



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**HCCC NO.168 OF 2002**

**ABRAHAM KAMUYU M’KIRIMA**

**SAMUEL M’NGAI**

**STANLEY THIKANYI (On their behalf &**

**on behalf of their 100 members.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE DIRECTOR KIEGOI TEA FACTORY LTD.....DEFENDANT**

**JOSEPH IRUNGU KIMANI T/A WACHIRA**

**IRUNGU & ASSOCIATES .....INTERESTED PARTY/APPLICANT**

**RULING**

Application dated 20<sup>th</sup> August 2015 is brought pursuant to order 51 Rule I of the Civil Procedure Rules 2010 and Sections 1A,1B, 3, 3A and 27 of the Civil Procedure Act, Cap 2a Laws of Kenya.

The application seeks for orders directing as to which party between plaintiffs and defendants are obligated to pay costs of audit ordered by court on 6<sup>th</sup> March 2003. It was also sought that the court approves the interested party’s annexed professional fees for services rendered on account of the audit ordered by court on 6<sup>th</sup> March 2003. The application is supported by the grounds on the face of the application and affidavit of Joseph Irungu Kimani. The interested party’s applicant was appointed by the court to audit and render an account in respect of financial affairs of Kiegoi Tea Factory Co. Ltd for the year ended 30<sup>th</sup> June 2001.

That it was ordered that costs of the interested party were to be dealt with later. The interested party both in the grounds of affidavit averred that they complied with the court order and filed report which eventually assisted in the determination of the issues in the suit. It was claimed that the interested party’s firm raised its fee note but the same has never elicited any positive response in regards to the payments by the parties in the suit. The application was served on both the defendants and plaintiffs but none opposed the application.

On 27<sup>th</sup> March 2017, when applications came up for hearing the 2<sup>nd</sup> time, Mr Kimathi Advocate for the interested party urged the court that in determining the application it should look at the directions on record on 6<sup>th</sup> March 2003 and 10<sup>th</sup> February 2003. He also urged that the court looks at the decree in the matter and order that plaintiffs bear the cost of the Audit.

Mr Omari Advocate for the defendant Tea Factory urged the court to be guided by orders made on 6<sup>th</sup> March 2003 and 10<sup>th</sup> February 2003 which is clear as to pay Auditors costs. When **Honourable Justice Kasanga Mulwa** ordered that plaintiff's allegations of mismanagement be investigated by an independent person to be agreed by the parties;

**“the Directors were to facilitate the independent person to carry out the investigations without any hindrance, this was on 10<sup>th</sup> February 2003”.**

On 6<sup>th</sup> March 2003, parties settled on the interested party to carry out the Audit. In regard to costs the trial Judge said costs shall be dealt with later together with costs of the audit. The plaintiffs originating summons dated 16<sup>th</sup> September 2002 sought for orders that Directors of the Defendant be compelled to call an annual General Meeting immediately to allow members to make the necessary resolutions and recommendations since the annual general meeting on 15<sup>th</sup> April 2002 failed to take off. They also prayed for costs of the summons chamber dated 20<sup>th</sup> January 2005 sought for injunctive orders against the directors of the Defendant Company as the grounds that they were holding office without authority of the shareholders. The application was opposed vide preliminary objections.

Instead of the application dated 20<sup>th</sup> January 2005, it is the originating summons which was heard and it is out of the said O.S that **Justice Kasanga Mulwa** decided to have the defendant company's finances Audited.

From the ruling of **Justice Anyara Emukule** dated 19<sup>th</sup> June 2009, he said the Audit Report showed the disputed figure of Kshs. 3,076,574/= alleged to have been misapplied by the Director was not expenditure but was a component of the liability for the year 2000/2001 and therefore the amount was correctly treated in the books of Defendants Company. The decision to subject the defendant's finances to Audit was not the idea of the plaintiffs or defendants. It was the idea of the judge to bring the dispute to an end. The judge ordered Directors to facilitate the Audit.

My interpretation of that order is that the Directors of the Defendant are to pay the professional fees for the Auditors. The fact that the plaintiffs originating summons was dismissed for want of prosecution does not therefore mean that plaintiff was also condemned to pay the Auditors professional fees.

Application for interested parties is therefore allowed to the extent that the professional fees will be paid by the Directors of the Defendant company from the finances of the company. Costs of application also to be taxed and paid by Defendant Company.

The interested party's annexed professional fees will have to be subjected to scrutiny by defendants and either agreed upon or taxed by the Deputy Registrar before the Court can approve the same for payment by the Defendant Company.

**Ruling Signed, Delivered and Dated this 27<sup>th</sup> Day of April 2017.**

**HON. A.ONG'INJO**

**JUDGE.**