



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 543 of 2008

PATRICK PIUS MUTUNE KATUBI & 4 OTHERSPLAINTIFFS

VERSUS

JAMES MUIYA MUEMA & 6 OTHERSDEFENDANTS

R U L I N G

Application dated 29/10/08. Orders were granted under payer 1 there being no objection.

Application dated 29/10/08 prayer 2 seeks orders for stay of all proceedings in this suit pending the hearing and determination of other suits by and/or between the same parties and/or other parties under whom the first to 4th plaintiffs' claim which suit has been previously instituted in this court and in which the matters are also directly and substantially in issue in the said previously instituted suits.

The other suits are:

- 1. Misc. Civil Application 3871/2008 – Judicial Review**
- 2. In the High Court of Kenya (Milimani) HCC No.301 of 2008**
- 3. HCC (at Nairobi) No.452 of 2008**

The other order sought is to strike out this suit and application on the Ground that the same is incompetent and violate provisions of law and procedure and are frivolous, vexatious, calculated to intimidate and harass the defendants and that the first to 4th plaintiffs/applicants have no reasonable cause of action. It is alleged that 5th plaintiff/applicant is non suited and wrongfully included as a party in this suit.

The suit should be struck out for failure to comply with law and procedure. The deponent, James Muiya Muema swears he was elected as Director of the company at Annual General Meeting held on 17/6/2008 and registered as new director together with others.

Proper notice was given. The order served by the plaintiffs to stop the meeting is said to be invalid and it is therefore untrue to state that participants acted in contempt of court. There is exhibit shown Company Form 203A being notification of change of directors and Secretary of the company following the Annual General Meeting held on 17/6/2008. Exhibit "JMM 3" a letter by Registrar of Companies to advocates

named therein.

The Registrar of Companies was of the view that on 17/6/2008 there was no injunction against the holding of the company meeting. The Registrar proceeded to register the new appointed directors.

Proceedings in **Mis. 387/2008** in Judicial Review by Notice of Motion was seeking to quash decision of the Registrar of Companies in his letter aforesaid dated 25/6/2008 which directed registration of newly elected directors. This proceedings is said to be pending determination.

Exhibit marked JMM 5 is an order made in **Suit No.301/2008** in a suit filed by Antony Nzonzi Kieta and Samson Kivuva Mweu vs. Kyanzavi Farmers Co. Ltd. (fifth applicant herein) where it is purported an injunction was issued by consent.

This consent was subject of challenge in HCC Commercial and Tax cases No. **452 of 2008** where the court held that the consent order was effective and the election or appointment or nomination or selection during the A.G.M. of 17/6/2008 was void ab initio and of no legal effect. The court ordered injunction in terms of ruling dated 8/8/2008 effectively restraining the holding of a meeting of the company scheduled for 16/8/2008 until the determination of this suit.

Exhibit 4 is order issued by Justice Kimaru on 9/9/2008 in **Milimani HCC No.507 of 2008 – Rocham Enterprises Lts. Vs. Kyanzavi Farmers Co. Ltd.** The court granted temporary injunction restraining the defendants from levying distress against the plaintiff's goods pending inter partes hearing on 23/9/2008. Before that date application dated 19/9/08 was filed seeking to restrain the defendants from holding themselves out as directors of the 5th plaintiff company (Kyanzavi Farmers Co. Ltd.) and before that application was heard, the present application dated 29/10/08 was filed by the defendants which has no supporting affidavit. The court has also been shown a ruling in **Milimani HCC No.128 of 2008** being a suit filed by the 5th plaintiff against Manu Ngolo where the orders sought were to restrain the said Mangu Ngolo from conducting an Annual General Meeting for the plaintiff company scheduled for 15/3/2008 at the company's office and a declaration that the said defendant is not the Chairman of the Board of Directors of the plaintiff company.

The issue of there being no resolution of the directors or the shareholders of the company to file suit arose. Also the issue of the defendant being Chairman of company had already been decided by the Registrar of Company by his letter of 15/2/2008 and that similar issues of law between the same parties were in **HCC No.101 of 2007**. This suit was dismissed by Hon. Okwengu, J. on 8/5/2008 on technicalities.

