REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL CASE NO 7 OF 2016

H.A. KATEMA

WALTER MWAWASI

KIRIGHA JONAS MKOSI……..…….....PLAINTIFFS

VERSUS

NATHANIEL MRAMBA……..…. .....1ST DEFENDANT

JOHN MWAENI…….….2ND DEFENDANT

FANUEL MWANDAWIRO……..3RD DEFENDANT

NEWTON MKALA…….…….……4TH DEFENDANT

CRISPUS MBASHU…….……..…….5TH DEFENDANT

PHILIP MARAMI…….……6TH DEFENDANT

REUBEN MWALUMA…….7TH DEFENDANT

MANUEL KITOLOLO…….…….……8TH DEFENDANT

DAWSON MARAMI…….……...……9TH DEFENDANT

MAUNGU RANCHING (D.A.) CO LTD……..……..10TH DEFENDANT

RULING

INTRODUCTION

1. On 15th December 2016, the Plaintiffs filed a Notice of Motion application of even date seeking orders that the Court do issue permanent orders barring the 1st, 2nd, 3rd, 4th, 5th , 6th, 7th , 8th and 9th defendants from assuming the seats of Chairman, Secretary and Treasurer or dealing with any matters of the 10th Respondent until this case was heard and determined.

2. Before this court could hear and determine the said application, the Defendants filed a Notice of

Preliminary Objection dated 18th April 2017 on 21st April 2017 seeking to strike out the Plaintiffs' suit on the ground that the 1st and 2nd Plaintiffs had not authorised the 3rd Plaintiff to institute the suit herein on their behalf.

3. In its Ruling of 27th June 2017, this court declined to strike out the Plaintiffs' suit as it would have been a draconian step but directed them to file the requisite documentation authorising the 3rd Plaintiff to act on behalf of the 1st and 2nd Plaintiffs. It also dismissed their aforesaid Notice of Motion application as it was incompetent for lack of requisite authorisation.

4. They filed the Consent/Authority on 3rd July 2017. On 5th July 2017, they filed a fresh Notice of Motion application dated 4th July 2017 pursuant to the provisions of Order 40 Rule 1, 2, 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 131 and 132 of the Companies Act and all other enabling provisions of the law.

5. Prayers No (1) of the said application were spent. The Plaintiffs sought the following remaining orders:-

1. Spent.

2. THAT the Court do issue permanent orders barring the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th , 8th and 9th defendants from assuming the seats of Chairman, Secretary and Treasurer or dealing with any matters of the 10th respondent until this case was heard and determined.

3. Costs if this application be in the cause.

THE PLAINTIFFS' CASE

6. The application was supported by the Affidavit of Kirigha Jonas Mkosi that was sworn on 4th July 2017. The Plaintiffs' Written Submissions were dated 11th September 2017 and filed on 12th September 2017.

7. The Plaintiffs stated that they were shareholders of the 10th Defendant (hereinafter referred to as "the Company"). Vide Notices dated 4th November, 2016, the then Secretary General, purported to call for an Extra-ordinary meeting that was to be held on 26th November 2016 at Mlundinyi at 10.00am. However, the said Notice was too short and poorly served as they were not advertised through the local media and local administration as had been recommended by a Task Force that had been set up to resolve wrangles in the Company.

8. It was their contention that the meeting was not properly called as a result of which many shareholders who resided outside Taita Taveta County did not receive the said Notice. They further stated that the procedure of how the elections were conducted on 26th November 2016 was illegal and in contravention of the Company's Articles of Association as it purported to distribute the directorships in groups.In addition, they averred that the Chairman, Secretary and Treasurer were also unlawfully elected.

9. The groups that elected the directors were contrary to the Act (not specified which) and the Articles of Association were as follows:-

1. Wongonyi elected 1 director

2. Ghazi elected 3 directors

3. Ndome elected 3 directors

4. Tausa elected 1 director

5. Mraru elected 1 director.

10. They reiterated the same facts in their Written Submissions and urged this court to find that the mode of the elections that was adopted by the Company was not proper. It was their averment that if this court did not intervene as it had sought in its application, the directors of the Company would be in office illegally causing the shareholders to suffer irreparably.

