



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CIVIL CASE NO. 7 OF 2015

TIMAU FARMERS COMPANY LTD 1ST PLAINTIFF

JOSHUA MARETE KIAMBATI 2ND PLAINTIFF

Versus

JOHN GATHOGO 1ST DEFENDANT

PETER NGANGA MBUGUA 2ND DEFENDANT

M'LINGERA M'NITARI..... 3RD DEFENDANT

JOHN KIUNJURI KAMAU..... 4TH DEFENDANT

IRENE WANJIKU KANYARI 5TH DEFENDANT

JOSEPH NDIANGUI WATUTHU..... 6TH DEFENDANT

MONICA GITONGA..... 7TH DEFENDANT

JUDGEMENT

1. This case was filed by **Timau Farmers Company Limited (the company)** as the first plaintiff and **Joshua Marete Kiambati** as the second plaintiff against the **seven (7)** defendants. The plaintiff seeks the following prayers in their plaint:-

1. **A declaration that the purported meeting of Timau Farmers Company Limited held at Dam Primary School on 18th October 2014 was irregularly convened and unlawful, therefore all resolutions made pursuant thereto were null and void *ab-initio*.**

2. **The defendants, their agents, employees or proxies be restrained by an order of permanent injunction from intermeddling or conducting any affairs of the company.**

3. **An order to the effect that the Registrar of Companies do rectify his records to reflect the correct status of the company in terms of directorship and date of registration.**

2. The defendant deny the plaintiff's claim and further plead that the second plaintiff had no authority to institute this action.

BACKGROUND

3. The company was registered in **August 1980** with the main objective being to purchase immovable properties for distribution amongst its members. It is what is commonly known as **Land Buying Company**. The second plaintiff and all the defendants are amongst the members of the company. The company purchased **900 acres** of land registered as **LR No. DAIGA/UMANDE BLOCK 10 Timau**. The plaintiffs allege that the company seal was stolen and as a consequence title deeds of the company's property in Timau were illegally issued to non-members of the company. **Paragraph 11 and 12** of the plaint will assist in understanding the plaintiff's claim. Those paragraphs are as follows:-

11. That with intentions of grabbing, stealing and/or wrongfully acquiring the assets of the company, the defendants herein either jointly or severally, forged and presented fraudulent facts to the registrar of companies that they were the directors of Timau Farmers Company Limited pursuant to elections carried out on 18th October 2014 at Dam Primary School.

12. The 2nd plaintiff avers that there has never been any such meeting on 18th October 2014 or any other day prior or subsequent. In the alternative, the 2nd plaintiff states that if there was any such meeting, the same was unlawful as there no notice to members nor was quorum sufficient for proceedings , as such any/all resolutions passed pursuant thereto were null and void *ab-initio*.

4. It is the basis of the above background that the plaintiffs seek the prayers reproduced above.

5. In evidence the second plaintiff and his witness Fredrick Kamau testified that the office holders of the company were elected in the year 2002. In that election the second plaintiff was elected chairman of that company. There were five other office holders that were elected in office at that time. The plaintiff's contention before court is that since that election there had not been any official general meeting of the company changing the office bearers. That the meeting allegedly held by the defendants on 18th October 2014 whereby the defendants were appointed as office holders of the company was illegal and irregular. The plaintiffs' therefore seek the declaration that the second plaintiff still holds the position of a chairman together with other officials. It is however important to note that the other alleged officials did not give evidence in support of the plaintiff's case. Indeed the second plaintiff in evidence stated that those other office holders had disappeared.

6. The defendants through the evidence of M'Lingera M'Nitari stated that there was a general meeting of the company which was called on 18th October 2014 which meeting elected the defendants as office holders. He stated that the meeting was regularly called for and that it was attended by government officials. In his evidence he stated that the new officials appointed during that meeting had revived the distribution of land to the members of the company which distribution had stalled during the tenure of the second plaintiff and his co officials.

ANALYSIS AND DETERMINATION

7. The issues that present themselves for determination in this case are:-

(a) Did Joshua Marete Kiambati obtain authorisation to file this case on behalf of the company?

(b) If the answer to (a) above is in the affirmative, was the impugned meeting of the company convened on 18th October 2014 irregular?

