



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 415 of 2007

1. JULIUS GACHUHI KAMAU
2. PAUL RIBATHI GACHUKE
3. SUSAN WANJA NDUNGU
4. JOSEPH KIMATA MWANGI
5. PHILOMENA WANGARI KAMAU
6. ANTHONY WAMBUGU
7. ROSEMARY WAITHIRA GIBSON
8. SAMUEL KARIITHI KAMAU
9. JOSEPH GATHUKU GITUNGO
10. MARGARET KIGIO MUGO
11. RICHMOND WANJARIA KARIUKI.....PLAINTIFFS

V E R S U S

1. JOSEPH N. MAINA
2. ANTHONY KIGAMBA HATO
3. NJOROGE MWANGI
4. SAMSON K. MWAURA
5. DAVID KAMAU CHEGE
6. ROBERT MWANGI KUNGU
7. JOSEPH IKUMI KARIUKI
8. JOSEPH WAHOGO KARARI

9. CECILIA NJOROGI

10. FELIX KINYUADEFENDANTS

RULING

The Defendants have, by notice dated 13th June, 2007, raised a preliminary objection to the entire suit on the following grounds:-

1. That the plaint dated 8th May, 2007 is irregular and incurably defective for being accompanied by a defective verifying affidavit.
2. That the suit is an abuse of the process of the court in that the Plaintiffs lack *locus standi* and authority to bring and prosecute it.
3. That the Plaintiffs are guilty of willful non-disclosure of material facts and have come to court with unclean hands; they are therefore undeserving of equitable relief.
4. That the suit is fatally defective for non-joinder of a proper and necessary party.
5. That the suit is bad in law, frivolous, vexatious and only meant to embarrass the Defendants.

I have considered the submissions of the learned counsels appearing, including the authorities cited. The last three grounds are easily disposed of. Willful non-disclosure of material facts and the allegation that the Plaintiffs have come to court with unclean hands are matters of evidence. They cannot be raised as preliminary points of law. I need say no more in that regard.

Regarding non-joinder of a proper and necessary party, rule 9 of Order I of the Civil Procedure Rules (the Rules) provides:-

“9. No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

It will also be noted that under rule 10 of the same Order, the court has power to order substitution and addition of parties. This ground is therefore not well-taken at all.

Where it is alleged that a suit is frivolous, vexatious or that it is meant only to embarrass the defendant, some material must be placed before the court as a foundation for such claim. The proper way of doing this is by way of affidavit evidence. So, this is not a pure point of law that can stand on its own. Evidence is necessary; it thus cannot be raised as a preliminary point of law.

I will now deal with grounds one and two. It was submitted for the Defendants that the affidavit verifying the correctness of the averments contained in the plaint as required under Order 7, rule 1(2) is defective in that it is sworn by the 1st Plaintiff on behalf of all the other Plaintiffs. It was further argued that the essence of the said rule is that every plaintiff must swear an affidavit verifying the contents of the plaint because an affidavit is evidence on oath and cannot be sworn on behalf of another person. In response, learned counsel for the Plaintiffs submitted that the other Plaintiffs had duly authorized the 1st Plaintiff to swear the verifying affidavit on their behalf, and that therefore the same was proper and not defective.

This particular point was recently considered by the Court of Appeal in the case of **RESEARCH INTERNATIONAL EAST AFRICA LTD –VS- JULIUS ARESI & 213 OTHERS, NAIROBI CIVIL APPEAL NO. 321 OF 2003** (unreported). The court held, *inter alia*, that in cases where there are numerous plaintiffs, each plaintiff is required under Order VII, rule 1 (2) to verify the correctness of

the averments in the plaint by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them, in writing, and files such authority in the case, to file a verifying affidavit on his behalf. So, the only issue that arises here is whether there was such written authority duly filed by the other Plaintiffs to enable the 1st Plaintiff to file the verifying affidavit on their behalf.

I have perused the court record. Attached to the plaint (in addition to the verifying affidavit) is a written authority dated 8th May, 2007 duly signed by all the other Plaintiffs. It was filed in court on 10th May, 2007 together with the plaint. It states:-

“We, the plaintiffs herein, have given authority to Julius Kamau Gachuki to swear all affidavits herein on our behalf.”

Julius Kamau Gachuki is, of course, the 1st Plaintiff. He was duly authorized in writing by the other Plaintiffs to swear all affidavits in the suit on their behalf. The authority was duly filed in court. The verifying affidavit sworn and filed by him on behalf of all the Plaintiffs is therefore properly before the court and is not defective. Ground one of the notice of preliminary objection is thus not well-taken.

The second ground is that the Plaintiffs lack the requisite *locus standi* and authority to bring and prosecute the suit. It was submitted for the Defendants that the Plaintiffs, who have pleaded that they are directors of WITEITHIE GWAKA INVESTMENTS LTD, have brought the suit to protect the interests of the company, a legal person with the capacity to bring suit in its own name. Further, the reliefs sought are in respect to the company’s properties. The suit should therefore have been brought in the name of the company after the board of directors passed the requisite resolution in that behalf. It was further submitted that an individual shareholder of a company can bring suit in his name only to protect his own individual interest in the company, which interest is limited to his shareholding; he has no proprietary interest in the property of a limited liability company.

For the Plaintiffs it was submitted that no reliefs have been sought against the company but against former directors of the company who are oppressing the new directors. The Plaintiffs were therefore entitled to bring the suit, and should be given a chance to demonstrate this by way of evidence at the trial.

It is trite that a company duly incorporated under the Companies Act, Cap. 486, is a body corporate with capacity to sue and be sued. It may only sue or be sued in its corporate name. It is also trite that in an action to redress a wrong done to a company the company is the only proper plaintiff; however its name should be used as plaintiff only by direction of the company or its directors. Nevertheless, proceedings may be brought by any member or members in his or their own name or names where such authority cannot be obtained and the act complained of is of a fraudulent character or oppressive or is *ultra vires* the company, or is criminal, or where the wrongdoers control the majority of votes. See paragraph 1171 of **Halsbury’s Laws of England**, 4th Edition.

I have perused the plaint herein. The Plaintiffs have pleaded that they are the duly elected directors of the company at issue herein. The complaint in the suit is essentially that the Defendants’ action of keeping the various equipment and documents of the company, including its seals and official stamp, has paralysed the operations of the company. One of the reliefs sought is that the Defendants do surrender to the Plaintiffs these equipment and documents. The Defendants are said to be former directors of the company.

It is clear from the plaint that this suit is an action to redress a wrong done to the company, not to the Plaintiffs in their personal capacities. The company should therefore be the proper plaintiff, and the suit should have been instituted in its name. The Plaintiffs, being the directors of the company, could not have had any difficulty in passing the necessary resolution to bring the suit in the company’s name. They have not brought the suit as shareholders under the exception set out in paragraph 1171 of **Halsbury’s** aforesaid. They clearly have no *locus standi* to bring the suit.

I will therefore uphold the preliminary objection upon the ground that the Plaintiffs have no *locus standi* to bring the suit. The suit is incompetent and not properly before the court. It is hereby struck out

with costs to the Defendants. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF JANUARY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 25TH DAY OF JANUARY, 2008