



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE 116 OF 2002

GRACE WANJIRU MUNYINYI.....1ST PLAINTIFF

MOSES KINYANJUI MUNYINYI.....2ND PLAINTIFF

VERSUS

GEDION WAWERU GITHUNGURI.....1ST DEFENDANT

KIMANI NJOROGE.....2ND DEFENDANT

JAMES KAMAU MWANGI.....3RD DEFENDANT

RACHAEL WANJIKU.....4TH DEFENDANT

MARY WANJIKU KAMAU.....5TH DEFENDANT

NAIROBI FRAME INDUSTRIES LTD.....6TH DEFENDANT

RULING

The plaintiffs, Grace Wanjiru Munyinyi and Moses Kinyanjui Munyinyi filed this suit on behalf of Moses Munyinyi Mbogo whom they claimed to be acting on behalf after being appointed as his attorneys. They contend that the said Moses Munyinyi Mbogo had appointed them to be his attorneys by executing a power of attorney which was duly registered. The plaintiffs have sued five individuals, who are all directors of Nairobi Frame Industries Limited, and the company itself. In their amended plaint, the plaintiffs have sought the following orders of this court against the defendants, both jointly and severally;

(i) A permanent injunction barring the defendants herein from closing or terminating the operations of the 6th defendant in an unprocedural or illegal manner or alienating or removing the machines or property of the 6th defendant from its premises situated on BAHATI/KABATINI BLOCK 1/2040 or converting the 6th defendants premises or business to other uses or operations contrary to the objects of the 6th defendant.

(ii) A mandatory injunction compelling the defendants to allow a declaration that Moses Munyinyi Mbogo is entitled either by himself or his agent to participate in the management of the affairs of the 6th defendant company with an order that the defendants herein do render to the plaintiffs a true and fair account of the assets and liabilities of the 6th defendant and of the profits or losses thereof since 1989 to the date of judgment.

(iii) Costs of this suit.

(iv) Further or other reliefs as the court will in its discretion deem fit.

The defendants filed a defence. In their defence the defendants denied that they had conducted the business of the 6th defendant company contrary to the law and its memorandum and articles of association. The defendants then filed an application under the provisions of Order VI rule 13(a) and (d) (actually order VI rule 13(1) (a) and (d)) of the Civil Procedure rules and Section 3A of the Civil Procedure Act seeking the orders of this court to strike out the plaint filed by the plaintiffs herein. The application is supported by the annexed affidavit of Gideon Waweru Gathunguri and the grounds stated on the face of the application. The defendants have contended that the plaint did not raise any reason cause of action against the defendants since the matters complained of principally concern the affairs and the management of the 6th defendant, a limited liability company incorporated under the Companies Act Cap 486 and that the plaintiffs ought to have availed themselves of and complied with the provisions of Section 211 of the Companies Act and approach the court by way of petition instead of filing a plaint. They further contended that the suit instituted purportedly on behalf of Moses Munyinyi Mbogo in the personal names of the plaintiffs and in their own capacities was fundamentally defective and irregular. The defendants stated that the suit had been filed in flagrant breach of the mandatory provisions of the law as relates to suits filed on behalf of persons of unsound mind. Finally the defendants contended that the suit, as filed, was an abuse of the due process of the court. The plaintiffs opposed the application. They filed grounds of opposition to the application.

At the hearing of the application, Mr Karanja, Learned Counsel for the defendants, basically reiterated the contents of the application and the affidavit in support thereof. He submitted that the complaint raised by the plaintiffs related to the manner in which the 6th defendant company was being run. He argued that the affairs of the 6th defendant was governed by its memorandum and articles of association. He submitted that a party could not challenge the running of the company by filing a suit against it. If a party felt aggrieved, or oppressed then the only available procedure is for such a party was to file a petition under Section 211 of the Companies Act. Learned Counsel argued that the plaintiffs suit intended to stop the 6th defendant company from selling some of its assets. The issue in dispute was therefore basically an issue of management of the company. Mr Karanja doubted if the plaintiffs had capacity to institute a suit on behalf of Moses Munyinyi Mbogo whom they contended was mentally unstable. He urged the court to allow the application and strike out the suit filed by the plaintiffs.

Mr Oduor, Learned Counsel for the plaintiffs opposed the application. He submitted that the plaintiffs were not the shareholders of the 6th defendant but the holders of a power of attorney donated to them by Moses Munyinyi Mbogo. He submitted that the plaint raised triable issues. He further argued that want of form cannot be raised to defeat the legitimate claim raised by the plaintiffs. He submitted that the plaintiffs did have capacity to file suit on behalf of the said Moses Munyinyi Mbogo who had donated to them power of attorney to act on his behalf. It was argued by the plaintiffs that this court had powers to interfere with the running of a company if the rights of a shareholder were being infringed. Although the plaintiffs conceded that they did not ask the 6th defendant to call a meeting so that they could raise their concerns, they argued that this fact did not deny an aggrieved shareholder a right to approach the court and seek appropriate remedies. Such an aggrieved shareholder could even approach the court by way of a plaint.

Learned Counsel submitted that an aggrieved shareholder could approach the court even by way of plaint and not only by filing a petition. He further submitted that Moses Munyinyi Mbogo was not of unsound mind when he donated the power of attorney to the plaintiffs. The plaintiffs denied that the said Moses Munyinyi Mbogo was of unsound mind. They contended that no proof had been exhibited in the application to show that the said Moses Munyinyi Mbogo was of unsound mind. The plaintiffs further submitted that the defendants had brought the application under the wrong provisions of the Civil Procedure rules. Learned Counsel argued that the application was therefore defective and should be struck out. Learned Counsel relied on several legal texts and a decided case in support his submissions.

