



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL CASE NO. 26 Of 2018**

**RICHARD MASINDE WAFULA**

**& 219 OTHERS .....PLAINTIFFS/APPLICANTS**

**VERSUS**

**TRANS-NZOIA TEACHERS ENTERPRISES**

**LTD & 23 OTHERS.....DEFENDANTS/RESPONDENTS**

**R U L I N G**

1. By their notice of motion dated 4/12/2018, the applicants have prayed for the following orders.

1. (Spend)

2. Leave be granted to the Plaintiffs/Applicants to continue this suit as a derivative action.

3. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from interfering with rent collection by Lesma Engineering Ltd from the rental units on the parcel No. KITALE MUNICIPALITY BLOCK 4/359 pending the hearing and determination of this application, and thereafter pending hearing and determination of this suit.

4. The 2<sup>nd</sup> 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from trespassing, selling, leasing or otherwise dealing in any adverse manner the property known as parcel No. KITALE MUNICIPALITY BLOCK 4/359 purchased by Lesma Engineering Ltd pending the hearing and determination of this application, and thereafter pending hearing and determination of this suit.

5. The 2<sup>nd</sup> 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from acting upon the resolutions made on 21<sup>st</sup> September 2018 in respect of the purported appointment of the 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendants as directors of the 1<sup>st</sup> defendant pending the hearing and determination of this Application, and thereafter pending hearing and determination of this suit.

6. The 2<sup>nd</sup> 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deed, minutes, resolutions, returns and any other documents in the name of and/or on behalf of the Plaintiffs and the 1<sup>st</sup> Defendant without the consent and concurrence of the Plaintiffs pending the hearing and determination of this Application, and thereafter pending hearing and determination of this suit.

7. The 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from acting as and holding themselves out as officers or directors of the 1<sup>st</sup> Defendant's taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of the 1<sup>st</sup> defendant pending the hearing and determination of this Application, and thereafter pending hearing and determination of this suit.

8. The 2<sup>nd</sup> 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup>

**Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from accessing and operating account numbers No. 0330190546195 with Equity Bank and Oriental Bank A/C No. 0060069568 operated by the 1<sup>st</sup> Defendant pending the hearing and determination of this Application, this suit or further Orders.**

**9. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from effecting any changes in the memorandum and article of association of the 1<sup>st</sup> Defendant and the shareholding and directorship of the 1<sup>st</sup> Defendant pending the hearing and determination of this Application, and thereafter pending hearing and determination of this suit.**

**10. The County Commander Trans-Nzoia to supervise and effect compliance of these orders.**

**11. Costs be provided for.**

2. The application is supported by the sworn affidavit of Richard Masinde Wafula sworn on 3/12/2016.

3. When the matter came up under certificate of urgency, this court granted some temporary orders. Subsequently there was a response by the Respondents vide the replying affidavit of John Mwangi sworn on 19/12/2018.

4. The said Richard Masinde Wafula filed a supplementary affidavit sworn on 4/1/2019 whereas John Mwangi filed a further affidavit sworn on 4/1/2019. The court has had occasion to peruse the aforesaid rival affidavits together with the attached annexures.

5. The court did order the parties to dispose the application by way of written submissions and indeed both sides have filed the same as well as the attendant authorities.

### **Applicants claim**

6. The claim by the applicant is clear and straight forward. They say that they are the shareholders of the 1<sup>st</sup> Defendant's company which was established way back in the year 1982. The said company comprises several shareholders who are essentially past and present members of the teaching profession. The said company inter alia owns land parcel number Kitale Municipality Block 4/359 which is developed and has paying tenants.

7. They further content that pursuant to a resolution by the majority of the members the said property was sold to one Lesma Engineering Ltd for a purchase consideration of Kshs 42 million.

8. That the company has had a long and protracted leadership wrangles between the Defendants some who are directors and another faction of the directions led by one Paul Opimo. They further state that on 21/9/2018 the 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendants in a special resolution appointed themselves as directors of the 1<sup>st</sup> Defendant's company, in a meeting which was not sanctioned by the shareholders.

