



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 15 OF 2016

MUNYAKA KUNA COMPANY LIMITED.....PLAINTIFF

- V E R S U S -

JOSEPH KIMANI HERMAN.....1ST DEFENDANT

T. WAMBUGU WARUI.....2ND DEFENDANT

LUKE CHEGE.....3RD DEFENDANT

E. GATU NDUNGU..... 4TH DEFENDANT

SAMUEL NJUGUNA WAWERU.....5TH DEFENDANT

DOUGLAS KAMOTHO MWANGI.....6TH DEFENDANT

GATIRU KANYORO.....7TH DEFENDANT

RULING

1) The defendants herein namely Joseph Kimani Herman, T. Wambugu Warui, Luke Chege, E. Gatu Ndungu, Samuel Njuguna Waweru, Douglas Kamotho Mwangi and Gatiru Kanyoro took out the motion dated 14.2.2017 in which they sought for the following orders:

1. That this application be certified urgent and the same be heard exparte in the first instance of account of urgency.

2. That pending interpartes hearing and determination of this application and thereafter the suit, this honourable court be pleased to issue an order of injunction restraining the persons namely Karanja Macharia, Charles Franccis Mbatia, Joseph Ndegwa, Francis Githuku, Joseph Gakaya, Dedan Kimathi and Harrison Maina claiming to be the directors of the plaintiff, their employees, servants and/or agents from doing the following acts or any of them that is to say from terminating and/or altering existing tenancies between the plaintiff and the tenants occupying the plaintiff's premises known as L.R. no. 209/138/27, demolishing or reconstructing the said premises, borrowing funds from financial institutions and/or other entities in the name of or for the benefit of the plaintiff without leave of this court.

3. That upon granting prayer 2 above, this suit be referred to court annexed mediation for hearing and final determination.

4. That costs of this application be borne by the defendant.

- 2) The motion is supported by the affidavit of Joseph Kimani Herman. When served with the motion, Munyaka Kuna Co. Ltd, the plaintiff herein filed, the replying affidavit of Karanja Macharia to oppose the application. The motion was disposed of by oral submissions.
- 3) 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 considered the rival oral submissions. It is the submission of the defendant/applicant that on 22.1.2016 Karanja Macharia, Francis Charles Mbatia, Joseph Ndegwa, Francis Githuku, Joseph Gakaya, Dedan Kimathi and Harrison Maina hereafter referred to as the 'group' claiming to be directors of the plaintiff company filed a suit using the company's name and successfully obtained orders of injunction to restrain the defendants from holding of an Annual General Meeting or a Special meeting of the plaintiff on 23rd January 2016. It is said that the order was not served upon the defendants and the defendants proceeded to convene the Annual General Meeting on 23.1.2016 in accordance with the notices issued to the shareholders in which meeting elections were held and the defendants were validly elected into office as directors of the plaintiff company.
- 4) The 'group' took out the application dated 16.2.2016 and sought for the defendants to be cited to contempt. It is argued that the group used the aforesaid application and the police to get back to office despite their term having lapsed and the defendants having been duly elected into office as directors of the plaintiff company. The defendants aver that the group is now purporting to terminate tenancies of tenants carrying on business at the plaintiff's business premises known as L.R. no 209/138/27. It also alleged that the group has begun to approach financial institutions with the intention of borrowing without being sanctioned by bonafide shareholders and directors of the plaintiff. It is also alleged that the group has failed to account for ksh.40 million they borrowed in the past in the name of the plaintiff. For the above reasons this court was beseeched to issue an order of injunction. The applicants further urged this court to refer the dispute to a court annexed mediation process.
- 5) In response to the defendants motion, the plaintiff filed the affidavit of Karanja Macharia. The plaintiff accused the defendants of failing to disclose the fact that on 29.7.2016 they unsuccessfully sought for an order stopping the plaintiff from holding its Annual General Meeting but the company still proceeded to hold the aforesaid Annual General Meeting on 30.7.2016 whereof directors were elected. It was pointed out that some people were wrongly referred to as directors yet they are not. The plaintiff names Charles Francis Mbatia and Harrison Maina were said to be non-directors. The plaintiff pointed out that the defendants were restrained by an order of this court from interfering with the management of the company which court order remained in force until the annual General Meeting was held on 30.7.2016. The plaintiff denied the allegations made against the group. It is apparent that the plaintiff is not averse over the application to have the dispute referred to a court annexed mediation.
- 6) After a careful consideration of the rival submissions, it is clear to me that there are two factions of directors each trying to wrestle the control of the plaintiff company.
- 7) It is difficult to discern from the pleadings and the submission the accusations and counter-accusations as to who is right or wrong in this saga. A balanced decision can only be reached after this suit is heard and determined in a trial where the veracity of the evidence tendered is interrogated in a trial by way of cross-examination.
- 8) The applicable principle in determining the request for an order of injunction is, the balance of convenience. Since this court is in doubt, in the circumstance of this case tilts the balance of convenience in favour of maintaining the *status quo*. Therefore, the motion seeking for an order of injunction is dismissed.
- 9) The second prayer is for the dispute to be referred to court- annexed mediation. Both sides are not averse to the prayer for the matter being referred to mediation. Currently court annexed mediation is being implemented in the Family and Commercial Divisions of the High Court, Milimani Law Courts, Nairobi on a pilot basis. After considering the request to have the matter referred to mediation, and

considering the fact that there is no objection from either side, I hereby direct that this file be placed before the Mediation Deputy Registrar (M.D.R) for screening to assess whether or not the matter is suitable for mediation.

10) In the circumstances of this case a fair order on costs is to direct which I hereby do that each party meets its own costs of the application.

Dated, Signed and Delivered in open court this 31st day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent