

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL SUIT 1087 OF 2003

Francis Mochu Kibui **1st Plaintiff**

Rushmore Company Limited.....**2nd Plaintiff**

-versus-

Joseph Kahungura Kariuki.....**Defendant**

RULING

On the and 3rd December 2003, the Defendant/Applicant filed a Chamber Summons application of that date seeking an order to strike out the Amended Plaint dated the 6th November 2003 and filed on 7th November 2003. The Applicant relies on the principal ground (amongst others) that no authority of the Second.Plaintiff/Respondent company was obtained to institute the suit. The application is supported by the Defendant's/Applicant's affidavit made on the 3rd December 2003.

No grounds of opposition to the application were filed but the same is nonetheless opposed on the basis of the Replying Affidavit of the First Plaintiff/Respondent made and filed on the 29th January 2004.

In support of the principal ground aforesaid, Mr. Mbigi, for the Applicant, replied on several judicial authorities, including the decision in *Bugerere Coffee Growers Ltd vs Sebaduka and Another* [1970] E. A. 147, and urged that the orders sought be granted.

Mr. Githara, for the Respondents, conceding that the authority of the Second Plaintiff to file suit was not obtained, contended that given that the First Plaintiff and the Defendant are the only Directors and Shareholders of the Second Plaintiff company, it was not practicable in the circumstances deponed to in paragraph 4 of the said Replying Affidavit for such authority to be procured either at a company or Board of Directors' meeting. Citing **Halsbury's Laws of 1 England** (4th Edition) Volume 7(2) at paragraph 1110, learned counsel argued that the proceedings had been properly instituted. He urged also, on the authority of **D. T. Dobie & Company (Kenya) Ltd. vs. Muchina** [1982] KLR 1, that the discretion to strike out pleadings should be used sparingly and cautiously and then only in the clearest of cases.

I have considered the application in light of the respective arguments of counsel.

Firstly, it is common ground that the authority of the Second Plaintiff company to file suit was not obtained. It is therefore not true that the First Plaintiff/Applicant is duly authorized to swear his Replying Affidavit on the company's behalf as stated in paragraph 1 thereof.

Secondly, and with respect, the reference to **Halsbury's** (supra) is of no assistance to the Respondents. It states:-

“Where, however the persons against whom relief is sought hold and control the Majority of the shares, and will not permit an action to be brought in the company name, shareholders complaining may bring an action in their own names and on behalf of the other” (emphasis added).

There is no evidence that the First Respondent made any attempt whatsoever to convene a meeting of the Second Respondent or of its Board of Directors but even if the Defendant had at such meeting, if held, not agreed to an action by the company, it would appear from the passage quoted hereinabove that the First Plaintiff could still not join the company as co-plaintiff when instituting his own action.

Accordingly, I find and hold for the Defendant/Applicant on his Chamber Summons application dated the 3rd December 2003 but only to the extent that the Second plaintiff cannot be a party to these proceedings without its consent and authority. I therefore order that the Second Plaintiff/respondent namely, Rushmore Company Limited, be and is hereby struck out from the amended plaint filed on the 7th November 2003 and from all pleadings herein.

The first Plaintiff/Respondent will bear the costs of the application.

Dated and delivered at Nairobi this twelve day of November 2004.

P. KIHARA KARIUKI

AG. JUDGE