



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE 296 OF 2009

1. GEORGE MUSILA MBITI
2. RUEBEN MUTUMA NGUMI & 72 OTHERSPLAINTIFFS

VERSUS

1. TROPICAL FARM MANAGEMENT KENYA LTD
2. PATRICK PIUS MUTUNE KATUBI
3. JUDAS MBULI NDAWA
4. CHRISTOPHER KASANGO KANYAMBU
5. JOSEPH KIBUBA KIOKODEFENDANTS

RULING

The Defendants have raised preliminary objections to the Plaintiffs' suit on points of law. The 1st Defendant's objection is contained in the **notice of preliminary objection dated 21st October 2009**. The objection of the other defendants is contained in the **replying affidavit sworn on 23rd and filed on 26th October 2009**. The points raised by the Defendants are –

1. That as regards 1st Defendant the suit is misconceived and does not lie in that the Plaintiffs, as shareholders of a limited liability company, have no *locus standi* to challenge, question or interfere with the contractual rights and obligations of the 1st Defendant, which is a third party as far as the Plaintiffs are concerned, arising out of a contract between the 1st Defendant and the limited liability company in which the Plaintiffs are shareholders.
2. That the plaint is incurably defective in that the mandatory provisions of **Order 7, rule 1(2) of the Civil Procedure Rules (the Rules)** have not been complied with in that 72 out of 74 plaintiffs have not filed verifying affidavits.
3. That in any event the verifying affidavit filed is incurably defective for being sworn by two persons.
4. That the 2nd to 5th Defendants are no-suited.

5. That the reliefs sought will affect a person, **Kyanzavi Famers Company Limited**, who has not been joined in the suit.
6. That there is no proper authority on record allowing the 1st and 2nd Plaintiffs to plead or swear affidavits on behalf of the other plaintiffs.

I have considered the written submissions filed on behalf of the parties, including the authorities cited. I will first deal with the suit as against the 1st Defendant.

The Plaintiffs have pleaded that they are shareholders of the limited liability company called **Kyanzavi Farmers Company Limited** (hereinafter called **Kyanzavi**). It is now axiomatic that a limited liability company is a legal person with an existence and persona separate from its shareholders and directors. The shareholders are **not** the company, and the company is **not** the shareholders. The company, not being a natural person, acts through its board of directors or through its shareholders by resolution passed in a general meeting.

Any property owned by a company belongs to the company. It does **not** belong to the shareholders, notwithstanding their shareholding in the company. The shareholders do not have any direct or registrable interest in the property of the company. The shareholders will be entitled to such dividends as may be declared by the board of directors from time to time if the company makes a profit. And needless to say, a limited liability company has capacity to sue and to be sued. It can institute proceedings in its own name to protect its own property.

The material now before the court discloses that the 1st Defendant and Kyanzavi have a contractual relationship under which the 1st Defendant manages Kyanzavi's coffee farm and markets its coffee produce. The Plaintiffs have pleaded that the 1st Defendant does not meet its obligations to Kyanzavi under that contractual relationship. There is not now before the court any complaint in that regard by Kyanzavi.

The material before the court also discloses a long-standing dispute between the Plaintiffs and the 2nd – 5th Defendants over the management of Kyanzavi. It is the Plaintiff's case that the 2nd - 5th Defendants are illegally in office as directors of Kyanzavi, their term having expired, and they having failed to call a general meeting for election of a new board of directors as required by the articles of association of Kyanzavi.

The issue here is whether there is any legal basis for dragging the 1st Defendant, which is indeed a third party and a stranger as far as the internal management of Kyanzavi is concerned, into the dispute between the Plaintiffs on the one hand and the 2nd to 5th Defendants over the management of Kyanzavi .

The 1st Defendant is not a director of Kyanzavi. It is a third party which has a contractual relationship with Kyanzavi. The 1st Defendant is not, under the contract, directly accountable to the shareholders of Kyanzavi. It is accountable to Kyanzavi.

The Plaintiffs as shareholders of Kyanzavi, of course have the right, if they are so minded, to be dissatisfied with the services being rendered by the 1st Defendant to their company. But they cannot themselves raise those issues directly with the

1st Defendant. They can do so only with the board of directors of their company using the machinery laid down in the company's articles of association, and that would probably have to be through a general meeting of the company. They have pleaded that it is not possible to call such a general meeting because of the management wrangle between them and the 2nd - 5th Defendants. But then, that is an internal dispute that should not involve the 1st Defendant.

