



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1298 of 2006

LUCKY SUMMER ESTATE LIMITED.....PLAINTIFF

VERSUS

KARIUKI & GATHECHA RESOURCES LTD.....1ST DEFENDANT

STEPHEN NYAMU T/A LIFELINE TRADERS2ND DEFENDANT

RULING

By way of Notice of Motion expressed to be brought under Order VI Rule 13 (1) (b) (c) and (d) Order XXXIX Rule 4 of the Civil Procedure Rules Section 3A of the Civil Procedure Act and Section 223 of the Companies Act Cap 486 the 1st Defendant sought orders:

1. That pending the hearing and determination of this application this Honourable Court be pleased to order a stay of the proceedings herein.
2. That the plaintiff's suit herein be and hereby struck out in its entirety
3. That in the alternative this Honourable Court be pleased to order stay of proceedings of the suit herein pending the hearing and final determination of the Winding Up Cause No. 26 of 2006 in the High Court at Milimani.
4. That the Interim Orders herein issued on 6th December 2006 be set aside for want of disclosure at ex parte stage.
5. Costs of the application be provided for.

The application is based on the grounds as stated on the body of the Notice of Motion and supported by an affidavit sworn by Dominic Gacheche.

Before the application came up for hearing the plaintiff raised a Preliminary Objection on a Point of Law.

Mr. Ndurumo learned counsel for the plaintiff submitted that the Chamber Summons dated 13th February 2007 seeks orders for stay of the current proceedings based on the ground that there is a Winding Up

Cause No. 26 of 2006 pending before Milimani Commercial Courts in which the petitioner is the current 1st Defendant and the Respondent is the current Plaintiff in this suit. The Winding Up Order has not been made and a liquidator appointed. The other ground is that the applicant has no capacity to bring this application. Under the provisions of Section 223 of the Companies Act Cap 486 such an application can only be brought by the company itself, a Creditor or a Shareholder. He urged the Court to strike out the Notice of Motion for being incompetent. He also prayed for costs.

The Preliminary Objection is opposed by Mr. Rangi learned counsel for the 1st Defendant on the ground that the same is misconceived. The prayers sought are, striking out the suit for being res judicata or in the alternative stay of proceedings until the Winding Up proceedings are determined. He further submitted that the 1st Defendant is a Creditor and that the issues raised in this Preliminary Objection ought to have been argued in the application.

A Preliminary Objection raises a pure point of law which is argued on the presumption that all the other facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is in the exercise of judicial discretion.

What is raised in this Preliminary Objection is not a point of law and therefore the same is improperly raised. The issues raised here could be argued in the Notice of Motion.

The Preliminary Objection is dismissed with costs.

Dated at Nairobi this 15th day of March 2007.

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J.L.A. OSIEMO

JUDGE