THE 1ST , 3RD, 4TH , 5TH , 6TH , 8TH AND 10TH DEFENDANTS' CASE

11. In response to the said application, on 27th July 2017, the 8th Defendant swore a Replying Affidavit on behalf of the 1st, 3rd, 4th, 5th, 6th and 10th Defendants. The same was filed on 28th July 2017.The said Defendants had previously filed an Authority Notice on 19th January 2017 authorising the 8th Defendant to represent the aforesaid Defendants in the proceedings herein. The 10th Defendant is hereinafter referred to as "the Company."

12. They also filed Grounds of Opposition that were also dated 27th July 2017 on the same date. The Grounds of Opposition were as follows:-

1. THAT the Plaintiffs had not met the requirements for the grant of an injunction as set out in the celebrated case of (sic) **vs CASSMAN BROWN.**

2. THAT the Plaintiffs had not specified which of the defendants were to be barred from which respective and specific positions.

3. THAT the application was frivolous, vexatious, without merit and an abuse of court process in that it offended the express and mandatory provisions of Section 7 of the Civil Procedure Act and was *Res judicata*.

4. THAT the application and entire suit was without merit and ought to be dismissed with costs.

13. In their Replying Affidavit, they agreed with the Plaintiffs that a Task Force had been set up to resolve wrangles in the Company. They averred that the said Task Force recommended that an Extra-ordinary meeting be held to rectify the anomalies in the financial management. It was their contention that the Notice were perfectly legal and met the requirements, provisions and procedure set down in Paragraph **(sic)** 8 of Articles of Association which provided that an extra-ordinary meeting could be held upon issuance of the mandatory twenty one (21) days' notice and that in fact the meeting was held in line with Paragraph **(sic)** 8 of the Articles of Association.

14. They stated that the 3rd Plaintiff did not annex a copy of the Notice as proof that was served upon him or provide proof to demonstrate the late receipt of the said Notice by himself, the 1st and 3rd Plaintiffs. They pointed out that the Plaintiffs did in fact admit in their Supporting Affidavit that they attended the meeting that was held on 26th November 2016. They further contended that the Plaintiffs did not indicate which of the Company's shareholders they were bringing the suit on behalf of and had therefore not satisfied the requirements of filing a representative suit.

15. In their Written Submissions that were dated 2nd August 2017 and filed on 3rd August 2017, they argued that the Plaintiffs had failed to demonstrate that they had established a *prima facie* case with a probability of success to warrant the granting of the orders they had sought as they attended the meeting that was held on 26th November 2016.

16. They submitted that the procedure of electing the directors was the same one that the Plaintiffs herein

had been appointed as directors of the Company and this court could not therefore interfere in the day to day running of the Company, a task that had been left to the Articles of Association.

17. They were emphatic that the present application by the Plaintiffs was incompetent, frivolous, vexatious and an abuse of the court process having been dismissed by this court on 27th June 2017.

THE 2ND, 7TH AND 9THDEFENDANTS' CASE

18. The 7th Defendant filed a Replying Affidavit on his own behalf and on behalf of the 2nd and 9th Defendants. It was sworn on 18th August 2017 and filed on 21st August 2017. The 2nd and 9th Defendantsalso filed a Consent/Authority on the same date authorising the 7th Defendant to act on behalf of the 2nd and 9th Defendants.

19. In their Replying Affidavit, their case was simply that a Task Force had recommended that the Company hold an Extra-ordinary meeting but that the publication of the Notices was not done properly as some shareholders did not get the Notices in time.

20. In their Written Submissions that were dated 26th September 2017 and filed on 13th October 2017, they contendedthat the wrong procedure was adopted as the directorships were done in groups, which they said was not permitted under the Companies Act and the Company's Articles of Association.

