REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 357 of 2012

JAMES WAINAINA IMUNYO

SAMUEL KAGIRI TIMOTHY

PAUL K. N. KIRATHE

CYRUS NGUNJIRI WANYUMU..PLAINTIFFS

PETER KANYUIRA GITHINJI

MERIOTH MUTHONI THAMANI

FAITH WANJIRU KIMERIA

VERSUS

KARANJA MBUGUA & CO. ADVOCATES.............................1ST RESPONDENT

MUHOTETU FARMERS CO. LTD..2ND RESPONDENT

RULING

There are two notices of preliminary objections filed seeking that the entire suit be struck out with costs on the grounds that:-

(1) The entire suit seeks to challenge execution of costs accrued and payable to the 1st defendant.

(2) All questions of execution between the parties to a decree ought to be determined by the court executing the decree and not by way of separate suit.

(3) Karanja Mbugua & Co. Advocates is not a legal entity and does not have judicial character thus not capable of being sued.

(4) The entire suit is described as being bad in law and should be struck out.

Mr. Githui submitted on behalf of the 1st Respondent that the preliminary objection relates to the interpretation of section 34 of the Civil Procedure Act. It is his contention that the suit commenced by way of plaint filed on 17th September 2012, seeking restraining orders against the respondents so as not to recover their costs in a different cause. Counsel argues that the matter should not go by way of a separate suit. He points out that, there is a decree in Misc. Application No.179 of 2011 arising from interpartes –

taxation of costs between the advocate and client. A reference was filed and compromised by consent at an agreed figure of Kshs.4 million. It is on this account that counsel submits that any challenge to the execution ought to have been filed in that suit and not by filing a fresh suit.

Secondly, it is argued that the 1st defendant has no juridical character upon which it can be sued and the plaintiff ought to have sued Karanja Mbugua as an individual, because the law firm is not a Limited Liability Company as defined under the Companies Act.

Mr. Nderitu further submits on behalf of the 2nd defendant, that there is no cause of action in this case, as the main complaint raised is that the plaintiffs are not personally liable to pay costs which arose out of legal representation in Nakuru HCCC No.81 of 2011 where the plaintiffs were sued in their personal capacity. There was an issue raised regarding competence of that suit, but the suit was withdrawn by consent, and no orders were made requiring the 2nd defendant to indemnify plaintiff for any costs that may have arisen in that suit. Counsel submits that there is no cause of action raised against the 2nd defendant that would warrant this court to hear and determine this suit because in any event the consent was that each party bears its own costs.

Counsel has urged this court to consider the prayers in the plaint dated **16/09/2012**, and contends that prayer **(a) and (c)** can only be dealt with in the suit where the proceedings have taken place, whilst prayer **(b)** could only have been raised in **HCCC No.81 of 2011**, during the lifetime of that suit.

In response Mr. Maatwa contends that the cause of action is the intended irregular and unlawful sale of the property stated in the plaint. He argues that, the subject matter is the sale of the property, because if the sale proceeds and execution is carried out, it will alienate the Title belonging to the plaintiffs.

As for suit No.81 of 2011, Mr. Maatwa contends that the same was withdrawn behind their backs and even the consents being referred to were entered into without his client's approval. Further that, even if they had challenged the matters in No.179 and 81, they would still have ended up in the High Court

While conceding that 1st defendant is a non-juridical body and not capable of being sued, counsel argues that such defect can be cured by an amendment. He contends that **Order 2 Rule 15** provides for what should be met before a suit is struck out, and in this instance, the defendants have not demonstrated how what is objected to is an abuse of court process warranting striking out. He urges this court to be guided by the decision in **Baharini Oil Supply Services Ltd V Kenya Ports Authority and the Hon. Attorney General** HCCC No.405 of 2007 (Milimani)

To this, Mr. Githui's response is that this action is simply not maintainable under **Section 34 Civil Procedure Act**, and the same is worse than being scandalous and frivolous, it simply should not have been filed. I have perused the pleadings – the prayers sought arise from two separate suits, one in which a decree issued and the process of execution is imminent hence the prayer for a declaration that the move to attach the plaintiff's parcel of land or any other property is unlawful, and prayer for injunction restraining any adverse action by 1st defendant with regard to the parcel of land.

Section 34 of the **Civil Procedure provides** that:-

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

An explanation is given that for purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

I am in total agreement with both Mr. Githui and Mr.Nderitu, that if the plaintiff wishes to contest the execution process in that suit, then the only avenue open is to challenge that process in the same suit, and not by filing a fresh suit. I need not belabour the point, section 34 speaks for itself. Whereas it is correct

that the misjoinder of party in this suit by naming a non-juridical entity can be cured by way of amendment – such amendment will not cure the violation of section 34 of the Civil Procedure Act. This limb of the preliminary objection has merit and is sustained.

There is also the prayer relating to costs with respect to the 2nd defendant. That was a suit which was withdrawn by consent and each party agreed to bear its own costs. If the plaintiff wishes to challenge the consent entered into, then again filing of a fresh suit is a complete abuse of the court process. If the plaintiffs wished to challenge the consent both on costs and the withdrawal – it could only be done in the self-same suit and not by filing a brand new suit.

I find that the preliminary objection have merit and are upheld. This suit should not see the light of day and is struck out with costs to the 1st and 2nd defendants.

Delivered and dated this 2nd day of November, 2012 at Nakuru.

H.A. OMONDI

JUDGE