In response, Mr Karanja, Learned Counsel for the defendants submitted that the plaintiffs ought first to

have exhausted all the remedies available to them under the memorandum and articles of association of the 6th defendant company before coming to court. He further submitted that an estate of a person of unsound mind could not be run by a person in possession of a power of attorney. He finally submitted that the omission of the word "Rule 1" was a typographical error which could be rectified by the court. He urged the court to allow the application with costs.

I have carefully read the pleadings filed by the parties to this application. I have also considered the able submissions made by counsel for the plaintiffs and counsel for the defendants. Two issues have emerged for determination by this court. The first issue is whether the plaintiffs had capacity to bring the suit on behalf of Moses Munyinyi Mbogo whom they contend donated a power of attorney to them to administer his affairs. The second issue for determination is whether the suit filed by the plaintiff disclosed reasonable cause of action to enable this court to rule that it ought to be heard and determined on merits. In their pleading filed in court and especially the affidavit of Gideon Waweru Gathunguri, the 1st defendant, it has been stated that the said Moses Munyinyi Waweru has suffered from mental illness to the extent that he was not in a position to manage his own affairs, including the affairs of the 6th defendant company. This statement of fact by the defendants has been denied by the plaintiffs. However their denial was made in court when Mr Oduor, Learned Counsel for the plaintiffs argued the plaintiffs response to the application filed by the defendants. No affidavit was filed by the plaintiffs to dispute the allegation as regard the mental status of the said Moses Munyinyi Mbogo. As it were, the said statement stood unchallenged and this court has no other option but to hold that the said Moses Munyinyi Mbogo was a person of unsound mind.

Having made this finding that the said Moses Munyinyi Mbogo is a person of unsound mind, could he donate the power of attorney to the plaintiff? In law, he could not. The power of attorney which the plaintiffs have exhibited and annexed to their pleadings state that the donor, Moses Munyinyi Mbogo appointed the plaintiffs "to manage and transact all (his) affairs in Kenya and execute such deeds or instruments as may be necessary or must to my advantage, and use all lawful ways and means thereto, as fully and effectively to all intents and purposes as I might or could to if personally present and acting herein ..." (underlining mine). A power of attorney presupposes that the person donating it has capacity. In the instant case it has been established that Moses Munyinyi Mbogo is of unsound mind and could not therefore have capacity to donate a power of attorney to anyone. What the plaintiffs should have done was to petition the court under Section 26 and 27 of the Mental Health Act (Cap 248 of the Laws of Kenya) to be appointed to be the administrators of the estate such a person of unsound mind. In the circumstances of this case, the plaintiff lacked capacity to file this suit on behalf of Moses Munyinyi Mbogo. The power of attorney that they have purported to rely on to file this suit has no legal effect since the person who purported to have donated the power of attorney did not have mental capacity in the first place to donate such powers.

On the second issue, the plaintiffs in their plaint are basically challenging certain decisions made by the five defendants in their capacity as directors of the 6th defendant. It appears that the plaintiffs were not happy with the decision of the directors of the 6th defendant company to close down its operations at Bahati and relocate to Nairobi. The plaintiffs have conceded that they did not raise this issue with the 6th defendant. They did not request a meeting of the shareholders of the 6th defendant company to be held so that their concern could be raised and addressed by the company. Instead the plaintiffs choose to file this suit. Now, are the issues raised by the plaintiffs' justiciable? In my humble view they are not. The plaintiffs have not established that the five defendants as the directors of the 6th defendants have managed the affairs of the 6th defendant contrary to the law or against the memorandum of articles of association of the 6th defendant. Courts can only intervene when it is established that either the law or the memorandum and articles of association of the company has been breached by its directors. Courts cannot be called upon to make decisions on issues which are basically related to the internal management of a company.

In the instant case, the plaintiffs are aggrieved that the directors of the 6th defendant company have made a decision to close its operations at Bahati and relocate to Nairobi. I suppose the said decision was made by the directors for some business reason. I do not know. But be it as it may, this is an issue which the plaintiffs could have raised in a meeting of shareholders. This they did not do. They instead came to

court. Unfortunately this court cannot enter into the fray and make decision on behalf of the 6th defendant company. To do so would be interfering with internal management of the 6th defendant, a role which this court is ill-equipped to undertake. If the plaintiffs were dissatisfied with the way the affairs of the 6th defendant were being managed, the right procedure they would have followed was to file a petition as provided by Section 211 of the Companies Act. They were not at liberty to file a plaint to ventilate what they perceived to be the mismanagement of the 6th defendant company. A litigant is not at liberty to choose the form in which to approach the court. He has to approach the court by the duly established procedure. By filing a plaint, the plaintiffs were not only abusing form, they were also abusing the established procedure.

For the reasons stated hereinabove, it is clear that the defendants application is meritorious. The same is allowed. The plaintiffs herein filed the plaint without legal capacity. They further filed this suit in abuse of the due process of the court. The plaint does not therefore disclose a reasonable cause of action. It is consequently struck out. The plaintiffs shall pay the costs of this application and the costs of the suit.

DATED at NAKURU this 17th day of June 2005.

L. KIMARU

JUDGE