21. They therefore urged this court to direct that fresh elections be conducted in line with the Company's Articles of Association. They indicated that they were willing to forego their positions with a view to paving way for fresh elections to avoid the Company collapsing. It was evident that they were in essence supporting the Plaintiff's case.

LEGAL ANALYSIS

22. It appeared to this court that there were only two (2) issues that had been placed before it for determination. The same were as follows:-

> **a. Whether or not the Plaintiffs' present application was *res judicata*;**
>
> **b. Whether or not the Plaintiffs had established a *prima facie* case warranting the granting of a permanent injunction pending the hearing and determination of their suit.**

23. This court therefore dealt with the said issues under distinct and separate heads.

I. *RES JUDICATA*

24. The Plaintiffs, 2nd, 7th and 9th Defendants did not address their minds to this issue. However, according to the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants, the Plaintiffs' present application was *res judicata* and contravened the provisions of Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) as a similar application was dismissed by this court on 27th June 2017. They relied on the cases of **Judith Gathoni Willie vs George Kihara Muchuki & 2 Others [2010]eKLR**, **Peter Mbogo Njogu vs Joyce Wambui Njogu & Another [2005] eKLR** and **Pop-In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich [1990] KLR** where the common thread was that once a decision has been rendered between parties or their privies over the same subject matter, none of the parties would be permitted to litigate over the same issue in a court.

25. Section 7 of the Civil Procedure Act provides as follows:-

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between**

parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issuehas been subsequently raised, and has been heard and finally decided by such court."

26. In Paragraph 35 of its decision of 27th June 2017, this court found that although the Plaintiffs' suit was incompetent for want of authority by the 1st and 2nd Plaintiffs to the 3rd Plaintiff to act on their behalf in the proceedings herein, the same was not incurably defective. The Notice of Motion application dated and filed on 15th December 2016 was therefore dismissed because this court found and held that the 1st and 2nd Plaintiffs had not authorised the 3rd Plaintiff to swear the Affidavit in support of the said application.

27. It was therefore not correct as the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants had submitted that the present application was *res judicata* because the previous application was never heard on merit but was dismissed on a technicality. The present application was therefore properly before this court for determination.

II. INJUNCTION

28. The Plaintiffs, 2nd, 7th and 9th Defendants contended that the notices of the meeting were not issued in accordance with the Companies Articles of Association and the same were not circulated widely through local media as had been recommended by a Task Force.

29. On their part, the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants averred that the Notices for the meeting were issued on 4th November 2016 for the meeting to be held on 26th November 2016. It was their contention that Paragraph 8 of the Companies Act provided that the non-receipt of notice of a meeting by any person entitled to receive notice shall not, except in the case of the agent, invalidate the proceedings at that meeting.

30. A perusal of Clause 8 of the Company's Article of Association provided as follows:-

"All general meetings other than annual general meeting shall be called extraordinary general meetings. All general and extra-ordinary meeting shall be called by twenty one days notice in writing at the least but the accidental omission or give (sic) **notice of a meeting to or the non-receipt of a meeting by any person entitled to receive notice shall not, except in the case of the agent, invalidate the proceedings."**

31. The Articles of Association Exhibit marked "KJM 2" that was annexed to the Affidavit in support of the Plaintiffs' Notice of Motion application was silent on how notices for general and extra-ordinary meetings were to be sent to the shareholders. They did not adduce any other documentary evidence to show that the Task Force had directed that the Notices be advertised in the local daily or that such advertisement was what was envisaged under Clause 8 of the said Company's Articles of Association.

32. A further perusal of the said Supporting Affidavit showed that some of the shareholders attended the meeting. As the Plaintiffs had not purported to represent other shareholders in the suit herein, the fact that they physically attended the meeting meant that they received the Notices before the meeting commenced.

33. It was sufficient under Clause 8 of the Company's Articles that the notices be sent within twenty one (21) days of the meeting called and that if no notice was received or inadvertently not sent, the omission would not invalidate the proceedings. The Notices that were annexed to the Plaintiffs' Supporting Affidavit and marked as Exhibit "KJM 1" were dated 4th November 2016 and the meeting was scheduled for 26th November 2016. For all purposes and intent, the said Notice were therefore valid in line with the aforesaid Clause 8 of the Company's Articles of Association.

