



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PETITION NO. 2 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLES 22 AND 23

AND

IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF KENYA

AND

IN THE MATTER OF ARTICLE 50 OF THE ARTICLES OF ASSOCIATION OF MOGUSII FARMERS GROUP COMPANY LIMITED

BETWEEN

MOGUSII FARMERS GROUP COMPANY LIMITED.....PETITIONER

=VRS=

JOHNSON MITEMA NYANGAU..... RESPONDENT

RULING

Before me is the undated Notice of Motion filed herein on 13th May 2019 in which the applicant seeks orders that: -

“1. (Spent)

2. (Spent)

3. That this honourable court do issue a temporary injunction restraining the Petitioner/Applicant and/or the incumbent Directors from transacting any business on behalf of the company pending the hearing and determination of this suit or the AGM whichever comes first.

4. Costs of this application be provided for.”

The application is premised on grounds that: -

“1. There is real danger that the Directors are likely to plunder the assets of the company.

2. The action by the Directors of selling part of the forest, company motor vehicles shows that the Directors may actually tamper with the company property.

3. That the Directors know that they are likely to be replaced hence they may injure the company.”

In the supporting affidavit (also undated) Gichana Ogeto Oseko who describes himself as a shareholder of the company deposes inter alia, that the directors have totally mismanaged the affairs of the company leading to the members reporting the matter to Matutu Police Station leading to the OCS to intervene; that it was agreed that some shareholders would join the Directors to run the affairs of the company pending holding of the AGM; that the rental income of the company has been plundered; that the Directors have sold part of the forest consisting of huge mature trees worth about 2 million and have never accounted for the same and also sold company vehicles and failed to account for proceeds of tea Kshs. 5,00,000/=. The deponent also alleges that the Safaricom booster erected on the company land has never been

accounted for and the shareholders have never received a bonus since the current leadership took office. He deposes that the Directors are likely to withdraw all the money from the bank accounts, hide the company files and assets and generally steal the property of the company. He accuses the Directors of engaging the services of Tropical Management Agency without the knowledge of the shareholders. He urges this court to restrain the Directors from transacting any business on behalf of the company pending the holding of the AGM as the company is likely to lose heavily in the event that the restraining orders are not granted.

The application is vehemently opposed. In his grounds of opposition, the petitioner/respondent states that the applicant herein is a stranger to these proceedings and hence has no locus standi; that the applicant has not shown any evidence of misuse/misappropriation of assets and that the application ought to be dismissed.

In addition to the grounds of opposition the petitioner/respondent has filed a replying affidavit sworn by Phillip Barare Oburu on 2nd May 2019. He deposes that he is the acting chairman of the petitioner/respondent and that the intention of the applicant is to ground and to destroy the company as it will not operate without an account. He reiterates that the applicant is a stranger to these proceedings and that the company is yet to hold the meeting as ordered by the court and the days ordered by the court have not lapsed. He urges this court to dismiss the application.

The application was canvassed by way of written submissions. For the applicant it is submitted that the Registrar has not made any attempt at convening an AGM as ordered by this court and that the applicants have a real fear that the incumbent Directors are likely to plunder the assets of the company since they have clung to the said company illegally, unlawfully for the past 13 years. Counsel for the applicant further submits that the Directors have secretly and clandestinely sold the property of the company without accounting for it and that this is a fit application to grant.

For the respondent it is argued that this application is in bad faith; that the court gave directions on how the AGM should be called and time for holding the said meeting has not lapsed. It is reiterated that the applicant brought this application on 10th May, the date when the meeting was to be held meaning he is not willing to obey court orders. Counsel contends that Gichana Ogeto Oseko the deponent of the supporting affidavit is a stranger to these proceedings and the application is not supported by an affidavit. Counsel also reiterates that no evidence of misappropriation has been placed before this court and that this application is merely intended to ground the company. Counsel for the respondent submits that the issues raised in the application should be raised at the AGM and the application be dismissed and Gichana Ogeto Oseko be condemned to the costs.

I have carefully considered the application and all the material placed before me. The conditions for grant of a temporary injunction are well settled and they are that: -

“.....First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.” See *Giella V. Cassman Brown [1973] EA 358*.

In the case of **Mbuthia V. Jimba Credit Corporation Ltd [1988] KLR 1** it was held that: -

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should weight the relative of the parties cases.”

On 9th May 2019 Majanja J, issued an order directing the Registrar of Companies to organize an Annual General Meeting of the company within 45 days. That time has not lapsed. Secondly, apart from making allegations the applicant has not tendered any evidence to show that the Directors have sold the company's properties or misappropriated its funds. Moreover, the applicant is a total stranger to these proceedings. He has brought this application without first seeking to be enjoined to the proceedings making it likely that his real intention is to bring the company to a halt. The issues and questions he seeks should in my view and as submitted by Counsel for the respondent be raised at the Annual General Meeting which the Registrar has been ordered by the court to convene within a specified period. All parties must co-operate with the Registrar so that he can convene the meeting within the stipulated time for the sake of the company and all its shareholders. Any action aimed at scuttling the convening of the meeting as ordered by the court shall not be entertained and accordingly this application is dismissed the applicant not being a party to the case and also not having established that he has a prima facie case with a probability of success. The costs of the application shall be borne by the respondent/applicant.

Signed, dated and delivered in Nyamira this 30th day of May 2019.

E. N. MAINA

JUDGE