

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
Civil Suit 245 of 2001

GATIMU FARMERS CO. LTD.....PLAINTIFF

VERSUS

SOLOMON MBUGUA & ANOTHER.....DEFENDANTS

RULING

The Defendants have made an application under **Order VI Rule 13(1) (b) (d) of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** seeking the orders of this Court that the plaint filed by the Plaintiff dated the 16th of July 2001 be struck out. The Defendants have further prayed that one Geoffrey Kagiri Kimari who purported to institute the said action in the Plaintiff's name be condemned to pay the costs of the suit and the costs of this Application in person. The Application is based on the legal grounds that the suit filed by the Plaintiff had been overtaken by events and one of the prayers sought was incapable of being executed and the grant of the said order would be in futility. The Defendants further stated that the suit filed by the Plaintiff was frivolous and did not have any substance or judicial utility. The Plaintiff further stated that the suit was filed by an individual who was masquerading as the Plaintiff company without any written authority or the resolution of the company to do so. The Defendant further stated that the said Geoffrey Kagiri Kimari had earlier filed a suit in the name of the Plaintiff which suit had been struck out and the said Geoffrey Kimari Kagiri condemned to pay costs. The Defendant were of the view that Geoffrey Kagiri Kimari was a vexatious litigant who had abused the due process of the Court. The application is supported by the annexed affidavit of Antony Gichuru.

The Application is opposed. The Plaintiff has filed grounds of opposition in opposition to the said application. The Plaintiff stated that the application filed was an abuse of the due process of the Court. It further stated that this Court had ruled on the 11th of May 2004 that no adverse orders on costs could be made against a person (read Geoffrey Kagiri Kimari) who was not a party to the suit. The Plaintiff further stated that the suit filed had not been overtaken by events as the purported subsequent elections and activities conducted by the Applicants in their purported capacity as directors of the company would be a nullity if the Court finds that the purported elections of 11th of July 2001 were a nullity. The Plaintiff further stated that the Application as filed was misconceived and did not have any merits. At the time of filing his grounds of opposition, the Plaintiff filed an application under **Order VIA Rules 3 and 8 of the Civil Procedure Rules** seeking the orders of this Court to grant it leave to amend its plaint. The parties to this application agreed to have the applications argued at the same time and a ruling given by this Court. I will address the fate of the application for amendment filed by the Plaintiff later in this ruling.

In the submissions made before Court on behalf of the Defendants, Mr Karanja, Learned Counsel, reiterated the grounds filed in support of the application. He submitted that the Plaintiff had earlier filed a suit i.e. Nakuru HCCC No. 197 of 2001 which suit had been struck out as the Plaintiff had not annexed a resolution of the company authorising the Plaintiff to file the said suit. Geoffrey Kagiri Kimari who had filed suit at the time was condemned to pay costs. His attempt to appeal against the said decision to the Court of Appeal was unsuccessful. Learned Counsel submitted that the meeting which the Plaintiff intended to stop went on and new directors of the company were elected and confirmed in office. It was further submitted that the said individual was not satisfied and again masqueraded as the Plaintiff company and filed the current suit challenging the new directors of the company. It was submitted that in the year 2003 another election was held and new directors elected. It was contended on behalf of the Defendants that this suit was filed without the authority of the Plaintiff. It was further argued that the prayers sought in the plaint were unenforceable the same having been overtaken by events. The Defendants prayed that Geoffrey Kagiri Kimari should be condemned to pay the costs of the suit and the costs of this application personally.

Mr Ngunjiri, Learned Counsel for the Plaintiff submitted that striking out of pleadings is a drastic remedy which could only be exercised where there is a good reason. It was contended on behalf of the Plaintiff that a suit which discloses an arguable case should not be struck out more so where amendment can cure the defect. The Plaintiff submitted that the plaint as it is could stand on its own. Learned Counsel submitted that the proposed amendments to be made to the plaint had been necessitated by the conduct of the Defendants. It was contended that the elections which were held were null and void. The Plaintiff argued that the suit filed was seeking declaratory orders which could not be overtaken by events. The Plaintiff further argued that this Court was being asked to strike out the suit without the benefit of oral evidence being adduced. On the issue of costs, Learned Counsel submitted that a ruling was made by this Court on the 11th of May 2004 to the effect that Geoffrey Kagiri Kimari could not be condemned to pay the costs of the suit as he was not a party to the suit. It was contended that if the said order as to costs was granted Geoffrey Kagiri Kimari would be condemned unheard. Learned Counsel submitted that Defendants should have appealed against the decision of this Court of the 11th of May 2004 if they were dissatisfied with the said ruling. It was further submitted that the suit filed by the Plaintiff still had utility and had not been overtaken by events. The Plaintiff urged this Court not to allow the application and thereby make the Defendants benefit from the circumstances which they had created. The Plaintiff submitted that as long as the Plaintiff could be able to amend its plaint, the suit should not be struck out.

In response, Mr Karanja Learned Counsel for the Defendants submitted that the issue of costs of the suit was not decided on the 11th of May 2004, what was decided was the issue of the costs of the application. It was the Defendants submissions that the company should not be condemned for the acts of Geoffrey Kagiri Kimari. It was their further argument that the Defendants had served three terms after the year 2001 and it would serve no purpose for the suit to remain pending.

I have carefully considered the arguments made on behalf of the Defendants and the Plaintiff in this application. I have also carefully read the pleadings filed by the parties in this suit. From the onset I have put in mind the decision of Madan JA in **D. T. Dobie & Company (K) Limited –versus- Muchina [1982]KLR 1** where he held that the power to strike out should only be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. The learned Judge of Appeal further stated that Courts should aim at sustaining rather than terminating suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. It was his view that as long as a suit can be injected with life by amendment, it should not be struck out. What are the issues in dispute in this case?