(c) If the answer to(b) above is in the affirmative should the defendants be enjoined from conducting the affairs of the company?

ISSUE (a)

8. In the first instant the law entrust the decision on whether a company is to litigate or not to the general meeting of the board of directors. With regard to that general proposition I wish to refer to the case **ASSIA PHARMACEUTICALS V NAIROBI VETERINARY CENTER LTD HCCC NO. 391 OF 2000** where the court had this to say:-

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the Articles of Association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

9. The plaintiff’s case was concluded without evidence being produced to show that the company through its Board of Directors had authorised the second plaintiff to institute this case. If that authority was not forth coming then the rule of **FOSS VS HARBOTTLE** comes into play and leave of court to file suit is imperative. In the case **EDWARD VS HALLIWELL & OTHERS (1950) ALL ER 1064** in discussing that rule stated:-

“The rule in Foss vs. Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company or association is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*.”

10. In other words the decision whether to litigate ought to be decided by the majority of the shareholders in a general meeting. This is made clear in the decision of Justice Mwera (as he then was now a Judge of the Court of Appeal) in the case **DADANI vs MANJI & 3 OTHERS (2004) KLR** where he stated:-

“It is a cardinal principle in Company Law that it is for the company and not an individual shareholder to enforce right of actions vested in the company and to sue for wrongs done to it. It is also cardinal that in absence of illegality of a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matter (see *Foss v. Harbottle (1843) 2 Hare 461*). All this is in deference to the self regulation the law allows corporations and thus limits the interference by courts in the running of such bodies on their own. However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of derivative suit.”

In that case Mwera, J refer to the learned Author Joffe in ‘**Law Practice and Procedure**’ viz;

“Where the shareholders seek to enforce a right not invested in himself by the company of which he is a member for example a claim for the company’s property misappropriation by the Director, he can only do (if at all) by means of a derivative claim. The derivative action is a claim brought by an individual shareholder in his own name but on behalf of the company. The reason the claim takes this form is that the minority shareholder is not in a position to see that the claim is brought in the name of the company itself to enforce the company’s rights.”

11. What essentially the second plaintiff should have done was to get the authority of the members of

the company on his own to meet and overturn the decision made on 18th October 2014 which the plaintiff alleged was an irregular meeting. If however the second plaintiff intended to enforce a right on behalf of the company he could only have brought a derivative claim. To bring a derivative claim the second plaintiff needed to obtain the leave of the court. In deed it is important to note that the **Company's Act 2015** under **Part XI** provides for derivative action. Under **section 239** of that Act a party has to seek the courts permission to continue derivative action.

12. The second plaintiff therefore having failed to obtain the company's authority through the general meeting to institute this action and further having failed to obtain leave of court to either file or continue with the derivative action this action is therefore invalid for want of authority and leave of the court. That determines issue (a).

ISSUE (b)

13. Although issue (a) was determined in the negative I will however proceed to consider issue (b) whether the meeting of the company of 18th October 2014 called by the defendant was regular.

14. The defendants evidence was through Joshua Ngeera M'Rintari. He stated that notice of that impugned meeting was issued 21 days prior to the date of meeting. At the meeting there were 71 shareholders in attendance. The Articles of Association of the company in particular **Article No. 9(ii)** provides as follows:-

“9.(ii) No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, twenty members or one third of all the members (whichever is the less) present in person or by proxy, shall be a quorum.”

15. From the above it will be seen that a general meeting can be held with 21 members of the company present or a third of the members of the company whichever is less. Since the meeting of 18th October 2014 had 71 members present the required quorum for a general meeting was met. The decision in that meeting to appoint the defendants as office holders was therefore regular.

16. It is clear from the above that the plaintiff failed to prove their case on a balance of probability. In the first instant the plaintiff's case fails for failure to obtain authorization. It also fails because in this court's finding the meeting dated 18th October 2014 was regular and the defendants hold their office regularly. For the above reasons the **plaintiffs' case is dismissed. The order of injunction issued on 26th January 2015 and the subsequent orders of the court issued on 23rd July 2015 are hereby vacated. The second plaintiff shall pay the defendants costs of this suit.**

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2016

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

Plaintiffs

Respondents:

For Plaintiffs:

For Respondents:

COURT

Judgment read in open court.

MARY KASANGO

JUDGE