



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**Civil Case 72 of 2003**

**ULUNGALU NA UTANU YATTA TRADING**

**INDUSTRY & TRANSPORT CO. LTD.....PLAINTIFF**

**VERSUS**

**FRANCIS MUTUA MBOYA P/A MUTUA MBOYA & COMPANY ADVS.**

**NGANGA NGIGI P/A NG'ANG'A NGIGI & CO. ADVOCATES .....DEFENDANTS**

**RULING**

Before me is the application dated 24/9/03 brought by the plaintiff/applicant. It seeks orders of injunction to restrain the 1<sup>st</sup> defendant from trespassing, transferring or in any manner interfering with the suit land known as Machakos/Matuu/594 pending the hearing and determination of this suit. Plaintiff also seeks costs of the application. The application is brought pursuant to order 39 Rules 1 and 2 of the Civil Procedure Rules and Section 3A Civil Procedure Act.

The grounds upon which the application is grounded are in the body of the application and it is further supported by the affidavit of John Mutua Kimuya the Secretary of the plaintiff company who claims to be authorized to swear the affidavit on behalf of the applicant. The application was opposed and a replying affidavit sworn by the 1<sup>st</sup> defendant Mutua Mboya.

The grounds upon which the application is brought are that the 1<sup>st</sup> defendant obtained the title to the suit land herein by fraud by misleading the court in that he teamed up with the 2<sup>nd</sup> defendant to mislead the court and entered into fraudulent consent orders without the knowledge or instructions or authority of the plaintiff company or its directors and it is only fair that the status quo be maintained pending hearing and determination of the suit.

In opposition of the application, Mr Ngolya for the Respondent argued that the application and suit are defective in that the affidavit in support of the application is fatally defective in that the affidavit does not have the endorsement of the advocate who drew it or the firm of advocates who drew it and Section 34 and 35 make it mandatory to have the same endorsed. Counsel cited the case of **BARCLAYS BANK LTD HCC 1736/01 versus DR. ORERO** where the Judge held that an affidavit without an endorsement by the advocate or the firm is fatally defective and not curable and such affidavit should be struck out.

It is the contention of Mr Ngolya that the present proceedings were not authorized by the plaintiff company as there is no company resolution sanctioning the filing of this suit. He relied on the case of **BUGERERE COFFEE GROWERS LTD versus SEBADUKA 1970 E.A 147** in which it was held that

for a company to file any proceedings, a resolution to that effect has to be passed and recorded in the minutes and that there is no evidence of the same. He urges that his suit is brought because of conflicting wishes and interest in the company and that before this suit is filed the said disputes have to be resolved first. The other argument raised by the Respondent is that there was a notice of appeal filed in H.C.C 82/02 which has not been disposed of or withdrawn and the filing of this suit, therefore, amounts to an abuse of court process. Further, it is urged that suit No. 82/02 was filed by the plaintiff now 2<sup>nd</sup> defendant seeking to give effect to the sale agreement between the parties whereas H.C.C72/03 only challenges the transfer of the suit land but not the sale.

Lastly, Mr Ngolya argued that there is no evidence to support a prayer for injunction as there is no evidence that the suit land is in danger of being transferred, wasted or disposed of but on the contrary there is a sale agreement showing a valid sale agreement to the 1<sup>st</sup> defendant.

I have considered the application, affidavits filed and arguments from both sides. As regards the argument by Respondents' counsel that this suit is improperly before the court because there are wrangles in the company which have to be resolved, the nature of the wrangles were not explained to the court. The Respondents have merely made allegations without any evidence in support thereof.

In their submission that there has been no company resolution giving instructions to the firm of Mwangangi Advocates to file this suit, I have earlier observed that there is no evidence of wrangling in the plaintiff company as was evident in the case cited **BUGERERE COFFEE GROWERS LTD. versus SEBADUKA (Supra)**.

In that case, groups of share holders had purported to oust the directors and install another group. It was, therefore, imperative that a resolution be made by the company giving instructions to the Advocates as there was a danger of other people who are not the management doing so. In any case, it is my view that a resolution by the company would be a matter of evidence as it was not claimed that the plaintiff's advocates had no instructions to file this suit. Even in H.C.C 82/02 where the 1<sup>st</sup> defendant was plaintiff and the firm of advocates acted on behalf of the company, there was no resolution passed and the case proceeded to its conclusion. They cannot now take advantage of that which they benefited from. It would not be a ground to strike out this suit or this application.

Can the order of injunction be granted as prayed?

The plaintiff's contention is that the defendants acted fraudulently by entering into consent orders before the court and that is why it is feared that the 1<sup>st</sup> defendant is likely to dispose of the suit land and put it out of reach of the plaintiff.

I have had a look at both the annexures by the plaintiff and defendants. Though it is denied by the Respondents that John Mutua Kimuya, the person who swore the affidavit in support of the applicant's affidavit, was the company secretary of the plaintiff company, at the time of the sale agreement disposing of the suit land, the annexures from the Registrar of Companies do show that he was one of the subscribers. The annexure by the Respondents dated 6/2/93 (minutes) at Minute 3/93 does mention that John Mutua Kimuya was the Secretary and that he owed some money to the company. The issue here is whether John Kimuya was company secretary and whether he took part in the sale agreement which he denies as indeed the same minutes of 6/2/93 indicate that a different person acted as secretary. This raises a triable issue as whether it is the genuine committee of the company which transacted the said sale of the suit land and whether the consents that followed in the matter were authorized by the company. There being an issue to be resolved at trial, I find that the applicants have a prima facie case made out and the plaintiffs would suffer irreparably if the suit land were to be disposed of by the Respondent.

On the other hand, the Respondent argued that the affidavit in support of the present application is defective and offends provisions of Section 35 (1) of the Advocates' Act in that it lacks an endorsement by the drawer of the affidavit. That section provides as follows:

***“Every person who draws or prepares or causes to be drawn or prepared any document or instrument***

***referred to in Section 34 (1) shall at the same time endorse or cause to be endorsed thereon his name or address, or the name and address of the firm which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding 500/= in the case of an advocate.”***

Section 34 (1) referred above provides that no unqualified person shall directly or indirectly take instructions or draw or prepare any document or instrument, amongst other things, relating to any other legal proceedings. It is this court's view that an affidavit is included in any other legal proceeding. Section 35 (1) is couched in mandatory terms.

In fact Section 35 (2) of the same Act goes on to prohibit the Registrar from accepting such a defective document upon filing of the application. In my view, the said section calls for strict compliance so that non compliance renders the affidavit fatally defective. This is what Justice Njagi held in the case of ***BARCLAYS BANK LTD versus DR. ORERO HCC 1736/01***. I do subscribe to the same view.

Despite the merits of the applicant's case, I find the affidavit in support of the application to be fatally defective. It cannot be salvaged or cured by Order 18 Rule 7 Civil Procedure Rules. It is not a procedural defect but offends provisions of a statute.

It has to be struck out and I order that the said affidavit dated 24/9/03 sworn by John Mutua Kimuya struck off. The application cannot stand alone without evidence. It suffers the same fate and it stands struck out with costs to the Respondents.

Dated at Machakos this 25<sup>th</sup> day of January 2005

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**