For the 3rd defendant it was also submitted that the preliminary objection was misplaced and brought in bad faith. It was maintained that Section 211 of the Company's Act refers to dispute in the running of a company which is not what the 3rd defendant was pursuing. It was argued that the issue of *res judicata* could not arise as the previous suit involved different parties. It was submitted that the plaintiff having filed a reply to defence and defence to the 3rd defendant's counterclaim it was now estopped from shutting out the 3rd defendant from pursuing his claim.

7. I have carefully considered the preliminary objection. I concur with the submissions made that a preliminary objection can only be made on a pure point of law taken on the assumption that the facts pleaded are correct. In this case, the issues raised by the plaintiff in support of the preliminary objection are issues which raise disputed facts and this is facts relating to the business of the plaintiff's company. In order to determine whether the dispute between the plaintiff and the defendants falls within the ambit of a commercial dispute involving the business of a company, there will be need for ascertainment of facts. Thus, there are no facts upon which this court can rule that the defendant's application and counterclaim ought to have been brought under the Companies Act or the Companies High Court Rules without going beyond the pleadings.

8. As regard the issue of *res judicata*, it is admitted that HCCC No.2358 of 2007 was struck out on a technicality. It cannot therefore be said that the issues raised in that suit were substantially heard and finally determined. I find that the preliminary objection which has been raised does not qualify to be a preliminary objection. It is accordingly overruled.

Dated and delivered this 3rd day of June, 2011

H. M. OKWENGU
JUDGE

In the presence of: -

Advocate for the plaintiff absent

Ngulu for the 1st defendant

Advocate for the 3rd defendant/applicant absent

Maina H/B for 4th and 5th defendants

B. Kosgei - Court clerk