9. On the same breath on 19/10/2015 in an ordinary general meeting held at Kitale museum and pursuant to the resolutions of 8/7/2016, the following were voted as directors namely;

1. Paul Opimo – Chairman

2. David Wekesa – vice Charman

3. Pius Mayende – Secretary

4. Gilbert Wasilwa – Assistant Secretary

5. Sabina Simiyu – Treasurer

6. Stephen Ndiema – member

7. LEAH Kimani – member

8. Rachel Njuguna – member

10. Mr Masinde contents on behalf of the plaintiffs that the Defendants action has given them exclusive control of the 1<sup>st</sup> Defendant's assets and that apart from pilfering, they stand to suffer hem and loss as well. Further that the 1<sup>st</sup> defendant's assets shall be sold and or managed in a way that the shareholders shall suffer serious loss and damage.

11. As a consequence, the “battle” of the directors herein led the 2<sup>nd</sup> - 15<sup>th</sup> Defendants decline to vacate office and led the new directors voted in to take office.

12. They thus pray that owing to the dangers faced by the 1<sup>st</sup> defendant and the rights of the plaintiffs they pray that their prayers to proceed by way of derivative suit be allowed.

### **Defendants/Respondents case**

13. The replying affidavit of John Mwangi sworn on 19/12/2018 does not deny the legal status of the 1<sup>st</sup> defendant. He said that he and others were elected as directors on 7/5/2010 in an extra ordinary general meeting for a period of 3 years. After their 3 years stint, they were again all reelected as directors. However in December 2015 wrangles arose pitting two groups, namely those who supported the sale of the property namely Kitale Municipality Block 4/359 and those who did not.

14. The group led by David Wekesa and Sabina Simiyu purportedly had an election on 8/7/2016, which he and others did not participate. As a consequences of the decision, the original group were not able to hand over the directorship. He called for a meeting on 26/9/2016, which was marred by chaos.

15. According to him therefore and following the chronology of the wrangles between the various factions he is unable to handover till the Registrar of Companies endorses the new directors.

16. It is his contention therefore that the purported sale of the property was illegal as the vendors (directors) were not validly on board. That at any rate the account they provided where the purchase consideration was wired belonged to a Community Based Organization C.B.O and not the 1<sup>st</sup> defendant. The same was registered on 3/2/2016. He further argued that at any rate Lesma Engineering Co. Ltd has not completed the payment of the purchase price and thus it should never be allowed to take over the property.

17. Consequently, he depones that the issues raised by the plaintiffs are purely internal and they could as well be handled in a valid Annual General Meeting.

18. In a nutshell those are the issues gravitating around this application. As stated earlier the court ordered the parties to file their written submissions which I have had the benefit of perusing.

### **Analysis and Determination**

18. Pouring through the voluminous pleadings herein its clear that two issues ought to be determined at this stage namely;

**a. Whether this court can grant the plaintiffs request**

**to proceed with this suit through a derivative process.**

**b. Whether they are entitled to the interalia injunctive**

**reliefs sought.**

#### **a) Whether the Derivative orders can be granted.**

19. Both counsels for the parties herein have submitted extensively on this matter and cited several authorities which I have perused.

20. The starting point however is *Section 238 of the Companies Act No. 17/2015* which states on derivatives as follows;

**“1) In this part “derivative claim” means proceedings by a member of a company -**

**a) In respect of a cause of action vested in the company; and**

**b) Seeking relief on behalf of the Company -**

**2. A derivative claim may be brought only -**

**ii) Under this part; or**

**b) in accordance with an order of the court in proceedings for protection of members against unfair prejudice brought under this Act.**

**3) A derivative claim under this part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty of trust by a director of the Company,**

**4) A derivative claim may be brought against the director or another person, or both.**

**5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative**

**claim became a member of the company.”**

21. As stated earlier the plaintiffs are shareholders of the 1<sup>st</sup> defendant, an issue not disputed by the defendants. Can it therefore be said that the plaintiffs/applicants are agitating an action vested in the 1<sup>st</sup> defendant?

