



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 11 OF 2018

IN THE MATTER OF KIBORON FARMERS CO. LTD

IN THE MATTER OF AN APPLICATION FOR INJUNCTION

KIROBON FARMERS LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

BENJAMIN CHESULUT.....DEFENDANT/APPLICANT

RULING

1. There are two applications before me.

The plaintiff in the suit is a Limited Liability Company while the defendant is a director and shareholder of the plaintiff company. Reading through the parties pleadings there is no doubt that there exists leadership wrangles between the directors collectively and individually, and the shareholders.

2. By its application dated 21st March 2018, the plaintiff company seeks to restrain and stop the defendant, one of its directors, from holding an Annual General Meeting(A.G.M) that he called without the consent or participation of the other Directors.

The main contention by the plaintiff is that the said A.G.M that was to take place on the 24th March 2018 was unilaterally called for by the defendant without authority, and therefore illegal.

Upon an interparte hearing of the application on the 22nd march 2018, the court stopped holding of the planned A.G.M.

3. Immediately thereafter and upon service of the court papers, the defendant filed an application on the **4th June 2018** against the plaintiff company seeking an order to restrain the directors of the company from selling, transferring or dealing with the companies assets, including withdrawing rent proceeds from Brookside Dairy, to the tune of Kshs.2,000,000/= which it was purported they intended to use for their personal use.

An order of interim injunction was likewise granted on the 4th June 2018.

4. These two applications are the subject of this ruling. They have filed written submissions.

A preliminary issue arose whether the suit was competently filed by the firm of Ochieng Gai & Co. Advocates, purportedly for lack of authority from the company to institute the case.

I have not seen any form of authority or resolution by the Board of Directors filed and appointing the plaintiffs law firm to act and file this suit on its behalf. The defendant raised the issue in his submissions. Mr. Gai Advocate who argued for the plaintiff tactfully failed to address the court on the issue.

Nevertheless, as a legal issue of a preliminary nature, it is my duty to deal with it.

6. A company can only sue on its own name with sanction of its Board of Directors or by a resolution in a general or special meeting. It is during such meetings that authority is given to a law firm to institute a case on its behalf.

In Leo Investments Ltd -vs- Trident Insurance Co. Ltd (2014) e KLR and Republic -vs- Registrar General and 13 Others (2015) e

KLR, Odunga J and Kimaru J respectively rendered that the legal position is that a resolution of the Board of Directors of a company may be filed at anytime before the suit is fixed for hearing. This is the same position by the **Court of Appeal in East Africa Safari Air Ltd -vs- Antony Ambaka Kegodre & Another (2011)** where it clearly rendered that:

“proceedings will not be set aside because a solicitor acted without authority as such.”

7. Proceedings can be ratified after filing in a meeting of the shareholders to see if the company supports the litigation. I have no reason to depart from such holding.

Consequently, it is my findings that though no express authority was exhibited or filed, the plaintiffs suit is competently filed, and that failure to file the authority before institution of the suit ought not invalidate the suit. The plaintiff is however under a duty to file the authority before the suit is fixed for hearing.

8. On the applications for injunction by both parties, it is obvious that both raise *prima facie* cases demanding consideration as to preserve the companies assets from wastage. The statement of defence, counterclaim and defence to counterclaim all speak to that need – **Giella -vs- Cassman Brown and Co. Ltd (1973) 358.**

9. There is not doubt that the plaintiff has a duty to call for an Annual General Meeting, as a mandatory requirement under the **Companies Act, Section 135.** Failure to do so, and which is not denied, may cause the company to be struck off under **Section 125, 131 and 145** thereof.

The plaintiff has not, by its affidavits or submissions given any reasons why no Annual General Meeting has been called since 2014. In my view, existence of a land case in itself does not bar the calling of an Annual General Meeting. No Order injuncting it from doing so has been provided, and none was given.

10. The importance of an Annual General Meeting can not be over emphasized. It is through such a meeting that it accounts to its shareholders, discusses its challenges, and comes up with resolutions on the running of its affairs. It is an important facet in the operation of its corporate entity.

11. Issues bedeviling the plaintiff can only be discussed, in such an AGM, properly called by the company or by a shareholder, or any other person but with leave of the court in a derivative action.

See **Agricultural Development Corporation of Kenya -vs- Nathaniel Tumxami (2014) e KLR.**

Under **Section 131(1) Companies Act,** a company is mandated to hold an Annual General Meeting. The plaintiff is under gross violation of the law and thus exposes it to penalties and sanctions as aforementioned under **Sections 125, 131 and 148.**

12. Having considered the rival arguments on the two applications, I am of the considered opinion that an AGM must be held before the hearing and determination of the pertinent issues stated both in the plaint and in the defence and counterclaim.

Both applications have merit.

13. However, orders sought in the aforementioned applications have been overtaken by events, as the interim orders of injunction sought and granted gave temporary relief to both parties. Consequently, I proceed to uphold and confirm the interim orders issued by the court on the 22nd March 2018(Odero J) and on the 6th June 2018 (Mulwa J).

14. In line with the above orders, and to facilitate compliance with the law, **I further issue an order that the plaintiff, through its Board of Directors do within a period of 75 days from the date of this ruling, call for an Annual General Meeting of all its shareholders during which issues stated in the parties respective pleadings may be discussed and possible solutions reached so as not to put the companies assets to waste and damage.**

15. Each party shall bear own costs of their respective applications.

Orders accordingly.

Dated, signed and delivered this 28th Day of November 2018

J.N. MULWA

JUDGE