



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL SUIT 79 OF 2005

UMOJA SERVICE STATION LIMITED.....1ST PLAINTIFF
PETER GAKONYO NDIRITU.....2ND PLAINTIFF
JOYCE M. GAKUGI.....3RD PLAINTIFF
NAFTALY W. NJOROGE.....4TH PLAINTIFF
SAMUEL A. KAMONJO.....5TH PLAINTIFF
PETER N. MUTHOGA.....6TH PLAINTIFF

VERSUS

HEZY JOHN LIMITED.....1ST DEFENDANT
ANTHONY WAGURA IKIKI.....2ND DEFENDANT
SAMUEL GICHUHI KING'ORI.....1ST DEFENDANT
DOUGLAS KING'ORI MUTHUA.....2ND DEFENDANT
PETER GICHOHI GITAU.....3RD DEFENDANT

RULING

By a Chamber Summons dated 19th September 2005, the Plaintiffs/Applicants moved this court under order XXXIX rule 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders *inter alia*:-

- ***That the Defendants by themselves, their agents, servants or any other person claiming through them be restrained by a temporary injunction from taking over the Plaintiff's company as Director and/or interfering with the Plaintiffs company on the strength of the minutes of extra-ordinary general meeting held on 2nd July 2005 and on 3rd September 2005.***
- ***That this Honourable court do order that the defendant's meeting held on 2nd July 2005 and subsequently on 3rd September 2005 be declared to be null and void.***

The application is grounded on several grounds stated on the body of the application and numbered (a) to (j). Grounds (g), (h) and (i) which are herein set out give the gist of the applicants' complaints.

“(g) That the defendants have declared themselves the Directors of the Plaintiffs’ company on the strength of the two notices and subsequently on the strength of the meeting held on 2nd July 2005 and on 3rd September 2005 which notices are defective, null and void and subsequently the meeting was irregular.

(h) That the defendants have indeed procured a certificate of registration from the registrar of companies as the directors of the Plaintiffs’ company which certificate was invalidated by the Senior Registrar of Companies on irregularity.

(i) That the defendants are interfering with the operations of the Plaintiffs’ company and the continued interference and disruption by the defendants of the company’s affairs and any attempt to act on the said notices and subsequently on the said minutes of the meeting would cause irreparable loss to the company which runs petroleum business and other undertaking of substantial monetary value.”

Having been served with the application the Respondents have raised a preliminary objection on the ground that the application dated 19th September 2005 and the entire suits were filed in contravention of Section 6 of the Civil Procedure Act and therefore subjudice, and not properly before the court.

It is the Respondent’s contention that the applicants had filed an earlier suit Nyeri HCCC 56 of 2005 wherein similar injunctive orders were sought but which orders the court declined to grant at an interlocutory stage. The suit is therefore still pending and the court cannot proceed with another suit raising the same issues. The Respondent therefore urged the court to strike out the suit as being improperly before it.

For the applicants it was submitted that section 6 of the Civil Procedure Act is inapplicable as the parties in the two suits are not the same nor are the prayers the same.

Section 6 of the Civil Procedure Act states as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Looking at the pleadings in HCC Suit No.56 of 2005 (which were provided) and comparing the same with the pleadings in this case. It is evident that the five Applicants/Plaintiffs in this case are also Plaintiffs/Applicants in HCCC No.56 of 2005 except that there is a 6th Plaintiff in the latter case.

The temporary injunction sought in HCCC No.56 of 2005 is in the following terms:-

“That the defendants by themselves their agents, servants or any other person claiming through them be restrained by a temporary injunction from convening the meeting of the company i.e. Umoja Service Station Limited on the strength of their notices dated 7th April 2005 and 10th June 2005 or any other notices at anytime pending the hearing and determination of this suit.”

The final prayer in the plaint seeks a similar order but for a permanent injunction.

A reading of these prayers shows that although the suit arises from the operations of Umoja Service Station Limited, the issues raised in the two suits cannot be said to be identical such that it can be said that the matters directly in issue are substantially the same.

Further unlike the present case the Defendants in HCCC No.56 of 2005 are Edith Wangari Gitata, Kiiru Gacuiga and Wangechi Kingori who are all sued in their own individual capacity. They are not therefore parties who claim or litigate under the same title as the Defendants herein.

In my considered opinion section 6 of the Civil Procedure Act is not applicable herein and I do therefore overrule the preliminary objection and order the hearing of the application to proceed.

Dated, signed and delivered this 13th day of October 2005.

H. M. OKWENGU

JUDGE