



REPUBLIC OF KENYA

IN THE HIGH KENYA AT NAIROBI

CIVIL SUIT 1000 of 2004

MUKUYU-INI FARMERS CO. LTD..... PLAINTIFF

VERSUS

**NJOMO NJENGA t/a NJOMO NJENGA & CO. ADVOCATES.....
DEFENDANT**

RULING

By chamber summons dated 21.10.04 and filed under Order VI rule 13 (1) (b) of the Civil Procedure Rules on the same date, the defendant applied for the following orders:-

1. That the chamber summons and plaint filed by the plaintiff on 23.09.04 be struck out with costs. 2. That the costs of this application be provided for. The grounds upon which the present application is based are :- a) That the filing of the said pleadings was not authorized by Mukuyu-ini Farmers Co. Ltd. b) That some of the purported directors of the plaintiff Co. have no legal or any capacity to act as directors of Mukuyu-ini Farmers Co. Ltd. c) That the said pleadings are scandalous, vexatious and frivolous. d) That this suit is an abuse of the court process.

The application is based on a short affidavit of the defendant/applicant, Njomo Njenga sworn on 21.10.04. The main thrust of the affidavit is that the defendant/applicant honestly believes that the said pleading are scandalous, frivolous, vexatious and are an abuse of the process of this honourable court; that the applicant honestly believes that that this suit has not been authorized by M/S Mukuyu-ini Farmers Co. Ltd; that some of the directors who signed the verifying affidavit have no legal or any authority to purport to represent M/S Mukuyu-ini Farmers Co. Ltd as its directors; that some of the purported directors of the Co. are not even shareholders leave alone its directors; and that he (defendant/applicant) honestly believes that this suit purportedly brought by Mukuyu-ini Farmers Co. Ltd cannot stand in light of clear provisions of the law.

For avoidance of doubt, the plaint filed on 23.09.04 prayed for judgment against the defendant jointly and severally for:- 1. A declaration that the continued interference of the affairs of the Co. by the defendant is unlawful, unprofessional and the defendant should pay the plaintiff general and exemplary damages. 2. An order of permanent injunction restraining the defendant either by himself, his agents, employees, servants, and/or otherwise howsoever, from holding himself and/or falsely representing himself as the plaintiff's advocate, lawyer, legal adviser in any matter pending in court or otherwise whatsoever and/or interfering with the affairs of the plaintiff, legal or otherwise to the detriment of the plaintiff's interest.

The main prayer in the plaintiff's/respondent's chamber summons filed on 23.09.04 seeks an order similar to the order sought vide prayer 2 of the plaint above but on a temporary basis pending the hearing and determination of the suit (or) further orders of this honourable court. The plaintiff/respondent also asks in the same chamber summons that costs of his application be provided for. The plaintiff's chamber

summons is based on the following grounds:-

1. That the defendant has falsely been representing himself as the plaintiff's advocate and has purported to file court documents on behalf of the plaintiff without the plaintiff's authority, consent, knowledge or at all. 2. That due to the foregoing conduct of the defendant, adverse orders have been issued to the detriment of the plaintiff. 3. That the plaintiff shall suffer great prejudice unless the sought orders are granted.

The defendant's/applicant's chamber summons of 21.10.04 came up for hearing before me on 21.02.05 whereat the defendant/applicant represented himself while the plaintiff/respondent was represented by learned counsel, Mr. N.M. Kamwendwa. When giving highlights of his chamber summons of 21.10.04 the defendant/applicant started with the second ground in his said chamber summons, namely, that some of the purported directors of the plaintiff Co. have no legal or any capacity to act as directors of Mukuyu-ini Farmers Co. Ltd. He sought to support this ground with his earlier replying affidavit sworn on 13.10.04.

In that long affidavit Mr. Njomo Njenga described himself as "the defendant/respondent herein" and proceeded to state, inter alia, that some of the deponents are not directors of the plaintiff Co. and that they cannot therefore purport to represent the company; that he believed the plaintiff co., Mukuyu-ini Farmers Co. Ltd has not authorized the filing of this suit; that he honestly believed that M/S N.M. Kamwendwa & Co. Advocates are not duly authorized to represent M/S Mukuyu-ini Farmers Co. Ltd and sought to support his latter belief with Annexure NNI", being " a copy of a letter from the plaintiff's company secretary."

That letter is dated 17.09.01. It indicates that it was addressed to him by one Paul Gitau Mbui as chairman of Mukuyu-ini Farmers Ltd, not a secretary, and it was telling Njomo Njenga & Co. Advocates that they had been appointed on 17.09.01 by the board of directors of Mukuyu-ini Farmers Co. Ltd to be the company advocate and that the letter was authorizing the said Njomo Njenga & Co. Advocates to take over the conduct of all the pending company matters and deal with the same to their conclusion.