34. Accordingly, in the absence of any other proof, this court was not persuaded to find that the notices were not sent in accordance with the Company's Articles of Association.

35. Turning to the mode of election, the Plaintiffs, 2nd, 7th and 9thDefendants had contended that the elections that were held on 26th November 2016 were not conducted in the manner allowed by the Company's Articles of Association and the Companies Act. Their contention was that the shareholders ought not to have been divided in groups namely Wongonyi, Ghazi, Ndome, Tausa and Mraru each appointing a director whereupon the elected directors would elect the Chairman, Secretary and Executive. They contended that the election was to be by show of hands.

36. On their part, 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendantsalso averred that the method of election on 26th November 2016was the one that was adopted in all meetings and that the Plaintiffs were themselves elected through the same process. They therefore stated that the Plaintiffs had not demonstrated that they were entitled to injunctive orders as they had sought.

37. A perusal of the Minute 7 .1 of the Minutes of the Special Annual General Meeting that was held on 26th November 2016 annexed to the Supporting Affidavit and marked as Exhibit "KJM 3" stated as follows:-

> **"As always, each of the five zones assembled separately to elect the directors from Ndome and Ghanzi,and one director each from Wongonyi, Tausa and Mraru, making a total of nine directors. No satisfactory basis for this has ever been stated."**

38. This court noted that the Plaintiffs relied on Clause 10 of the Company's Articles of Association that provided as follows:-

> **"At any general meeting a resolution put to the vote of the meeting shall be decided by a show of hands unless a poll is (before or on the declaration of the result of the show of hands) demanded by any member present in person or by a proxy in which case a poll must be held. Unless a poll is so demanded, a declaration by the chairman that a resolution has on a show of hands, been carried or carried unanimously or by a particular majority, or lost and an entry to that effect in the book containing the minutes of the proceedings of the company shall be conclusive evidence of the fact without proof of the number of proportion of the votes recorded in favour of or against such resolution. The demand for a poll may be withdrawn. Regulation 58 of the Table shall not apply."**

39. It was apparent to this court that Clause 10 of the Company's Articles of Association spelt out the mode of voting where a resolution had been put to the vote. It did not give the mode of voting for directors during Annual General Meetings or Extra Ordinary meetings. On the other hand, the rotation of and retirement of directors was stipulated in Clauses 26 and 27 of the Company's Articles of Association. The Plaintiffs did not appear to have raised any concern on this issue.

40. In the circumstances foregoing, it was the finding and holding of this court that the Plaintiffs had failed to demonstrate that the election of the directors was to be by a show of hands as Clause 10 of the Company's Articles of Association related to voting for resolutions and not election of directors.

41. Accordingly, having considered the pleadings, affidavit evidence and the written submissions and the case law in respect of the parties' case, this court found that the Plaintiffs had not established any grounds under which it could grant a permanent injunction. They failed to satisfy this court that they had satisfied the criteria of granting an injunction as was held in the celebrated case of **Giella vs Cassman Brown Company Limited (1973) EA 360** in which it was held that:-

> "**The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."

42. As this court found that the Plaintiffs failed to discharge its burden of showing that it had met the criteria that was set out in the case of **Giella vs Cassman Brown Company Limited** (Supra), it was not inclined to exercise its discretion in their favour.

DISPOSITION

43. For the foregoing reasons, the upshot of this court's Ruling was that the Plaintiffs' Notice of Motion application dated 4th July 2017 and filed on 5th July 2017 was not merited and the same is hereby dismissed with costs to the 1st, 3rd, 4th, 5th, 6th, 8th and 10th Defendants, which for the avoidance of doubt shall be payable to them by the Plaintiffs herein.

44. It is so ordered.

DATED and **DELIVERED** at **VOI** this1**8th** day of **January** 2018

J. KAMAU

JUDGE