



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

Civil Suit 80 of 2002

ERASTUS K. WAMEYA

AMILA CHERWA

BARNABAS EJAKAIT

SHADRACK ORONI

GROMWEL W. MANYONGE..... PLAINTIFFS

VERSUS

1. JOTHAM WABOMBA.....1ST DEFENDANT

2. NGOBOLELE FARMERS CO. LTD.....2ND DEFENDANT

RULING

The main suit herein was filed on 9/10/2002 by 5 Plaintiffs against the 2 Defendants namely JOTHAM WABOMBA and NGOBOLELE FARMERS CO., LTD. From the Plaintiff the 1st Defendant is not sued in his capacity as a director of the 2nd Defendant Company.

There is no evidence in the court file to show that the Defendants were duly served with the Plaintiff and summons. Be that as it may, the 1st Defendant did enter into a consent with the Plaintiffs herein on 18/10/2002. The defendant signed the consent on behalf of himself and of the 2nd Defendant Company. The said consent was filed in court on 22/10/2002. The consent was to the effect that judgment be entered against both defendants as prayed in the plaintiff. The said consent was adopted by the court and decree issued to that effect. This decree was issued on 14th of January 2003. It is not clear why, but the said decree was not executed until the Deputy Registrar issued the eviction order dated 24/1/2005. That order appears to have spurred the 2nd Defendant into action and they filed the application dated 2/2/2005 which was amended on 31/1/2006 seeking the following orders inter alia.

1. That there be a stay of execution of the consent judgment, the Decree and all consequential orders pending the hearing and determination of this application.
2. That that consent order dated 18/10/2002 and consent judgment of 22/10/2002 be reviewed, varied and set aside.

The 1st prayer has been spend, as the application has since been heard interpartes. The only issue now is whether the consent order and consent judgment in question should be reviewed, varied and set aside. Each party has filed several affidavits with several annexures in support of their case. I have considered all these affidavits along with the said annexures. The main grounds raised in support of the application are that the 2nd Defendant was not served with the plaint herein and was not party to the consent in question; and further that the 1st Defendant was not authorized agent of the 2nd Defendant and had no mandate to execute the consent on behalf of the 2nd Defendant.

The 3 affidavits in support of the said application have all been sworn by one SIMIYU KAPCHANGA who describes himself as Chairman of the 2nd Defendant saying that he has authority from the 2nd Defendant to do so.

The Plaintiff/Respondents however have urged the court to expunge the replying affidavit of SIMIYU KAPCHANGA on the grounds that he is not a director of the 2nd Defendant and cannot therefore swear an affidavit on its behalf. He has annexed annexure 'EKWI' to his affidavit showing the list of directors of the 2nd Defendant as at 2/12/2005. SIMIYU KAPCHANGA is not one of the Directors according to that list. He nonetheless appears as a director in the list of directors filed on 14/2/2006. From this list therefore, SIMIYU KAPCHANGA could, only represent the 2nd Defendant after 14/2/2006. I have seen the applicants' annexure 'SKI' which is the minutes of the 2nd Defendants General Meeting held on 24/6/98. These minutes do describe SIMIYU KAPCHANGA as Chairman of the Company. He also appears to have been elected as one of the Directors of the 2nd Defendant. Unfortunately, this list does not appear to have been sent to the Registrar of Companies. The effective list of directors as at 2/2/2005 is the one marked 'EKWI' and as at 14/2/2006 the one marked 'EKW3'. I would therefore agree that SIMIYU KAPCHANGA was not a Director of the 2nd Defendant in 2005 when he swore the affidavits in question on behalf of the 2nd Defendant. He was not competent to do so. For this reason, the affidavit in the support of the Notice of Motion dated 31/1/2006; is not properly before the court. The same is accordingly expounded from the record.

I will therefore have to consider the application before me in absence of that affidavit. I have nonetheless considered all the pleadings herein and the affidavits, which remain on the record.

It is not disputed that there is no affidavit of service in the court file showing that the 2nd Defendant was served with the plaint and summons. As stated earlier on, the 1st Defendant was sued in his private capacity and not as a Director of the 2nd Defendant herein. The 2 were entirely different entities and each of them should have been served separately. The 2nd Defendant Company should have been served and an affidavit of service filed to that effect. It is after being served that the 2nd Defendant would have decided by way of passing a resolution that it had authorized the 1st Defendant to proceed in the case on its behalf. I agree that the 1st Defendant was then a director of the 2nd Defendant. This did not however give him an automatic right to represent the Company and make decisions on its behalf to the exclusion of the other members/directors. The 1st Defendant has not availed to court such a resolution. He could not confer upon himself authority to act on behalf of the company in question. For a director of a company to represent a company in matters that are likely to affect the rights of the company or its shareholders, then the company must be involved in the decision as to who should represent it. There should therefore be a resolution by the directors appointing the particular director to proceed on behalf of the company. Had this been done, then the situation before us could not have arisen.

The 1st Defendant could not therefore decide on his own to compromise the suit on behalf of the company in absence of a resolution by the company empowering him to do so.

A cursory look at the consent will also show that the 1st defendant did not even indicate the capacity in which he signed that consent in respect of the 2nd Defendant. My finding is that he lacked the legal capacity to do so. Indeed, it is noted that the effect of the said consent was to dispossess the 2nd Defendant of some property to which it had stated a claim. This should not therefore have been done

without the knowledge of the other directors of the said company. In the result, I find that the lack of service of the plaint on the 2nd Defendant coupled with the lack of resolution by the company's director's authorizing the 1st Defendant to compromise the suit are sufficient reasons to vitiate the consent in question.

The amended Notice of Motion must therefore carry the days. The same is hereby allowed. The consent order dated 18/10/2002 and consent judgment of 22/10/2002 are hereby set aside along with all subsequent orders arising therefrom.

Costs of the application to be borne by the 1st Defendant/Respondent.

W. KARANJA

JUDGE

Delivered, signed and dated at KITALE this 2nd day of March, 2007

In the presence of: -