Mr. Adala in submitting on Notice of Motion dated 29/10/08 raised the issue of plaint paragraph 14 and paragraph 13 and prayer numbered (9) and stated that that other suit is seeking the same remedies as this one and as it is still pending this court has no jurisdiction to hear the present suit in view of **Section 6 of Civil Procedure Act**. He relied on **H.C. Civil Suit No.128/2008** mentioned above.

Mr. Adala proceeded to show that there are other suits pending between the parties namely **387 of 2008, 301 of 2008** and **452 of 2008**. He submitted that all these suits should be stayed as they deal in the same issue and claiming the same remedies.

The defendants are the registered directors of 5th plaintiff while the first 4 plaintiffs were removed from their directorships. However, it is to be remembered that by ruling of Hon. Lesiit, J. the meeting in which the defendants were elected was declared null and void ab initio. That decision is not set aside or appealed from.

On the plaintiff's side they challenged the defendants' Notice of Motion that it is not supported by any affidavit. The affidavit of James Mwema is headed "Replying Affidavit" to the plaintiff's application dated 19/9/08. The affidavit was subject to prayer in Notice of Motion which was allowed upon Mr. Oyugi for applicant graciously not opposing the admission of the same.

On the issue of stay the learned counsel stated that in Judicial Review, the Registrar General is a party but he is not involved in the other suits. And it is to set aside the decision of Registrar General. I have perused the material placed before the court. The suits filed are between different parties and different causes of action.

Judicial Review suit **Misc. 387/2008** relates to the quashing of the decision of Registrar in his letter dated 25/6/2008. Judicial Review jurisdiction is meant to check the activities of statutory bodies and officials who have power to take decisions likely to affect citizens and is not used to resolve disputes of private persons.

Therefore, it cannot be consolidated or stayed at the request of private persons. The suit **301 of 2008** was subject of the ruling of Lesiit, J. in the **Suit 452/2008** where she said the court order made on 12/6/2008 was valid order binding on the fifth defendant (the company) restraining itself or any of its agents, employees or servants from holding or convening and Annual General Meeting pending the hearing and determination of this suit. The Judge proceeded to state:

“Until that consent order has been varied or set aside the meeting that took place on 17/6/2008 is null and void ab initio and therefore the election of the first defendant as Chairman and consequently election of the defendants herein is null and void.”

The suit is still pending. However, the suit is not between the same parties. It is between Dominic N. Nyamai and Gideon Kivinda. The rights of a director of a company are separate and individual. It cannot be said that all directors have common cause of action. Each is appointed individually and therefore has individual cause of action.

It is clear from **Suit No.301/2008** by different plaintiffs is raising separate issues. It is between different parties as plaintiffs. The defendant is the company. And it sought to restrain the defendant from holding any Annual General Meeting and other meetings pending determination of the suit.

In **HCC No.452 of 2008** different issues arose and the court restrained the holding of extra ordinary meeting on 16/8/2008 until determination of the suit. In the present case the issues are different. Although the defendants are holding themselves as directors of the fifth defendant, the matter is in dispute.

In the circumstances, I do not find any reason to stay any of the suits stated in the Notice of Motion dated 29/10/08. On the issue of the consolidation of this suit with other suits mentioned above, the relevant **Order is Order XI Civil Procedure Code**. The court is empowered to order consolidation of suits pending in the same court in which the same or similar questions of law or fact are involved, upon such terms as may seem fit and court may direct further proceedings in any of such suit be stayed until further orders.

As I have stated above, the disputes between the parties are separate and involve separate parties. In case of consolidation there will be confusion as to issues arising in each case. There are serious differences on each side and this will delay the final determination of these suits.

The defendants also seek to strike out this suit out on the grounds set out in prayer 4 of the Notice of Motion. This prayer has not been argued by the parties and the court has no power to shut people out of judgment/seat before hearing the issues.

Regarding the prayer 5, I would say the same as of prayer 4. In view of the observation of Hon. Justice Lesiit on the validity of meeting held on 17/6/08, it is not possible to dismiss the plaintiffs' claims.

The upshot is that the application (Notice of Motion) dated 29/10/08 is dismissed with costs to the respondent.

DATED and DELIVERED this 13th day of February 2009.

JOYCE N. KHAMINWA

JUDGE