I find that on the basis of the pleadings and the material now before the court, that the Plaintiff's suit as against the 1st Defendant is misconceived in law and cannot be sustained. The suit has attempted to involve a third party and stranger in the internal dispute between the Plaintiffs and the 2nd - 5th Defendants over the management of Kyanzavi. That cannot be permitted. The Plaintiffs suit as against the 1st Defendant is hereby struck out with costs. It is so ordered.

Regarding the Plaintiff's suit as against the 2nd - 5th Defendants, there is a serious dispute over the management of Kyanzavi disclosed as between these parties. The Plaintiffs have pleaded that the 2nd - 5th Defendants are illegally in office, and that the latter have refused to call a general meeting to facilitate the election of new directors. This is certainly a dispute that is justiciable in this suit.

It is to be noted further that the tenor of the Plaintiff's suit against the 2nd - 5th Defendants is that Kyanzavi is at present not able to act to protect its interests because it is in the control of the 2nd - 5th Defendants who are illegally in office, that their actions in management of Kyanzavi are illegal, that they are committing a fraud upon the company, that their actions are certainly not in the interests of the company, that they are infringing upon the rights of the shareholders to periodically elect the board of directors, and that as a result of all this and more, the company and its shareholders are seriously prejudiced. In these circumstances the Plaintiffs, as shareholders, have the right to bring this suit as against the 2nd - 5th Defendants to resolve what appears to be a management stalemate.

I therefore hold that the Plaintiff's suit as against the 2nd - 5th Defendants is good and properly before the court. Whatever defects or inadequacies there may be in the pleadings can be rectified by amendment.

I will now briefly consider the other issues raised. The first thing to note is that this is not a representative suit. It is brought by some 74 named Plaintiffs for themselves. The suit has not been brought on behalf of the other shareholders of Kyanzavi, though such other shareholders, it would appear, may benefit from the litigation.

Under **Order 1, rule 12** of the Rules, where there are more plaintiffs or defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act in the proceedings. The authority must be in writing signed by the party giving it and must be filed in the case.

There was filed with the plaint such authority which is signed by 72 of the 74 Plaintiffs. "Appearing, pleading and acting" will include swearing and filing affidavits in the case. See the **Court of Appeal** case of **Research International East Africa Ltd vs Julius Arisi & 213 Others, Civil Appeal No 321 of 2003 at Nairobi** (unreported).

Much has been made in the written submissions about **Order 18, rule 5** of the Rules which states –

"5. Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject."

The point that has been taken by all the Defendants is that the verifying affidavit is incurably defective for having been sworn jointly by two plaintiffs.

This submission is, with respect, misconceived and probably based on an inadequate knowledge of English grammar. The rule quoted above does not state that every affidavit shall be drawn in the first person “**singular**”. The rule therefore does not preclude an affidavit drawn in the first person “**plural**”. “**I**” is first person singular. “**We**” is first person plural.

There is absolutely nothing wrong with an affidavit drawn jointly by two or more persons, and such affidavit would not offend rule 5 of Order 18 quoted above.

The verifying affidavit herein is thus not defective at all and properly verifies the plaint. In any case, even if it were defective, which it is not, it would be a defect that could be cured by an order for filing compliant verifying affidavits.

For the 2nd - 5th Defendants it was also submitted that the orders sought will affect Kyanzavi which is not a party to the suit. As already pointed out, this suit, as between the Plaintiffs and the 2nd - 5th Defendants, is essentially about the internal management of Kyanzavi. A resolution of the dispute will no doubt be of benefit to Kyanzavi. In any event, if found to be a necessary party, the company can always be joined in the proceedings.

In the event, the preliminary objection of the 1st Defendant has succeeded on the one point already indicated, and the case against it struck out with costs. The preliminary objection by the 2nd - 5th Defendants is overruled with costs to the Plaintiffs. Those will be the orders of the court.

DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF FEBRUARY 2010.

H.P.G. WAWERU
JUDGE

DELIVERED THIS 26TH DAY OF FEBRUARY 2010