



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 136 OF 2018

NEW AKAMBA UNITY (NAU) a Community Based Organization suing through its Chairman and Secretary General SMITH KIMETA MUNYAO and AUGUSTINE MWANGANGI respectively.....PLAINTIFF

VERSUS

NEW AKAMBA UNITY (NAU) LIMITED.....1ST DEFENDANT

REGISTRAR OF COMPANIES.....2ND DEFENDANT

THE ATTORNEY GENERAL3RD DEFENDANT

SALOME SYOMWEU KINYILI.....4TH DEFENDANT

RULING

1. In the Notice of Preliminary Objection dated 15th October, 2018, the 1st and 4th Defendants have averred as follows:

a. That the Plaintiff's entire suit and Application as filed is scandalous, frivolous and vexatious and is an abuse of the process of the court.

b. That the prayers made and matters being raised in the Application dated 6th July, 2018 are res-judicata as they have already been canvassed in other Applications in civil suit in Nairobi HCC No. 162 of 2015 civil division and a Ruling was delivered on 24th February, 2017.

c. That the Plaintiff's suit as filed is sub-judice as a similar matter is pending for hearing of the main suit before a court with the right jurisdiction and competent to hear and determine the said matter being Nairobi High Court Case Number 162 of 2015 in the civil division.

d. That the suit is currently filed in a court that lacks jurisdiction to hear and determine it.

2. The Preliminary Objection proceeded by way of submissions. The Defendants'/Applicants' advocate (*in the Preliminary Objection*) submitted that the Plaintiff is attempting to misuse and circumvent the court process by filing the current suit; that the prayers sought in the Application are unattainable; that the Plaintiff filed a similar suit with similar parties and Application in Nairobi HCCC No. 162 of 2015 and that the court dismissed the Plaintiff's Application for injunctive orders.

3. The Defendants' counsel submitted that this suit offends the doctrine of *sub-judice* and the provisions of Section 6 and 7 of the Civil Procedure Act and that in any event, this court does not have the requisite jurisdiction to deal with the dispute.
4. The Defendants' counsel submitted that the dispute herein is between members of the 1st Defendant and that the proper court to determine those issues is the High Court, and not this court. In conclusion, the Defendants' advocate submitted that the Application dated 6th July, 2018 together with the Plaint of the same date should be dismissed with costs.
5. The Plaintiff's advocate submitted that a Preliminary Objection must raise a pure point of law; that the Defendants' Notice of Preliminary Objection does not raise a pure point of law and that it should be dismissed on that ground.
6. The Plaintiff's counsel submitted that the dispute in the current suit relates to the ownership and use of fifty six (56) parcels of land situate in Machakos; that the suit is seeking for an order compelling the 1st and 4th Defendants to hand over the 56 Title Deeds to the Plaintiff and that Nairobi HCCC No. 162 of 2015 relates to an injunction against the use and ownership of the suit properties.
7. The Plaintiff's advocate submitted that the substance of HCCC No. 162 of 2015 is a dispute relating to leadership and officials of the Plaintiff's Community Based Organization; that the Application in HCCC No. 162 of 2015 was never had on merit and that in any event, the two suits are different.
8. In the Plaint dated 6th July, 2018, the Plaintiff averred that its members are the beneficial owners of 56 parcels of land, whose details have been given. The Plaintiff's officials have alleged that they registered the 1st Defendant to allow them register the suit properties in the name of a Limited Liability Company; that when the 4th Defendant left office as a Secretary General, he went away with the Title Deeds of the suit land and that the Said Title Deeds should be returned to them.
9. The orders that the Plaintiff is seeking are those of mandatory injunction directing the 1st and 4th Defendants to return the Title Deeds for the said parcels of land and a declaration that the 1st and 4th Defendants are holding the suit land in trust for the Plaintiff. The Plaintiffs are also seeking for a declaration that the removal of the Plaintiff's Chairman's name from the list of Directors of the 1st Defendant was unlawful, null and void.
10. In the Application dated 6th July, 2018, the Plaintiff is seeking for a temporary mandatory order directing the 4th Defendant to release the 56 Title Deeds for the parcels of land listed in the Application to its officials. In addition, the Plaintiff is seeking for a temporary order restraining the 1st and 4th Defendants from disposing, selling, charging, alienating or any way dealing with the 56 parcels of land.
11. The 1st and 2nd Defendants have sought, by way of a Preliminary Objection, the dismissal of the Plaint and the Application on the ground that the same is *sub-judice* and *res judicata*. According to the 1st and 4th Defendants, the parties in this matter are the same parties in Nairobi HCCC No. 162 of 2015 and that the issues raised herein are the same issues that the Plaintiff's officials have raised in the Nairobi suit.
12. To support the Preliminary Objection, the Defendants have annexed on their written submissions the Ruling of the High Court in Nairobi HCCC No.162 of 2015 and a copy of the Plaint.
13. It is true, as submitted by the Defendants' advocate, that a court is prohibited from trying a suit or issue in which the matter has been directly and substantially been in issue in a former suit between the same parties, or between parties under whom they or any of them, have litigated under the same title in a competent court. (*See Section 7 of the Civil Procedure Act*).
14. It is also true that a court is prohibited from proceeding with the trial of a suit in which the matter in

