



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Suit 260 of 2007**

**JANE KAVITI NZIOKA .....1<sup>ST</sup> PLAINTIFF**

**ASIA TRANS TRADING CO. LTD. ....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ROSHANZAMEER ALI MOHAMED KASMANI .....1<sup>ST</sup> DEFENDANT**

**MUSHTAQ AHMED ALI MOHAMED KASMANI ...2<sup>ND</sup> DEFENDANT**

**KULSUMBHAI & ALI MOHAMED ESSA**

**CHARITABLE TRUST .....3<sup>RD</sup> DEFENDANT**

**SALIM SHAMSHUDEEN ESSA .....4<sup>TH</sup> DEFENDANT**

**SHAMSHUDEEN ESSA KASMANI .....5<sup>TH</sup> DEFENDANT**

**RULING**

By a plaint dated 17<sup>th</sup> September 2007, Jane Kaviti Nzioka and Asia Trans Trading Co. (K) Ltd., being the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs prayed for:

**(a) An order to compel Roshanzameer Ali Mohamed Kasmani, Mushtaq Ahmed Ali Hohamed Kasmani, Kulsumbhai & Ali Mohamed Essa Charitable Trust, Salim Shamshudeen Essa and Shamshudeen Essa Kasmani the 1<sup>st</sup> – 5<sup>th</sup> defendants respectively to accept rent from the plaintiffs in respect of the premises standing on title No. Mombasa/Block XIX.125 pending the hearing and determination of Mombasa H.C.C.C. 98 of 2007.**

**(b) In the alternative, the plaintiffs be authorized to deposit the aforesaid rent in court pending the hearing of this suit, the plaintiffs filed a Chamber summons dated 1<sup>st</sup> November 2007 under XXXIX rules 2,3,8 and 9 of the Civil Procedure Rules in which they sought or the orders prayed in the plaint.**

After hearing the aforesaid application exparte on 8/11/2007, this court issued a temporary order of injunction to restrain the defendants from locking out or evicting the plaintiffs from the premises located on Mombasa/Block XIX/125. The order was subsequently extended. When Served with the plaint and the application, the defendants filed a defence to deny the plaintiffs' claim. They also filed the summons

dated 19<sup>th</sup> March 2008 in which they sought for the following main orders:

(i) *The plaint to be struck out and dismissed.*

(ii) *The 1<sup>st</sup> plaintiff be ordered to vacate the suit premises and pay mesne profits at the rate of Kshs.36,000/- per month as from 1<sup>st</sup> May 2007. The plaintiffs opposed the summons by filing the replying affidavit of Jane Kaviti Nzioka and grounds of opposition. The aforesaid summon is the subject of this ruling.*

Mr. Kasmani, learned advocate for the defendants beseeched this court to grant the defendants the orders. The learned advocate argued two main grounds in support of the application. First it is argued that the 2<sup>nd</sup> plaintiff has been struck out the register of companies hence it no longer exists. Copies of minutes in respect of an extra-ordinary General meeting held on 19<sup>th</sup> April 2007, containing the resolution to wind up the 2<sup>nd</sup> plaintiff were annexed to the affidavit of Salim Shamshudeen Essa Kasmani filed in support of the summons. Annexed therein also, is the Kenya Gazette notice No. 4320 of 9<sup>th</sup> May 2007 of the intended Dissolution of the 2<sup>nd</sup> defendant.

Secondly, it is argued that the 1<sup>st</sup> plaintiff has not been authorized by the 2<sup>nd</sup> plaintiff to institute the suit.

I have already stated that the summons is opposed on the ground that the plaintiff was not a party to the resolution passed on 19<sup>th</sup> April 2007 in that the defendant did not invite her to the meeting. She deponed in her replying affidavit that she has gone to court to challenge the purported winding up of the 2<sup>nd</sup> plaintiff vide Mombasa H.C.C.C. No. 98 of 2007. This assertion has not been controverted. Annexed to the replying affidavit is an order restraining the other directors of the 2<sup>nd</sup> plaintiff namely:-

*“Jochen Flaechner and Chaveekan Flaechsner from*

*interfering in anyway with the affairs of the 2<sup>nd</sup> plaintiff”.*

I have considered the rival arguments herein and I have come to the conclusion that this ground must be dismissed. The issue touching on the winding up of the 2<sup>nd</sup> plaintiff is yet to be heard and determined by this court. It cannot be used as a ground to strike out the suit. In any case the intended Dissolution of the 2<sup>nd</sup> plaintiff published in the Kenya Gazette No. 4320 of 11<sup>th</sup> May 2007 cannot by any stretch of imagination be regarded to have resulted to the winding up of the 2<sup>nd</sup> Defendant. There must be evidence to show that the company has been struck out under S.339(5) of the Companies Act.

The second ground argued is to the effect that the 2<sup>nd</sup> plaintiff did not authorize the 1<sup>st</sup> plaintiff to institute this suit. Annexed to the supporting affidavit is the lease agreement executed by the defendant and the 2<sup>nd</sup> plaintiff. The 1<sup>st</sup> plaintiff claims she is a lawful tenant. She has not annexed to her affidavit any lease agreement between herself and the defendants. It is settled law that a company is a separate legal entity from its directors, members and or shareholders. It speaks through resolutions. In this case it is clear that the 1<sup>st</sup> plaintiff was not authorized her to institute these proceedings. She is not the tenant save that she is a director and shareholder of the 2<sup>nd</sup> plaintiff. The main suit relates to the tenancy over the premises standing on title No. Mombasa/Block/XIX/125. It is clear that the 2<sup>nd</sup> plaintiff did not sanction the 1<sup>st</sup> plaintiff to file of this suit. She therefore had no *locus standi* to commence these proceedings. Her remedy however meritorious lies elsewhere and not through these proceedings. For the above reason the entire suit is rendered null and void. The plaint herein is hereby ordered struck out with costs to the defendant.

**Dated and delivered at Mombasa this 23<sup>rd</sup> day June 2008.**

**J. K. SERGON**

**J U D G E**

In open court in the presence of Mr. Kadima h/b Kasmani for the defendant.

N/A for plaintiff.