



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 162 OF 2015

NEW AKAMBA UNITY (NAU) a community based organization suing

through its Chairman and Secretary General – SMITH KIMETA

MUNYAO AND JANET KAVINDU RESPECTIVELY.....1ST PLAINTIFF

SMITH KIMETA MUNYAO.....2ND PLAINTIFF

VERSUS

NEW AKAMBA UNITY LTD.....1ST DEFENDANT

REGISTRAR OF COMPANIES.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

SALOME SYOMWEU KINYILI.....4TH DEFENDANT

RULING

1. This is a ruling on the Defendant's Preliminary Objection dated 6th May, 2015 to the Plaintiffs Notice of Motion dated 17th April, 2015. That objection which was on notice was to the effect that:-

"1) The said Applicants' suit is *res-judicata* contrary to Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya, to a lower court suit pending a ruling before Hon. Chepseba in Milimani CMCC No. 3575 of 2014 and HCCC 217 of 2014 which was also stayed by Hon. Justice HPG Waweru for the lower court matter to proceed.

2) The Applicants have not satisfied the threshold for granting a temporary injunction under Order 40 of the Civil Procedure Rules, and therefore is misrepresentation of facts and duplication of suits and based on those grounds the suit must be stayed and Orders dated 28th April, 2015 discharged.

3) That the said Orders were obtained with material non-disclosure of facts and the same ought to have not been granted *ex-parte*, as a result the *ex-parte* applicants misled the court to issue orders that can be construed as having misled the court to stop or interfere with an otherwise existing company which enjoys perpetual succession and normal operation."

2. Mr. Lang'at for the Defendant submitted that there were other two (2) suits involving the same parties, one in the lower court and the other before the High Court; that proceedings were stayed in the High Court matter and there was a ruling made on 4th June, 2015, in respect of the lower court matter. He therefore submitted that the present suit was in breach of Section 7 of the Civil Procedure Act. He concluded that the thresh hold for granting orders of injunction has not been met. He urged that the objection be upheld.

3. Mr. Koceyo, learned counsel for the Plaintiff opposed the objection. He submitted that the cases referred to in ground No 1 of the objection were not related to the present suit; that the parties are not the same; that in the premises the objection was mischievous. He urged that the same be dismissed.

4. In **Mukisa Biscuit Manufacturing Co. ltd Vs West End Distributors Ltd (1969) EA 696**, at page 701 the Court of Appeal for Eastern Africa held:-

“A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

5. In **Oraro Vs Mbaja (2005) 1KLR 141** Ojwang J (as he then was) delivered himself thus:-

“A Preliminary Objection correctly understood, is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

6. On the foregoing alone, ground Nos. 2 and 3 of the Preliminary Objection fails. How else will the court satisfy itself that the application does not satisfy the threshold of Order 40 or whether it was misled by the Plaintiff through material non-disclosure without having to examine the facts presented and subject them to or test the same against the normal rules of evidence. The two are not proper points for a Preliminary Objection but for Grounds of Opposition.

7. As regards ground No 1, there is an allegation of the existence of two other suits where rulings have been delivered. I have seen paragraph 36 of the Plaint, the Plaintiffs therein disclose the existence of **CMCC No. 3575 of 2014 Salome Kinili & Others Vs Smith K. Munyao** and **HCCC No. 217 of 2014 Smith K. Munyao Vs Salome Kinyili & Others**. The Plaintiffs state in that paragraph that the causes of action in those suits are different from the current suit. The Defendants have neither filed any Defence to the claim nor any Replying Affidavit.

8. Apart from that statement in the Plaint, there is nothing on record to prove the existence of those suits. The copies of the Plaints or other pleadings or proceedings in those suits are not on record. There is nothing the court can rely on to ascertain what the cause of action in those cases are as suggested by Mr. Lang'at. The bare assertions from the bar that causes of action are the same is but mischievous in itself as counsel cannot purport to give evidence from the bar. He should have produced the copies of the Plaints and rulings in those suits by way of an Affidavit. This he did not. As far as the documents on record stand, there being no answer by the Defendant to the Plaintiffs claim, it is taken that the assertions by the Plaintiffs in paragraph 36 of the Plaint that the causes of action in those other suits are different, to be correct. There is nothing to contradict those assertions.

9. In the circumstances, I find the Preliminary Objection to be mischievous and without merit. The same is hereby dismissed with costs to the Plaintiffs.

DATED and DELIVERED at NAIROBI this 10th day of July 2015

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A.MABEYA

JUDGE