According to the plaint, the Plaintiff, a limited liability company was aggrieved by the decision of the defendants to convene an annual general meeting on the 11th of July 2001. The Plaintiff contended that the said meeting was held without the requisite notice being issued in accordance with the memorandum and articles of association of the company. The Plaintiff therefore sought the orders of this Court to declare that the purported elections held on the 11th of July 2001 was illegal, null and void. The Plaintiff further sought permanent orders of this Court restraining the defendants from taking over the management of the Plaintiff as directors. The verifying affidavit of the said plaint was sworn by Geoffrey Kagiri Kimari purportedly in his capacity as the secretary of the Plaintiff company. The Defendants have now made an application to strike out this suit. The Defendants contend that the said suit was actually filed by the said Geoffrey Kagiri Kimari who was masquerading as the Plaintiff Company. The Defendants have further argued that since the said suit was filed three annual general meetings had been held and three elections held. It was the Defendants submission that the suit filed by the Plaintiff was overtaken by events as the orders sought by the Plaintiff was not capable of being enforced or executed. The Defendants have urged this Court to order that Geoffrey Kagiri Kimari be condemned to pay the costs of the suit should the application be allowed.

On the hand, the Plaintiff has submitted that its suit was not overtaken by events. The Plaintiff has submitted that it had sought declaratory orders in its plaint which orders could not be overtaken by events. The Plaintiff has further submitted that if the plaint were found to be inadequate, the inadequacy could be remedied by amendments being made to the said plaint. The Plaintiff submitted that Geoffrey Kagiri Kimari could not be condemned to pay the costs of the suit as he was not a party to the said suit. The Plaintiff further submitted that an order had been made by this Court on the 11th of May 2004 that the

said Geoffrey Kagiri Kimari should not pay the costs of this suit. The Plaintiff submitted that the Defendants application was misconceived, did not have merit and should be dismissed.

I have considered the arguments made. The issue for determination by this Court is whether the Plaintiff's suit was overtaken by the three elections which have been held since the Plaintiff filed the suit. The other issue which came to the fore for determination by the Court is who is the "Plaintiff" in this case? I have evaluated the submission made. It is not disputed that the Defendants are now the recognised directors of the Plaintiff Company. The Defendants have annexed a letter written by the Registrar of Companies dated the 28th of January 2004 confirming the directors of the Plaintiff company as contained in the records of the said Registrar. The suit filed by the Plaintiff seeks the orders of this Court to the effect that the elections which were held on 11th of July 2001 were illegal and null and void. From the face of it, it appears that Gatimu Farmers Company Limited was aggrieved by the election of the Defendants as its directors. It is trite law that a company can only act through a resolution passed by its directors. A company on its own is lifeless. A company cannot act in a manner which is at variance with the decision of its directors. In the instance case, "the Plaintiff" filed suit because it allegedly was aggrieved by the election of the Defendants as its directors. That cannot be. The Plaintiff cannot be aggrieved by an act of its directors. The actual explanation for the apparent anomaly in the naming of the Plaintiff in this suit is that some shareholders of the Plaintiff, fronted by Geoffrey Kagiri Kimari were aggrieved by the election of the Defendants as directors of the Plaintiff company.

It is therefore Geoffrey Kagiri Kimari who was aggrieved and not Gatimu Farmers Company Limited. If the name Geoffrey Kagiri Kimari is substituted as the Plaintiff instead of Gatimu Farmers Company Limited the plaint would make sense. The submission by the Defendants that the said Geoffrey Kagiri Kimari had filed this suit masquerading as the Gatimu Farmers Company Limited is not therefore without merit. I do find that this suit was actually filed by Geoffrey Kagiri Kimari with a view of frustrating the Defendants from assuming office once they were elected as Directors. When the said Geoffrey Kagiri Kimari failed in his attempt to stop the Defendants from taking over the reigns of the company, he filed this suit in a disguise. The said Geoffrey Kagiri Kimari purported to be acting on behalf of the Plaintiff Company yet he knew very well that he had been voted out of office. There was no resolution of the company authorising him to file this suit. Having considered the arguments made it is the finding of this Court that since Gatimu Farmers Company Limited, (the purported Plaintiff in this case) could not be said to be aggrieved by the election of the Defendants as its directors, then the suit allegedly filed by the Plaintiff does not disclose any reasonable cause of action. The Defendants application has merit. The same is allowed. The plaint filed on 16th of July 2001 is hereby ordered struck out with costs.

As earlier ruled by this Court, Gatimu Farmers Company Limited, could not have been aggrieved by the decision of its shareholders to elect the Defendants as its directors. This Court has found that Geoffrey Kagiri Kimari used the said Company as his alter ego. He should therefore bear the consequences once the fate of the suit has been determined. I therefore order that the costs of this suit shall be paid by Geoffrey Kagiri Kimari, the actual Plaintiff in this suit. The ruling made by this Court on the 11th of May 2004 only related to the costs which were awarded in an application. The said ruling on costs of the application did not consider the issues and arguments which were raised by the parties and considered by this court.

As regards the Plaintiff's application to amend the Plaint, this Court will not make a ruling in respect of the said application in view of this Court's ruling striking out the suit filed by the Plaintiff. To make such ruling would be superfluous.

It is so ordered.

DATED at NAKURU this 17th day of December 2004.

L. KIMARU

JUDGE