



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CORAM: D. K. Kemei – J

CIVIL SUIT NO. 2 OF 2014

WENDANO MATUU COMPANY LIMITED.....1ST PLAINTIFF

STEPHEN NDAMBUKI MULI.....2ND PLAINTIFF/RESPONDENT

ONESMUS MUISYO KIMATU.....3RD PLAINTIFF/RESPONDENT

VERSUS

JOSHUA KIMEU KIOKO.....1ST DEFENDANT/APPLICANT

JAMES KIOKO KIVUVO.....2ND DEFENDANT/APPLICANT

JOHN BOSCO NDIRA.....3RD DEFENDANT/APPLICANT

SAMUEL MWANZA NZIOKA.....4TH DEFENDANT/APPLICANT

JUVENALIS MUSYOKI KAVITA.....5TH DEFENDANT/APPLICANT

MUNGU NGOLO.....6TH DEFENDANT/APPLICANT

ROSE NDANU MUTUA.....7TH DEFENDANT/APPLICANT

RULING ON DIRECTIONS

1. Mr. B. M. Nzei learned counsel for the Defendants has sought for directions that the Defendants application dated 4/07/2018 and a preliminary objection dated 30/10/2017 seeking for striking of the Plaintiff's suit should be heard on priority basis. According to learned counsel, the preliminary objection aforesaid which has the effect of disposing the suit should be given priority and went on to suggest that the said application and preliminary objection be served upon the other parties and that each of the parties be given limited period to file and serve responses and be disposed of by way of written submissions. It was counsel's view that the application and preliminary objection being preliminary in nature should be heard first and that the same should not be canvassed alongside the other pending applications since they are not compatible with the prayer for dismissal of suit. It was further submitted that the period to amend the plaint by the plaintiffs has since elapsed and that the plaint should be tackled the way it is. Finally, it was submitted that this court should call for **Machakos CMCC No. 1167 of 2013** for perusal during the canvassing of the Defendants application and preliminary objection aforesaid.

2. Mr. Mikwa learned counsel for the 1st and 2nd plaintiffs proposed that the Defendants application dated 4/07/2018 and preliminary objection dated 30/10/2017 be canvassed alongside all pending applications so as to pave way for the disposal of the main suit. Learned counsel sought that the 1st and 2nd Plaintiffs be given time to amend the plaint as it has had challenges in accessing the court file for the purposes of assessing the draft amended plaint.

3. Mr. Omari, learned counsel for the 3rd plaintiff proposed that there is need to expedite the matter. It was his view that the parties should tackle the main suit instead of the preliminary objection.

4. Miss Esami for the 6th interested party proposed that all pending applications be heard together. She sought to have the 6th interested party

enjoined into the proceedings to which Mr B.M Nzei did not oppose.

5. Mr. Ondabu for Cannon Aluminum Fabricators Limited, an interested party pointed out that there are two ELC matters namely **457/2017** and **31/2020** involving his client and the Plaintiffs as well as the Defendants herein and which are scheduled for mention on the 5/10/2021 for further orders as they are awaiting the outcome of this suit. He submitted that his client had paid monies to the 1st Plaintiff for purchase of some parcel of land and due to wrangles over the question of the true identity of the directors of the 1st Plaintiff, the sale transaction has not been concluded. It was his view that the suit herein should be determined to enable his client know the proper directors of the 1st Plaintiff so as to conclude the transaction.

6. I have given due consideration to the submissions of learned counsels. This court vide directions dated 11/11/2020 had ordered that the contempt application dated 24/09/2019 be canvassed first and that all other pending applications were stayed pending the determination of the said application. The said application has since been determined vide the ruling dated 20/05/2021 and that the court's task was to give directions on the disposal of the pending applications so as to pave way for the disposal of the main suit. The Defendants counsel has now urged this court to grant their request that their application dated 4/07/2018 and preliminary objection dated 30/10/2017 be given priority by being heard first on the grounds that the same raises preliminary issues that might dispose of the suit. The counsels for the Plaintiffs and interested parties are of the view that all the pending applications should as well be canvassed so as to pave way for the determination of the suit. The Plaintiffs counsels have also pointed out that they are yet to file and serve their amended plaints. I have perused the court record for the 18/06/2020 and note that indeed the plaintiffs had been granted leave to file and serve an amended plaint within 7 days while the Defendants were to file an amended defence within 7 days upon being served. It is noted that the Plaintiffs have not filed any such amended plaint and that they have blamed the delay on the non-availability of the court file at the registry for purposes of assessment of the new pleading. I am unable to believe the assertions by counsel for the 1st and 2nd Plaintiffs since from 18/06/2020 to date it is a period of two years. It is not conceivable to believe the claims since it cannot be probable that the court file had been lying in chambers for purposes of rulings yet the proceedings reveal otherwise. The court file has been very active as parties have been prosecuting their issues in court and filing pleadings at the registry. The excuse given by the 1st and 2nd Plaintiffs is a lame one and that this court will not believe it. In any case, no such draft amended plaint has even been presented to court as a sign of good faith. It is clear that the 1st and 2nd Plaintiff has not complied with the directions issued on 18/06/2020 wherein they were to file and serve an amended plaint. Hence, the parties and the court must now proceed with what has been filed as at 10/06/2021. It is also noted that the parties herein are anxious to conclude the matter that was filed in 2014. Looking at the various pending applications, I find they seek for several reliefs and appear to be incompatible with the Defendants application dated 4/07/2018 and preliminary objection dated 30/10/2017. As the application dated 4/07/2018 and preliminary objection dated 30/10/2017 target the striking of the Plaintiffs suit, I find the same to be preliminary in nature and if the same succeeds in the end, then the parties agony caused by the delay in finalization of the suit will come to an end as they are all anxious to bring this old matter to a closure. As the preliminary objection raised by the defendants is targeted at the plaint as presently drawn, it would cause prejudice to the defendants if the belated request for amendment by plaintiffs is allowed as it will circumvent the aforesaid preliminary objection. It is clear that the plaintiffs have unduly sat on their right to amend their plaint for a long period and it is appropriate to have the preliminary objection heard on priority basis.

7. As regards the defendants request to have **Machakos Cmcc No. 1167 of 2013** availed to this court for perusal during the canvassing of the preliminary objection, it is noted that the defendants have not laid out any cogent reasons for the same. It will therefore not serve any useful purpose at this juncture. Hence, the request is declined.

8. In light of the foregoing observations, I issue the following direction:

(i) The 6th intended interested party is hereby enjoined herein as a party in these proceedings.

(ii) The Defendants application dated 4/07/2018 and preliminary objection dated 30/10/2017 shall be heard on priority basis while the other pending applications will await its outcome.

(iii) The said application dated 4/07/2018 and preliminary objection dated 30/10/2017 (if not served) be served upon the Plaintiffs and interested parties within 7 days and the Plaintiffs and interested parties to file and serve responses within 7 days upon being served.

(iv) The Defendants are granted leave to file further affidavit within 7 days upon being served.

(v) The said application dated 4/07/2018 and preliminary objection dated 30/10/2017 be canvassed by way of written submissions with the defendants being granted 14 days to file the same while the Plaintiffs and interested parties shall file theirs within 14 days upon being served.

(vi) Mention on 15/07/2021 to confirm filing of submissions.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF JUNE, 2021.

D. K. KEMEI

JUDGE