Mr. Kamwendwa as counsel for the plaintiff and respondent to Mr. Njomo Njenga's chamber summons of 21.10.04 objected to Njenga addressing himself to issues not raised in his chamber summons of 21.10.04. Mr. Kamwendwa submitted that the issues raised by Mr. Njenga in his affidavit of 21.10.04 do not form part of the issues in the present application and that by raising them now, he will deny the plaintiff/respondent the opportunity of substantively responding to any issues in connection with the present application from the Bar. Mr. Kamwendwa urged that Mr. Njenga should confine himself to the application presently before court.

In his rejoinder, Mr. Njenga described Mr. Kamwendwa's objection as misplaced, pointing out that at paragraph 4 of his (Njenga's) affidavit of 21.10.04 he had deponed that some of the directors have no legal or any authority whatsoever to represent the plaintiff. He (Njenga) added that the issue of lack of capacity on the part of some of the directors was responded to in paragraphs 6 and 7 of the affidavit of the plaintiff sworn on 15.12.04.

Mr. Njenga submitted that for the court to determine the issue of whether to strike out the pleadings or not, the court has to look at the plaint by the plaintiffs, their chamber summons and his (Njenga's) affidavit of 13.10.04 on record and "raise" (address) the issue of capacity. Mr. Njenga also pointed out that he had attached to his replying affidavit of 13.10.04 Justice Lenaola's orders.

I peruse here to note that Justice Lenaola's orders relate to High Court Miscellaneous Application No.723 of 2004, being an application by one Stephen Waweru Njenga for leave to apply for an order of certiorari against the Registrar of Companies to prohibit him from registering some 9 people as directors of Mukuyui-ni Farmers Co. Ltd and that some of them appear to be among the persons who filed the chamber summons of 22.09.04 and that pending the determination of the application for prohibition and mandamus, the directors of Mukuyuini Farmers Co. Ltd elected in the 2003 Annual General Meeting shall continue to act as directors. Mr. Njenga concluded his submissions by contending that the

plaintiff/respondent (Mukuyu-ini Farmers Co. Ltd) is estopped from denying what he knows about; that it is not the practice to annex documents already in the file; and that Mr. Kamwendwa's objection be dismissed.

In reply, Mr. Kamwendwa as counsel for the plaintiff/respondent submitted that paragraph 4 of the defendant's (Njenga's) affidavit of 21.10.04 wrongly states that some of the directors do not have authority to represent the plaintiff. He (Kamwendwa) pointed out that the said paragraph does not say which directors it alludes to, neither does the paragraph or the affidavit give reasons as to why the directors alluded to have no authority or capacity to represent the plaintiff. Mr. Kamwendwa objected to the defendant, Mr. Njenga giving those reasons from the Bar now. Mr. Kamwendwa contended that if the defendant intended to rely on any document previously filed in court, he should have specifically stated so in his affidavit in support of the present application.

With regard to paragraphs 6 and 7 of the plaintiff's affidavit of 15.12.04, Mr. Kamwendwa pointed out that the plaintiff specifically responded, vide those paragraphs, to paragraph 4 of the defendant's affidavit of 21.10.04. He maintained that an application or affidavit is not a pleading and referred the court to the definition of pleading in section 2 of the Civil Procedure Act (Cap. 21). He urged the court to confine itself to the plaint or defence, if any, in considering the application for striking out. Finally, Mr. Kamwendwa urged that the defendant, Mr. Njenga should confine himself to the issues raised in his chamber summons application of 21.10.04.

I have given due consideration to Mr. Kamwendwa's objection and to Mr. Njenga's rejoinder thereto and have come to the conclusion that the interlocutory application now before me by way of chamber summons application of 21.10.04 will not resolve the real issues in controversy between the parties. In my humble view, Mr. Njenga's pet subject of lack of capacity or authority on the part of some of the directors who brought the suit against him on behalf of Mukuyuini Farmers Co. Ltd, and whom Mr. Njenga has not named, is a substantive issue which the court can only properly determine on full evidence upon hearing the main suit.

I am also of the considered view that if the defendant, Mr. Njenga intended to support his chamber summons application of 21.10.04 with his earlier replying affidavit of 13.10.04, he should have so specified in his said chamber summons application. I am of the further considered view that it will be very difficult for the parties herein to address their respective interlocutory applications meaningfully without having to veer into issues central to the main suit and which issues, as indicated earlier, can only be properly adjudicated upon by the court upon hearing full evidence in the main suit.

Accordingly, Mr. Kamwendwa's objection is hereby upheld. This court does not find it useful to tax itself with the side-shows the present application by the defendant, Mr. Njenga is inviting it to engage in. The upshot is that since the pleadings raise triable issues for the courts determination regarding the defendant's authority or otherwise to represent the plaintiff company in any of its affairs, the parties should take a date on priority basis for the hearing of the main suit. Meanwhile the interim restraining orders issued earlier against the defendant are hereby extended pending the hearing and determination of the suit. Costs shall be in the cause. Orders accordingly.

Delivered at Nairobi this 13th day of May, 2005.

B.P. KUBO

JUDGE