Are the reliefs sought herein for the benefit of the company.

22. Has or will the company or the members suffer any prejudice?

23. Looking at the situation obtaining which is acknowledged by the defendants, its clear that there are two groups pitted against each other. To put it succinctly, the group led by the “old” and the “new” directors. Each of the group claims supremacy.

24. It appears from the annexures to the affidavits that there have been various Annual General Meetings. whether special, ordinary or extra ordinary held by the shareholders and their factions.

25. The resolution which have arisen have been varied. Infact according to John Mwangi replying affidavit, they have been unable to have the newly elected group, at least from his faction, recognised by the Registrar of Companies.

26. At the same time, the other 2<sup>nd</sup> group claimed that they were validly elected on 8<sup>th</sup> July 2016 and as a result two things flowed from their election, namely, the sale of the suit property and the registration of the C.B.O. That the two were sanctioned by the Annual General Meeting and they have attached the minutes to that effect.

27. Taking the totality of the confusion bedeviling the 1<sup>st</sup> defendant, can it be said that, the company as well as the shareholders in general be they be the plaintiffs and or defendants and perhaps those whose names do not appear in the pleading, be considered safe? Absolutely not. In my view unless the company is shielded, there is bound to be loss and damage.

28. Even if one was to consider the fact that the issues could be resolved through an “internal mechanism” as provided under the Companies Act and specifically the Articles and Memorandum of Association, there is clearly bad blood between the two groups.

29. The financial situation of the Company seemed to be in limbo as there are separate accounts operated by the factors. Further, it is alleged that the Memorandum and Articles of Association of the Company have been amended and that shares have been increased to other members without their knowledge of the rest.

30. The sticky issue of the sale of the property is a hot potato which it is imperative that the company and the members must be shielded against. Whether it was validly sold or not is an issue which must be brought to the light.

31. The above position is buttressed by the words of *Lord Denning MR in Wallersteiner Vs Moir (No. 2) (1975) 1 ALL ER 849* where he stated that;

***“ But suppose (the Company) is defrauded by insiders who control its affairs by directors who hold a majority of the shares who then can sue for damages. Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the Company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue themselves. Yet the Company is the one person who is damnified. It is the one person whi should sue. In one way or another some means must be found for the Company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.”***

32. Taking cue from the above citation I am satisfied that the applicants have demonstrated that the company has been injured by the acts of the shareholders and or directors. In the interest of justice and for the protection of the 1<sup>st</sup> defendant I shall grant prayer (1) of the application.

**b) Whether they are entitled to the interim injunctive reliefs.**

32. The applicants have asked for a raft of injunctive orders. The case of *Giella Vs Cassman Brown & Co. Ltd*, which has gained notoriety has given two critical grounds to be satisfied by any party seeking injunction, namely;

**1) the plaintiff must establish that he has a prima facie case with high chances of success**

**2) that the plaintiffs would suffer irreparable loss that cannot be compensated by way of an award of damages.**

33. Given the issues surrounding the leadership of the 1<sup>st</sup> defendant, and in my view reading the correspondences attached to the rival affidavits, it us abundantly clear that all is not well within the company. There must be injected some stability for the sake of the ordinary members. Should the court not intervene, then I find that it shall be abating some claring supremacy battles between directors without consideration of the interest of the ordinary members.

34. The prayers sought by the applicants are far reaching in the circumstances. Nonetheless, there must be stability in the company. The only way to ensure stability is to have proper leadership. I am however surprised by the “fence sitting taken” by the Registrar of Companies. It is ideally its responsibility to ensure compliance and the interest of the shareholders protected.

