



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.577 OF 2010

SOLOMON MACHARIA KURIA.....1ST PLAINTIFF
GIBSON HASTINGS GITOME.....2ND PLAINTIFF
KARAGITA (EA) LTD.....3RD PLAINTIFF

VERSUS

JAMES KAMAU KANIU.....DEFENDANT

R U L I N G

1. On the 26th November, 2010, Solomon Macharia Kuria, Gibson Hastings Gitome and Karagita (EA) Limited, herein referred to as the 1st, 2nd and 3rd plaintiffs respectively, filed a suit against James Kamau Kaniu hereinafter referred to as the defendant. The plaintiff's sought judgment against the defendant as follows:-

- a) THAT the defendant be ordered to hand over, the company seal, company rubber stamp, company register and all other relevant documents to the Chairman of the board.
- b) THAT the defendant be permanently restrained from dealing with any of the companies property more particular public utility Plots on LR No. 5908/3 and any land parcel illegally transferred by him to any party revert to the company.
- c) THAT the defendant be surcharged for any company finances misappropriated by him.
- d) Costs and interest of the suit.

2. The 1st and 2nd plaintiffs who describe themselves as the directors of the 3rd plaintiff claimed that the defendant who was also a director of the 3rd defendant fraudulently and illegally caused unapproved sub-divisions of property known as LR No. 5908/3 belonging to the 3rd defendant to be made public

utility plots and unilaterally disposed of the same to unsuspecting buyers. Filed simultaneously with the plaint is a chamber summons dated 25th November, 2010. The plaintiffs claiming that the respondent has used hired youths to prevent them from accessing the company's registered office, and that the defendant is continuing to dispose of public utility plots reserved for public purposes, while maintaining a secret bank account, sought interlocutory orders as follows:

- (i) THAT the mater herein be certified urgent and heard exparte in the first instance.

- (ii) THAT the defendant/respondent whether by himself, agents and/or workmen be restrained by an Order of the Honourable Court from conducting any business of the plaintiff company at its registered office on Mfangano Street, its Farm at LR No. 5908/3 or in any other place and/or operating any company bank Accounts until the hearing and determination of this suit.

- (iii) THAT the defendant/respondent be ordered to surrender the company seal and register of members to the applicants herein for safe custody.

- (iv) THAT in the interim period pending the final disposal of this suit other parties do appoint duly registered Auditors to audit all the affairs of the company and in the event of non agreement the court do appoint such auditors to submit an audit report of the company books.

- (v) THAT the costs of the application be provided for.

3. The 2nd plaintiff has sworn a supporting affidavit and a further affidavit. He maintains that he is a director of the 3rd plaintiff having been elected through a special general meeting held in August, 2003. He contends that the defendant has been fraudulently allocating to private individuals, plots which were set aside by the 3rd plaintiff for public utility. That action has been taken unilaterally without consultation with the board of directors.

4. The defendant objects to the application through a replying affidavit and a further replying affidavit to which he has annexed minutes of the annual general meeting of the 3rd plaintiff company held on 11th February, 2011, and a letter from the Registrar of Companies indicating that the directors elected during that meeting were three i.e. the defendant, Kihoge Karanja and Alphonse Mukwoyu Musyimi. Following an agreement by the parties counsel, written submissions were duly filed and the court is invited to determine the application based on those submissions.

5. I have carefully considered the application, the affidavit in support and in reply as well as the annexures thereto. I have also considered the submissions which have been filed. The plaintiffs' suit is based on the capacity of the 1st and 2nd plaintiffs as directors of the 3rd defendant. The defendant has however demonstrated that the 1st and 2nd plaintiffs are no longer directors of the 3rd plaintiff. There is therefore an issue as to whether the suit is properly before this court.

6. Secondly, it is evident that this suit arises from a dispute concerning the management of the 3rd plaintiff which is a limited liability company. The affair of the 3rd plaintiff, is governed by the provisions of the Company's Act Cap 486 Laws of Kenya. Thus any dispute between the directors of the company and the company ought to be dealt with under that Act. The 3rd plaintiff has been roped in as a party. However, being a company, it is evident that the decision to sue was taken by the 1st and 2nd plaintiffs as no resolution of the board of directors has been exhibited.

7. Thus, the 1st and 2nd plaintiffs have not demonstrated any prima facie case with a probability of success nor have they established any loss to be suffered by them as individuals if the order of interlocutory injunction is not granted. The plaintiffs have not provided any justification for this court to issue the orders sought. Accordingly, I find no merit in the chamber summons dated 25th November, 2010. It is accordingly dismissed with costs.

Dated and delivered this 22nd day of July, 2011

H. M. OKWENGU

JUDGE

In the presence of: -

Mureithi W. H. for the plaintiffs

Mureithi N. for the defendant

Kosgei - Court clerk