



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 128 of 2008**

**KYANZAVI FARMERS COMPANY LTD:.....PLAINTIFF/APPLICANT**

**VERSUS**

**MANGU NGOLO:.....DEFENDANT/RESPONDENT**

**R U L I N G**

By a chamber summons dated 4<sup>th</sup> March, 2008 brought under Order XXXIX Rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, Kyanzavi Farmers Company Ltd (hereinafter referred to as the applicant), seeks inter alia: -

- (i) An order of interim injunction restraining the defendant/respondent, his agents, servants and or any one acting through him from convening, conducting and or presiding over an Annual General Meeting of the Applicant/Plaintiff on the 15<sup>th</sup> March, 2008 at the company's office at Kyanzavi Farm within Matungulu Division Kangundo District and or any other place pending the hearing and determination of the applicant's suit.
- (ii) An interim injunction restraining the defendant/respondent from holding himself out and or claiming to be the chairman of the Board of Directors of Kyanzavi Farmers Ltd, the applicant named herein pending the hearing and determination of the applicant's suit.

The applicant's suit which was filed contemporaneously with the chamber summons is against Mangu Ngolo (who is also the respondent in this application.) The prayers sought in the suit are as follows: -

- (a) A permanent injunction restraining the defendants, his agents, servants and or anyone acting through him from convening, conducting and or presiding over an Annual General Meeting of the applicant on the 15<sup>th</sup> March, 2008 and or any other date.
- (b) A permanent injunction restraining the defendant from holding himself out as chairman of the Board of Directors of the plaintiff company.
- (c) A declaration that the defendant is not the chairman of the Board of Directors of the plaintiff company.

By a notice of preliminary objection filed on the 14<sup>th</sup> March, 2008 the respondent has raised a preliminary objection to the hearing of the chamber summons dated 4<sup>th</sup> March, 2008 on the following grounds: -

1. That the suit and the chamber summons are incurably incompetent as there is no resolution of the directors or of the shareholders of the plaintiff company authorizing the filing of this suit.

2. The suit and the chamber summons are bad in law in that:

(a) The status of the defendant as a chairman of the Board of the plaintiff company was decided by the Registrar of companies vide his letter dated 15<sup>th</sup> February 2008, and this decision has not been set aside nor has the Registrar of Companies been enjoined in the suit.

(b) There are similar issues of law and fact between the same parties in HCCC No. 101 of 2007 and the matter is fixed for hearing on 30<sup>th</sup> April, 2008.

It is submitted on behalf of the respondent that he is the chairman of the plaintiff's Board of Directors and that though the suit is purportedly filed by the company, there is no resolution from the company authorizing the filing of the suit. It was further submitted that a company cannot claim that one of its directors is not a director, as a company cannot act in a manner inconsistent with its directors.

Relying on the case of **Gatimu Farmers Ltd Vs Solomon Mbugua, HCCC (Nakuru) No.245 of 2001** it was submitted on behalf of the respondent that the real plaintiff was not the company but the 3 Directors who had filed the suit to frustrate the holding of the Annual General Meeting of the company. It was further submitted that there was another suit filed by the 3 Directors against the respondent and the company raising similar issues as the instant suit.

Finally it was submitted that the Registrar of Companies having ruled that the respondent was still a Director of the company and directed that an annual general meeting be held, the suit was incompetent without the Registrar of Company being joined. In this regard reliance was placed on: ***Huruma Kuuga Na Gwika Company Ltd vs Peter Kimani Kibe & 8 Others HCCC (Nrb) No.592 of 2003.***

***Githunguri constituency Ranching Company Ltd vs the Registrar of Company and Another HC. Misc. Application No.1002 of 1996.*** In response to the preliminary objection, counsel for the applicant submitted that the objection, was only intended to delay the suit so that the Annual General Meeting which has been called does not proceed. It was maintained that there was no requirement that in filing a suit a company resolution must be filed. Counsel for the applicant urged the court not to follow the authorities referred to by counsel for the respondent contending that they were only of persuasive value and that in any case, none of the suits was determined on the preliminary objection.

As was stated by Law JA in the case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd 1969 EA 696**: -

***“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit.”***

In this case, the preliminary objection which has been raised, questions the competence of the entire suit, and also the chamber summons dated 4<sup>th</sup> March, 2008. If the preliminary objection is upheld it will result in the disposal of the suit as the same may be struck off.

The suit herein purports to have been brought by the applicant which is a limited liability company and therefore a corporation. Under Order III Rule 1 of the Civil Procedure Rules a corporation can only bring such a suit through a recognized agent. Under Rule 2 of the same order such a recognized agent may be an officer of the Corporation duly authorized under the company seal.

Where an advocate is appointed to undertake the conduct of any proceedings on behalf of the company as a recognized agent such appointment must be made under the company seal. In this case it has been alleged that there was no such authority to institute this proceedings. It would have been a simple matter for the advocate who has instituted these proceedings to swear an affidavit verifying the source of his authority. However no such affidavit has been availed nor has any resolution of the company appointing him as an agent been availed. The sum total is that no authority to institute these proceedings in the name

of the company has been demonstrated to this court and the suit is therefore incompetent.

Under Order VII Rule 1(2) of the Civil Procedure Rules a plaint must be accompanied by an affidavit verifying the correctness of the averments contained in the plaint. In this case, one Patrick Pius Mutune Katubi who claims to be a director and chairman of the board of the plaintiff has sworn a verifying affidavit in support of the plaint. In doing so the said Patrick Pius Mutune Katubi is acting as an agent of the company and must therefore satisfy Order III Rule 2C of the Civil Procedure Rules i.e. that he has been duly authorized under the corporate seal of the company to make that averment. Again no resolution of the company has been produced and to this extent the suit is incompetent.

Further a reading of the plaint and the contending affidavits which have been filed in support of, and in opposition to, the chamber summons dated 4<sup>th</sup> March, 2008 shows that there is a dispute regarding the directorship of the plaintiff company. Indeed annexure "MN4" to the affidavit of the respondent sworn on 13<sup>th</sup> March, 2008 confirms that there is HCC. No. 101 of 2007 brought by three of the directors including Patrick Pius Mutune Katubi against the respondent and the company. That suit raises similar issues as the instance suit and the orders sought therein includes an injunction restraining the defendants from interfering with the operations, duties and responsibilities of the plaintiffs as directors of Kyanzavi Farmers Company Ltd. Section 6 of the Civil Procedure Act provides that: -

***"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them clam, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

Thus this suit cannot proceed in the light of the previous suit between the parties, and were the suit competent an order of stay of proceedings would have been appropriate.

For the above reasons I uphold the preliminary objection and find that the suit herein is not properly before this court and must be struck out.

Orders accordingly.

**DATED THIS 8<sup>TH</sup> DAY OF MAY, 2008**

**H.M. OKWENGU**

**JUDGE**

In the presence of: -

Moindi for Plaintiff

Adala for Kalove

