



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

**AT NYERI**

**Civil Case 79 of 2005**

**UMOJA SERVICE STATION LIMITED.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**  
**PETER GAKONYO NDIRITU.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**  
**NAFTALI W. NJOROGE.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**  
**JOYCE M. GAKUGI.....4<sup>TH</sup> PLAINTIFF/RESPONDENT**  
**SAMUEL A. KAMONJO.....5<sup>TH</sup> PLAINTIFF/RESPONDENT**  
**PETER N. MUTHOGA.....6<sup>TH</sup> PLAINTIFF/RESPONDENT**

***Versus***

**HEZY JOHN LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**  
**ANTHONY WARUGA IKIKI.....2<sup>ND</sup> DEFENDANT/APPLICANT**  
**SAMUEL GICHUKI KINGO'RI.....3<sup>RD</sup> DEFENDANT/APPLICANT**  
**DOUGLAS KINGORI MUTHUA.....4<sup>TH</sup> DEFENDANT/APPLICANT**  
**PETER GICHOI GITAU.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

The Plaintiffs' claim relates to two notices that were given by persons other than the parties in this action. In those notices they requested that a general meeting of the 1<sup>st</sup> Plaintiff Company be convened. The Plaintiffs who were then the Board of Directors of the company did not convene the meeting. The Defendants, however, did convene the meeting and as averred by the Plaintiffs in their plaint, the Defendants proceeded to declare themselves directors of the company. The Plaintiffs have pleaded in the plaint that those notices were null and void in law. They therefore prayed in their plaint for an injunction against the Defendants stopping them from interfering with the company's operations. They further sought a declaration that the meeting where the Defendants were appointed as directors was null and void.

The Defendants have now brought an application by way of Chamber Summons dated 8<sup>th</sup> May 2006.

The Defendants have brought that application under **Order VI Rule 13 (1) (d)**. The prayer that the Defendants seek is in the following terms:

*“THAT the Honourable court be pleased to strike out the suit for being an abuse of the process of the court and for disclosing no reasonable cause of action.”*

As can be seen from that prayer the Defendants have combined sub rule (1) (a) together with sub rule (1) (d). These sub rules provide as follows:

***“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-***

***(a) it discloses no reasonable cause of action or defence; or***

***(b) .....***

***(c) .....***

***(d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”***

**Order VI rule 13 (1) (2)** clearly provides that when one relies on sub rule (1) (a) of that rule they cannot rely on any evidence in support of their prayer other than placing reliance on the pleadings on record. The prayer brought by the Defendants as seen hereinbefore, contravenes that sub rule. Accordingly, the words in that prayer seeking that the court will find that the Plaintiffs’ suit does not disclose a reasonable cause of action is hereby struck out. What then the court will consider in this ruling is whether the Plaintiffs’ suit is an abuse of the court process. The grounds upon which the Defendant seeks striking out is that at the time when this suit was filed the Plaintiff had ceased to be directors of the company. The Defendants state that by their action, the Plaintiffs were seeking to stop what had already happened. The Defendants in their supporting affidavit stated that it was because of that state of affairs that the court in entertaining the injunction application declined to grant an injunction. That further the Plaintiffs being dissatisfied with that order filed an injunction application in the Court of Appeal. They annexed a copy of the ruling of the Court of Appeal and stated that the Court of Appeal also declined to grant an injunction. It ought to be noted that the injunction application at the High Court was mainly refused on the basis that if it were to be granted it was likely to determine the suit. What the court needs to now determine is whether the grounds presented by the Defendants show that the Plaintiffs’ case is an abuse of the court process. The Court’s response to that issue is in the negative. The fact that the Defendants are now the directors of the company and the Plaintiffs are not does not in any way detract the Plaintiffs’ claim in the plaint. In the plaint as stated before, the Plaintiffs are seeking for an injunction and a declaration that the appointment of the Defendants as directors was null and void. What was before the court during the hearing of the injunction application was an interlocutory application. During that hearing of that application all the court needed to determine was whether the Plaintiffs had shown a prima facie case with probability of success. The fact that the Court refused to grant an injunction does not follow that after the hearing of the evidence during the trial, the trial judge would not reach a decision that the Plaintiffs had proved their case. For that reason the Defendants’ grounds for seeking striking out is hereby rejected. Similarly the Defendants’ argument that the company was wrongly joined as a plaintiff was fatal. The action itself does involve the company and therefore it was correct for the company to be joined. The Court of Appeal in the case of **KISSII FARMERS CO-OPERATIVE UNION LIMITED V SANJAY NATWARLAL CHAUHAN T/A ORENTAL MOTORS C. APP. NO. 32 OF 2003** had to decide an appeal where the suit had been struck out by the superior court had the following to say:-

***“It is now well settled law, that the power to strike out a pleading or any part of a pleading is a power that courts must exercise with a lot of restraint. Normally it is better to allow a weak case to go to trial than to invoke the guillotine process.”***

Bearing in mind the Plaintiffs’ claim I am of the view that the same cannot attract such a harsh penalty

such as striking out. That indeed was the argument of the Plaintiff in opposition to the present application. Accordingly the Defendants' application dated 8<sup>th</sup> May 2006 is hereby dismissed with costs to the Plaintiffs.

**MARY KASANGO**

**JUDGE**

*Dated and delivered at Nyeri this 14<sup>th</sup> day of November 2007.*

**By: M. S. A. MAKHANDIA**

**JUDGE**