



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 232 OF 2016

JOHN MUTHAMO WASUSANA.....PLAINTIFF/APPLICANT

- V E R S U S -

KTDA MANAGEMENT SERVICE LTD.....1ST DEFENDANT/RESPONDENT

PETER MUCHOKI WAHOME.....2ND DEFENDANT/RESPONDENT

OSBERT MWANGI KARIUKI.....3RD DEFENDANT/RESPONDENT

MATHEW KABUE NJOGU.....4TH DEFENDANT/RESPONDENT

NICHOLAS MURIITHI MAHIHU.....5TH DEFENDANT/RESPONDENT

PETERSON WAWERU THINGO.....6TH DEFENDANT/RESPONDENT

ESTHER WANJIRU.....7TH DEFENDANT/RESPONDENT

RULING

1. The subject matter of this ruling is the motion dated 2/9/2016 taken out by John Mithamo Wasusana, the plaintiff/applicant herein. In the aforesaid motion, the plaintiff applied for the following orders *inter alia*:

- 1. THAT the instant application be certified as urgent and heard ex-parte in the first instance.***
- 2. THAT there be an order staying and/or injunction the further implementation of the resolution suspending the plaintiff/applicant from performing his functions as a director of NDIMA TEA FACTORY CO. LTD reached by the 2nd – 7th defendants/respondents on 19th August 2016 and communicated as per the 1st defendant's letter to the plaintiff/applicant dated 23d August 2016 pending the hearing and final determination of the suit herein.***
- 3. THAT further and/or in the alternative to prayer (2) hereinabove, there be an injunctive order restraining the defendants/respondents by themselves, their agents, servants and/or employees from barring, suspending, interfering, frustrating, denying and/or interfering in whatsoever manner with the plaintiffs/applicants exercise of his mandate, functions, privileges and/or rights as a Director of NDIMA TEA FACTORY LTD pending the hearing and determination of the suit herein.***

4. THAT pending the inter-partes hearing of the applicant herein, there be an interim order of stay in terms of prayer 3 and/or 4 hereinabove.

2. The motion is supported by the affidavit and supplementary affidavit sworn by the plaintiff. When served with the motion, Kenya Tea Development Agency, the 1st defendant, filed the replying affidavit of Florence Mitey to oppose the motion. The 2nd, 3rd, 4th, 5th, 6th and 7th defendants each filed a notice of preliminary objection to resist the motion.

3. When the motion came up for inter partes hearing, learned counsels recorded a consent order to have the motion disposed of by written submission.

4. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have further taken into account the grounds stated on the notices of preliminary objections. I have also considered both the rival oral and written submission. It is the submission of the plaintiff that he was duly elected as a director of Ndima tea Factory Co. Ltd alongside the 2nd to the 7th defendants. It is stated by the plaintiff that the 2nd to 7th defendants at the behest of the 1st defendant resolved on 19.8.2016 to suspend the plaintiff from performing his functions as a director of Ndima tea Factory for 6 months with effect from 19.8.2016. It is argued that the defendants lack the legal mandate to make such a resolution which in his view is irrational, capricious, highhanded, unlawful baseless, malicious and made in bad faith. The applicant further argued that unless the order for injunction is given the defendants' resolution will lock him out from playing his role as a director of the Tea factory thus defranchising the tea farmers the plaintiff represents.

5. The 2nd to 7th defendant filed notices of preliminary objection with similar grounds. The main ground argued is that the plaintiff is seeking to challenge the decision/resolution of Ndima Tea Factory Company Ltd, a limited liability company, therefore the 2nd to 7th defendants cannot be held personally liable. It is their submission that the suit as against the 2nd to 7th defendants is untenable. The 1st defendant on its part has pointed out that though it is the appointed managing agent of Ndima Tea Factory Co. Ltd, that alone did not entitle the plaintiff to file this suit against the agent for wrongs allegedly committed by the principal herein, Ndima Tea Factory Co. Ltd. The 1st defendant pointed out that the Board of Directors of Ndima Tea Factory Co. Ltd found the plaintiff as having breached the code of conduct of a director and proceeded to pass a resolution to have him suspended as a director for a period of 6 months with effect from 19.8.2016. It is therefore the submission of the 1st defendant that the resolution was not baseless as alleged by the plaintiff.

6. The first issue which commends itself for determination is the question as to whether or not it was tenable to sue the 2nd to 7th defendants in their individual capacities for the wrongs committed by a limited liability company. The plaintiff has defended his action arguing that the 2nd to the 7th defendants are not sued in their individual capacities but rather in their official capacities as Board members of the tea factory. He argued that the 2nd to 7th defendants constituted themselves as a board of directors which board was not properly constituted nor did it have the proper quorum contrary to the articles of association of the company. With great respect, I am not persuaded by the arguments put forward by the plaintiff. The truth of the matter is that the 2nd to 7th defendants met and passed resolutions as a board of directors of Ndima Tea Factory Co. Ltd. Their decision therefore is that of Ndima Tea Factory Co. Ltd, which is an independent legal entity separate from its directors and shareholders. The directors cannot be held liable for the said decision. It suffices to cite the case of **Salmond vs Salmond & Co. Ltd (1897) A.C** in which it was stated *inter alia* as follows:

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the shareholders of the subscribers or trustees for them nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act.”

7. There is no doubt that Ndimia Tea Factory Co. Ltd is not a party to this suit. The resolution passed by the 2nd to 7th defendant is clearly stated to be the resolution of Ndimia Tea Factory Co. Ltd. The motion and the suit as against the 2nd to 7th defendants in the absence of Ndimia Tea Factory Co. Ltd is therefore untenable.

8. I have also carefully considered the material supplied in support and against the application filed against K.T.D.A Management Services Ltd the 1st defendant. It is apparent that the decision complained of was arrived at by Ndimia Tea Factory Co. Ltd an independent entity separate from Kenya Tea Development Agency Management Service. In my humble view it is therefore inappropriate by the plaintiff to sue Kenya Tea Development Management Services. It is clear from the contents of the letter forwarded by the company secretary of Kenya Tea Development Agency Group under the letterhead of the 1st defendant that the resolutions were passed by Ndimia Tea Factory Co. Ltd and not the 1st defendant. There is no evidence that the 1st defendant is not a board member of Ndimia Tea Factory Co. Ltd.

9. In my view and without going into details on the merits or otherwise of the suit and the application before this court, I think the preliminary objection is well founded. It is upheld.

10. For the avoidance of doubt the preliminary objection is upheld with a consequential order that the motion dated 2/9/2016 is ordered dismissed with costs abiding the outcome of the suit. I have deliberately refused to dismiss the suit because if well advised the same may be cured by the plaintiff taking the appropriate steps provided by law.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Respondents