issue is also directly and substantially in issue in a previous suit between the same parties, where such a suit is pending in the same or other court seized of jurisdiction in Kenya (*See Section 6 of the Civil Procedure Act*).

15. However, for the court to determine if indeed the suit before it offends the provisions of Section 6 and/or 7 of the Civil Procedure Rules, the pleadings and decisions of the former or pending suit should be availed. Indeed, the 1st and 4th Defendants should have caused the Nairobi file to be moved to this court to enable the court ascertain the contents of the pleadings in that file. Alternatively, the 1st and 4th Defendants should have filed a formal Application annexing all the pleadings in the Nairobi HCCC No. 162 of 2015 to enable this court arrive at an informed decision on whether this suit is *res judicata* or *sub-judice*.

16. Although the 1st and 4th Defendants annexed the Plaint and Ruling in Nairobi HCCC No. 162 of 2015 on their list of authorities, such a procedure is neither authorized by law or applicable in practice. Indeed, the 1st and 2nd Defendants cannot annex what are supposed to be “*annextures*” on a list of authorities. An Affidavit should have been filed instead, on which the pleadings and Rulings(s) in Nairobi HCCC No. 162 of 2015 would have been exhibited.

17. In any event, even if, for the sake of argument, I am to consider the Plaint in Nairobi HCCC No. 162 of 2015, annexed on the Defendants’ list of authorities, as an annexture, I find that the main issue for determination in the Nairobi suit is for the reinstatement of the 2nd Plaintiff in that suit, who is not a party to this matter, as a Director of the 1st Defendant. The Plaintiffs in that suit are also seeking for a declaration that the inclusion of the new Directors of the 1st Defendant as contained in the official search dated 12th February, 2015 is fraudulent, illegal, null and void.

18. The main prayers in the suit in Nairobi are meant to determine the bona fide Directors of the 1st Defendant. On the other hand, in the current suit, the Plaintiff is seeking for orders compelling the 1st Defendant to release to its officials the Title Deeds in respect of 56 parcels of land.

19. Although the issue of directorship of the 1st Defendant is linked with the issue of who should be in custody of the Title Deeds, the current claim cannot be said to be substantially similar to the Nairobi suit. However, it would be prudent for this suit to be stayed and await the hearing and determination of the Nairobi suit which is seeking to determine the issue of the bona fide Directors of the 1st Defendant.

20. For the reasons I have given above, I do not find any merit in the Defendants’ Preliminary Objection dated 15th October, 2018. The said Notice of Preliminary Objection is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE