



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT ELDORET**

**CIVIL CASE 22 OF 2006**

**SIMBA HILLS FARM LTD ..... PLAINTIFF**

**=VERSUS=**

**SULTAN HASHAM LALJI ..... 1<sup>ST</sup> DEFENDANT**

**ABDULAZIZ KANJI ..... 2<sup>ND</sup> DEFENDANT**

**MADATALLY SIDI ..... 3<sup>RD</sup> DEFENDANT**

**JAMES KIMOSBEI TUWEI ..... 4<sup>TH</sup> DEFENDANT**

**ISAAC CHEPSIROR ..... 5<sup>TH</sup> DEFENDANT**

**SYLVESTER BIWOTT ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

This is an application by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants, under the provisions of Order VI, Rule 13 (1) (a) and (b) of the Civil Procedure Rules for the following Orders:-

“ (a) That the Suit is defective having been instituted in the name of the Plaintiff Company against its directors

(b) That this Suit be and is hereby struck out / dismissed.

(c) Costs in the cause. ”

The application is based on the following grounds:

- 1). That the Suit herein has been instituted in the name of the Plaintiff Company without its authority.
- 2). That the Plaintiff is a limited liability Company and the 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Defendants / applicants are directors of the Company.
- 3). That the Suit was instituted by one person, one KIPRONO KOSGEI who is also a director without a resolution to allow the said director to do so.

4). That without the authority of the Company through the directors who include the applicants herein, this Suit is defective ab initio and should be struck out.

5). That the suit is self defeating as the directors sued are still in office and cannot be sued in the names of the Company at the instance of one single director who is dissatisfied with the affairs of the Company.

6). That the Orders sought are in vain as they cannot be enforced by the directors who have been sued as Defendants.

7). That the whole suit is defeating and particularly paragraph 14 and 15 of the Plaintiff.

The application is supported by the annexed affidavit of Sylvester Biwott who claims to be one of the directors of the Company. The application is opposed by the Plaintiff which filed a Replying Affidavit sworn by one Kipsondun Arap Kuto who claims to be a Secretary of the Directors of the Plaintiff.

Order 13 (1) Rules (a) and (b) under which the application is brought provides as follows:-

**“ 13 (1) At any stage of the proceedings, the Court may order to be struck out or amended any pleadings on the ground**

**that:-**

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

**or**

**(b) it is scandalous, frivolous or vexatious; or**

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

**(d) .....**

**and may order the Suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.”**

On the basis of Rule (2), No evidence shall be admissible on an application under sub-rule (a) but the application shall state concisely the grounds on which it is made. Grounds 1, 2, 3, 4 and 5 can only be proven upon evidence being tendered and admitted. In the premises, this Court shall deem that the said grounds are in support of an order under VI, Rule 13 (b).

It is my view that Grounds 6 or 7 do not require any evidence and the Court can determine the same on the basis of the pleadings and without any reference to any evidence contained in the affidavits. I shall therefore deem it that the said two grounds are in support of an order under Rule 13 (1) (a) to the effect that the Plaintiff does not disclose any reasonable cause of action against the 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Defendants.

I have carefully perused the Plaintiff and Defence by the Applicants and in particular paragraph 11, 14 and 15 of the Plaintiff. In the Suit, the Plaintiff claims to have purchased the Suit property L.R. No. 8304 situated at Eldoret North, Moiben Division in Uasin Gishu District measuring 1680 acres from the 1<sup>st</sup> Defendant who is still registered as the proprietor thereof. Although, it has not been extended to the prayers, the Plaintiff through paragraph 15 of the Plaintiff appears to be seeking a declaration that the suit property legally belongs to the Plaintiff vide an agreement entered between the Plaintiff and the 1<sup>st</sup> Defendant. There is an alternative prayer for an order of specific performance for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to transfer the title to the property to the Plaintiff. There is a prayer for a Permanent Injunction against **all** the Defendants, their servants, and agents from interfering with, trespassing onto, surveying, subdividing, alienating, selling, transferring or in any other way doing anything over and in

respect of the suit property.

There are allegations in the Plaintiff that the 1<sup>st</sup> Defendant is in the course of carrying out acts of fraud and breaches of contract “in cahoots” with the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants.

It is my view that on the face of the pleadings, the Plaintiff discloses a reasonable cause of action against the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants i.e a Permanent Injunction restraining them from carrying out the acts alleged in Paragraph 11 of the Plaintiff. The prayer for an order under rule 13 (1) (a) must therefore fail.

I now will deal with the Order sought under Rule 13 (1) (b) which shall be deemed to be supported by the annexed affidavit to the Application.