35. Taking the inherent powers bestowed upon this court and in the interest of the company and the members and shareholders it shall be necessary to hold afresh elections to be supervised by this court. The said elections should be held as soon as practicable so as to forestall any further damage to the 1<sup>st</sup> defendant. The resultant elected officials should be able to steer the company afresh and resolved any outstanding issues including but not limited to the sale of the property.

36. It is further appreciated that Lesma Engineering Co. Ltd purchased the property namely Kitale Municipality Block 4/359. There is however a dispute by the other faction of directors. The bottomline however is that a sum of kshs 34 million was paid by Lesma to the 1<sup>st</sup> Defendant. The amount it appears was used interalia to settle a court decree amounting to kshs 11 million or thereabouts as well as other liabilities.

37. Be it as it may, the legality or otherwise of the said transaction is not for this court to make a determination for now. It is acknowledged from the sale agreement that there is an outstanding sum of kshs 8 million or thereabouts which would be paid after the completion of the conveyancy exercise.

38. Prima facie therefore the 1<sup>st</sup> defendant has entered into a contract, which this court cannot close its eyes on. As a matter of fact, its admitted across, the divide that the payment was used to settle some debt. What then is the consequence of the contract between the 1<sup>st</sup> Defendant and Lesma being frustrated? Definitely, there shall be an issue of damages.

39. It is in my considered view that it is necessary to secure at least in the interim the interest of both the purchaser and the 1<sup>st</sup> defendant. It is noted by the defendants that there is outstanding balance due to the 1<sup>st</sup> defendant which is as stated earlier premised on the completion of the transfers or the conveyancing process.

40. Paragraph 9 of the Sale contract states that;

***“The vendor further covenants that the purchaser shall at the signing hereof, be at liberty to take possession, occupation and full ownership of the subject land at the signing hereof”***

41. Consequently, and taking into consideration that the transaction is not at least complete, and having contracted to permit the purchaser to take possession of the property, the contract at least for now and pending the election ordered above should take over the premises fully.

### **Conclusion**

42. The court has stated as much to show that the interest of the company is paramount. Its interest and survival must be shielded. Ordinary shareholders who may never vie for any seat or office must be protected. The issue bedeviling the company is simple, leadership wrangles and fight for supremacy which is symptomatic of fighting for the company scars resources.

43. The law and in particular the Constitution and the Companies Act permits this court to intervene.

44. In the premises, the court make the following orders;

**1) The plaintiffs are hereby granted leave to continue this suit as a derivative action**

**2) Fresh elections to be supervised by the Deputy Registrar of this court, to be conducted within 35 days from the date herein to choose new Directors of the 1<sup>st</sup> defendant. Any of the valid members or shareholders be at liberty to contest.**

**3) Pending the aforementioned elections, there shall be no amendment or changes on the Memorandum and Articles of Association of the Company or at all.**

**4) The defendants to continue operating Account Number 0330190546195 at Equity Bank and Oriental Bank A/C No. 0060069568 and the proceeds therefrom should be applied for paying any statutory deductions , salaries and emoluments, utilities and the cost of Extra Ordinary Meeting to conduct the Election ordered above.**

**5) The records of the expenditure must be prepared and kept and be produced on demand.**

**6) For avoidance of doubt the aforestated Extra Ordinary General Meeting shall only be for the election of new office holders and nothing else.**

**7) The County Commander Trans Nzoia County shall supervise the above election by providing the necessary security.**

**8) The procedures to be followed during the elections shall be provided by the Deputy Registrar of this court in line with the Provision of the Memorandum and Articles of Association of the Company and if in doubt the Provisions of the Companies Act shall apply.**

**9) M/s Lesma Engineering Ltd is hereby allowed pending the determination of this suit to take over control and use of the property comprised in Kitale Municipality Block 4/359 as at the date of this ruling.**

**10 ) Costs shall abide the outcome of the main suit.**

Orders accordingly.

**Delivered, signed and dated at Kitale this 24<sup>th</sup> day of January, 2019.**

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**H.K. CHEMITEI**

**JUDGE**

**24/1/19**