



REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 766 of 2006

NANCY WANGUI NJUGUNA.....1ST PLAINTIFF

JAMES NJUGUNA KAGWIMA.....2ND PLAINTIFF

VERSUS

NANCY NJERI GITAU.....1ST DEFENDANT

JAMES MUTA GITAHI.....2ND DEFENDANT

Summary:

1. Land and Environmental Law Division
2. Subject of main suit: Dispute over ownership and management of a school situated on Plot 489 Mutirithia Phase II Kasarani Mwiki and Plot 438.
3. Defendants 1 and 2 file Notice of Motion seeking stay of proceeding
 - i) Notice of Motion 29 August 2006
 - a) Reasons
 - a) Memorandum of Understanding between parties in the running of school
 - b) Any disputes to be referred to arbitration
 - c) Milimani Chief Magistrate Civil suit No.13299/04 against defendants No.1 was referred to arbitration.
 - d) Arbitration proceeding still pending
4. In reply:
 - a) Milimani Chief magistrate suit No.13299/04 was withdrawn

- b) There is now no arbitration
 - c) Suit is competent to be tried before this court.
5. Finding
- a) Miliman Chief Magistrate court case 13299/04 called up.
 - b) Confirmed the suit was referred to arbitration by trial magistrate T.W.C. Wamae SRM on 7 December 04.
 - c) Whilst arbitration was pending, a notice to discontinue suit was filed by plaintiff
 - d) Magistrate endorsed this discontinuing of suit.
 - e) The plaintiff files a new suit in the high court identical to the magistrates court case, save with additional parties.
6. Held: a) Orders to discontinue suit is null and void. The discontinuation was subject to the arbitration being concluded
- b) The suit before court is a repetition to the subordinate court though more detailed
 - c) Declaration that arbitration should be completed in lower court.
 - d) Application granted – suit stayed pending completion of arbitration suit.
7. Case Law – Nil

8. Advocate:

B.M. Isindu for Burton Isindu & Co. Advocates for the defendant/applicant

J.W. Kimiti for Rumba Kinuthia & Co. Advocates for the plaintiff/respondent

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RULING

1: Background to the application dated 29 August 2006 seeking stay of proceedings and or of the suit.

1. The relationship between the plaintiffs and defendants is that of partnership. The plaintiff 1 and 2 are wife and husband whilst the defendant 1 and 2 are also wife and husband. The couple entered into a business venture in which they would run a school on a Plot No.489 that belonged to the defendants. A school known as Gloria Nursery School was already in place. They wished to run a primary school which school actually came into existence.

2. The said parties entered into a Memorandum of Understanding whereby the school would run by. The plaintiff No.1 being dissatisfied with the manner defendant No.1 took control of the school filed a suit against defendant No.1 only, seeking orders of injunction to restrain defendant No. 1 from running the school and from interfering with the decision making of the school. The reasons for this injunction is that the school had classes from standard one to five, they required to start and build standard six for the year January 2005. Instead it was alleged that the defendant No.1 was in the process of registering her own school and refused for construction to be carried out. All these facts are alleged and require to be proved at a full trial.

3. The suit was filed in the Chief Magistrates courts at Milimani being No.13299/04 Nancy Wangui Njuguna v Nancy Njeri Mugo. I did call for this file and perused the same. It clearly showed that the suit on being filed in the year 2004, the defendant filed a notice of motion on 3 December 2004 seeking for a stay of proceeding on grounds that the parties had a Memorandum of Understanding requiring that any dispute that would arise between parties be referred to arbitration.

4. It was therefore as a result of the said application that the parties on 7 December 2004 entered into consent before T.W.C. Wamae Senior Resident Magistrate to refer this matter to arbitration. The magistrate should have given a time limit but did not do so. After two years the plaintiffs filed a notice of discontinuation of the suit. The defendant appeared not to be aware of this. The plaintiffs instead filed a suit on 13 July 2006 by a plaint dated 10 July 2006 seeking the said same orders as required by the former suit but that it included a prayer for damages.

5. The defendants filed an application dated 29 August 2006 seeking a stay of the courts proceeding and or striking out of this suit being the subject matter of this ruling in this case.

II: Application 29 August 2006

6. The defendant/applicant informed the court that this matter was still pending for arbitration. That the proceeding in CMCC1399/04 of the subordinate courts had been stayed. The plaintiffs cannot then come to this court to seek another suit to be heard.

7. The plaintiffs in reply stated that the said suit was discontinued in the subordinates court. There is therefore now no arbitration. It is this High Court which is competent to try this suit as by their new plaint, it shows certain claims that the arbitration has no jurisdiction to deal with.

III: Finding

8. This court on perusing the subordinate courts file confirms that the suit indeed was referred to arbitration with the consent of the parties on 7 December 2004. That whilst the arbitration proceeding were pending the plaintiff discontinued the suit.

9. Where there concerns a third party such as the arbitrator and whilst arbitration is in progress the plaintiff cannot discontinue the suit. The reason being that the arbitration has orders of the court asking him to proceed with the hearing. Parties require to appearing before the arbitrator and ask for the arbitration to be discontinued before coming to court to seek the same prayers. The procedure followed herein was irregular. The trial magistrate had no jurisdiction to discontinue a suit pending before the arbitrator. There are issues to be canvassed in the arbitration such as costs, the decision of the arbitrator etc.

10. I noted that when the orders for arbitration had been made there ought to have been specified a reasonable time limit for the award to be made, say 150 days or 90 days etc. If on the day the award is not yet reached the parties may extend the days of hearing by say another 150 days etc. This way the parties can keep abreast of their proceeding.

11. I do not agree that two meeting with the "chief" is part of arbitration. A chief is not an arbitrator under the arbitration act as he has his superior being the District Officer and or the District

Commissioner.

12. In this case the parties have not disclosed who their arbitrator is.

13. The issues before me is whether the plaintiffs are permitted to discontinue the former case and file a new case insisting that the High Court hears the same?

14. I find that the plaintiff had no jurisdiction to discontinue the suit through the magistrate without first discontinuing the arbitration proceeding in the arbitration suit. This therefore means that it was irregular for the plaintiff to file a new suit in this court touching on the matters in question.

15. I would therefore allow the application of 29 August 2006 and hereby order that there be a stay of this suit. I further order that the orders to discontinue the lower court file made by the trial magistrate be set aside. That the arbitration proceedings do commence from where it reached. That the parties and the arbitrator are given 150 days to commence. The arbitration and the proceeding be in the magistrate courts case 13299/04 and recorded therein.

16. Those are my orders. There will be costs to the defendant/application.

IV: Summary

17. The suit be and is hereby stayed.

18. The orders of discontinuing the magistrates court, case be and is hereby is set aside

19. The arbitration proceeding to commence for hearing for 150 days with leave to extend this period.

20. The proceeding be in the magistrates court file

21. Costs to the defendants/applicant to be paid by the plaintiffs/respondent.

Dated this 10th day of July 2007 at Nairobi.

M. A. ANG'AWA

JUDGE

J.W. Kimiti for Rumba Kinuthia & Co. Advocates for the plaintiff

B.M. Isindu for Burton Isindu & Co. Advocates for the defendant