The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants claim to be among the lawful directors of the Plaintiff Company and that this suit was instituted against the Defendants and in particular the 3 directors without a resolution of the Company. In support of the said contention, they produced a copy of a letter dated 3<sup>rd</sup> March, 2006 from the Department of the Registrar General which confirms that according to the Company’s annual return (last filed) in 1979 and Notice of Change of directors (form 203) dated 12.08.1992 and filed on 14.08.1992, the following are indicated as directors:-

1. KIPRONO ARAP KOSKEI
2. KIMETO ARAP ROTICH
3. KIPSONDIN ARAP KUTO
4. KIPYEGO ARAP SIGILAI
- x 5. JAMES KIMOSBEI TUWEI
6. JULIUS CHELUGUI
- x 7. ISAAC CHEPSIROR
8. PHILIP MANDAGO
9. JACKSON BUSIENEI
10. FRANCIS KUTTO
11. SAMWEL TIROP
- X 12. SILVESTER BIWOT
13. DANIEL MUGE
14. KIPKEMBOI SAINA

The 4<sup>th</sup> Defendant is listed as No. 5 on the list, the 5<sup>th</sup> Defendant as No. 7 and the 6<sup>th</sup> Defendant as No.12.

In their Replying Affidavits, the Plaintiff states that the first Directors of the Plaintiff Company were:-

- (i) KIPRONO ARAP KOSKEI
- (ii) KIPSONDIN ARAP KUTO

(iii) KIMETO ARAP ROTICH (since deceased)

(iv) KIPYEGO ARAP SIGILAI.

That no new directors have been appointed pursuant to the Articles of Association. The Plaintiff said that it obtained a copy of the Form 203 A registered on 12.08.1992 and noted that:-

(a) The said form is a forgery

(b) The number of Directors purportedly appointed are 10 when the maximum is 7 Directors

(c) There were no minutes accompanying the registration as required under the Articles of the Company

(d) Thus, the said persons are mere imposters and the Company has moved appropriately, to seek remedy for the imposition.

The Plaintiff also contends that when it learnt of the purported registration, it moved with speed and had the Criminal Process invoked.

I have considered the application, the supporting affidavits, Replying Affidavits and Submissions by Counsel.

For this Court to consider whether the suit was filed with the authority of the Plaintiff Company through a valid resolution or otherwise and whether the application has any merits, it must in essence determine who are the lawful directors of the Company. The Defendants rely on the letter dated 3<sup>rd</sup> March 2006 from the office of the Registrar – General which sets out the list of directors of the Company. It includes the 3 Defendants as directors. The Plaintiff in its reply alleges that this is a forged document and the 3 Defendants are imposters. The Plaintiff denies that the three are directors and members of the Plaintiff Company.

In the light of the foregoing, I hereby do find that there is a serious dispute between the Plaintiff and the 3 Applicants herein as to the authenticity and validity of the letter dated 3<sup>rd</sup> March, 2006. There is a serious controversy as to the true and lawful directors of the Company. The Plaintiffs alleges that the letter is a forgery. It claims that it has commenced Criminal proceedings against the three Defendants though there is no evidence before this Court that the matter was referred to the Police.

This Court at this stage is unable to determine and rule as to who were the true and lawful directors of the Company at the time the Suit was instituted. The affidavits and contents are not adequate for a fair and accurate finding by the Court on this contentious issue.

There are two possible ways for this question to be determined. These are:-

1. Either these proceedings to be stayed for investigations to be carried out by the Registrar of Companies or the Police,

or,

2. The parties amend their pleadings to include this question so that it is determined within the suit.

This Court would not direct stay of proceedings to enable Criminal Investigations to be carried out. This is a matter for the Plaintiff to consider. It would also delay the expeditious disposal of the suit. I would recommend that for an effectual and wholesome determination of this suit, that the 3 Defendants /Applicants do amend their defence to specifically respond to the allegation that they are not members of the Plaintiff Company as pleaded in paragraph 14 of the Plaint. It is noted that the 1<sup>st</sup> Defendant alleges

that in August, 1997, it entered into a Sale agreement with the lawful representatives /agents of the Plaintiff, to wit, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants. This demonstrates that the dispute as to who are the true directors of the Company is a common issue between the parties.

In the light of the foregoing, this Court cannot strike out the Plaintiff's suit on the ground that the suit has been instituted without the authority and resolution of the Company. It is not quite certain and clear at this stage as to who are the directors of the Company and authorized to institute this suit in the name of the Company. Equally, the alleged directorship of the 3 Defendants is seriously disputed and can only be determined upon a full hearing by way of viva voce evidence.

I therefore do hereby dismiss the Application. Since I think that the application was not frivolous in the circumstances considering the existence of the letter dated 3<sup>rd</sup> March, 2006, costs shall be in the cause.

Under the powers of this Court under Rule 13 (1), I do hereby order that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants do file an Amended Defence within the next 45 days (considering the on-coming Christmas Vacation). Orders accordingly. The Plaintiff to file a Reply within 21 days of service.

**DATED AND DELIVERED AT ELDORET ON THIS 20<sup>TH</sup> DAY OF DECEMBER 2007.**

**M.K. IBRAHIM,**

**JUDGE.**

-----