



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL CASE NO. 13 OF 2014**

GEORGE MAINA KABUI.....1<sup>ST</sup> PLAINTIFF  
KANGARA MUTUGI KAMAU.....2<sup>ND</sup> PLAINTIFF  
PERMINUS MWANGI NJUKI.....3<sup>RD</sup> PLAINTIFF  
LAZARUS MUGO MUNYI.....4<sup>TH</sup> PLAINTIFF  
EMMANUEL GICHIRA NJAMUMO.....5<sup>TH</sup> PLAINTIFF  
CHARITY WAMBUI NJAMBURI.....6<sup>TH</sup> PLAINTIFF

-VERSUS-

DAVID CRISPO CHIGITI.....1<sup>ST</sup> DEFENDANT  
DAVID MURIUKI MIGWI.....2<sup>ND</sup> DEFENDANT  
WINNIE WAMBUI GACHOKI.....3<sup>RD</sup> DEFENDANT  
STEPHEN KABUI GACHOKI.....4<sup>TH</sup> DEFENDANT

**RULING**

1. **DAVID CRISPO CHIGITI, DAVID MURIUKI MIGWI, WINNIE WAMBUI GACHOKI** and **STEPHEN KABUI NYAGA** are the defendants in the above case and the applicants in a Notice of Motion dated 17<sup>th</sup> June, 2015. In the application the applicant sought the following reliefs:

- i. *That the application be certified urgent and be heard exparte in the 1<sup>st</sup> instance.*
- ii. *That pending the hearing and determination of the said application the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>*

*and 5<sup>th</sup> plaintiffs be restrained either by the themselves or their agents from issuing orders, directives, threats or instructions to third parties in relationships contractual or otherwise with Kerugoya Service Station Ltd. or from preventing Total (K) Ltd. or any other third parties from fulfilling their duties, contractual or otherwise towards Kerugoya Service Station.*

- iii. *Further to the above prayer (2) Total (K) Ltd., be and is hereby allowed and/or directed to proceed and honour its contractual obligations towards Kerugoya Service Station.*
- iv. *That pending the hearing of the suit the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Plaintiffs be and are hereby restrained by themselves or their agents from issuing orders, directives, threats or instructions to third parties in relationship contractual or otherwise with Kerugoya Service Station Ltd., or from any other way preventing any of those 3<sup>rd</sup> parties from fulfilling their duties contractual or otherwise toward Kerugoya Service Station.*
- v. *That costs of this application be provided for.*

2. Mr. Okubasu counsel for the Applicants relied on the grounds on the face of the application contending that the Respondents have paralyzed the operations of Kerugoya Service Station Ltd., (hereinafter to be referred to as the company) in their capacity as shareholders by issuing threats and directives after the ruling of this Court delivered on 18<sup>th</sup> February, 2015 that declined to issue orders in their favour. The Applicants have further alleged that the Respondents have held irregular meetings inviting members that included deceased persons and thereby interfered with operations of the company by issuing directives to 3<sup>rd</sup> parties.
3. The Applicants further argued that the Plaintiffs/Respondents cannot issue directives concerning the affairs of a company and that they should be stopped from stifling the operations of the company. The Applicants contended that the company is unable to meet its statutory obligations owing to the Respondents actions which they view as a collateral way of achieving what this Court declined to grant vide its ruling delivered on 18<sup>th</sup> February, 2015.
4. The Applicants through **DAVID CRISPO CHIGITI** deposed that this Court declined to compel the Defendants to call for a meeting within 30 days and despite that the Respondents herein went ahead to call for a meeting on 29<sup>th</sup> February, 2015 where they invited shareholders including the deceased members as evidenced by annexure "DCC2" annexed to the affidavit of the said deponent. They also alleged that the Respondents wrote to Total (K) Ltd., stopping them from releasing any money to the company until their house is put in order.
5. In view of the actions of the Respondents the Applicants alleged that Total (K) Ltd., acted and stopped remitting money as expected to the company thereby making the company run the risk of being wound up as it was unable to meet its obligations.
6. The Applicants urged this Court to stop the Respondents' actions saying that their grievances would be addressed in the main suit at the trial and that the company should be left to operate without any interruptions.
7. The Respondents named in the motion through Mr. Gori opposed the application saying that the Applicants are not bona fide directors of the company. They exhibited a letter dated 28<sup>th</sup> May, 2015 from Assistant Registrar of Companies (as annexure 'EGN1' in the affidavit of Emmanuel Gichira Njamumo sworn on behalf of the other Respondents to the application) showing who the bona fide directors are.
8. The Respondents made serious allegations of impropriety by the Applicants accusing them of misappropriating funds from the company. They annexed copies of bank statements as EGN 2 and EGN 3 to demonstrate that money had been misused by the Applicants who have failed to account for the money withdrawn. They have also accused the Applicants of operating illegally having failed to file returns for many years. Mr. Gori further faulted the Applicants for concealing books of account from the shareholders leaving them in the dark on how the company was being run and argued that they wrote letters to save the company from further losses and in order to protect their investment. The Respondents further alleged then that the company has not been paying dividends to all the shareholders and neither does it pay taxes as required by law.
9. I have considered the application and the arguments by the Applicants' counsel Mr. Okubasu. I

have also considered the rival submissions made by Mr. Gori as highlighted above. The nature of the application before Court is an injunction under Order 40 of the Civil Procedure Rules. For an injunction to issue in a matter, 3 principles that govern injunction must be met;

i. *There must be a prima facie case with a probability of*

*success.*

ii. *Does the applicant stand to suffer irreparable harm if relief*

*is denied.*

iii. *If the court is in doubt on the above, the matter would be*

*decided on where the balance of convenience lies.*

10. The above principles were well settled in the now celebrated case of **GIELLA -VS- CASSMAN BROWN & CO. LTD. (1973) E.A., 358** where the court held as follows:

*“The conditions for the grant of interlocutory injunction are now well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide on a balance of convenience.”*

11. To apply the above principles in the context of the application now before this Court, we need to look at the Applicants’ claim against the Respondents. This can be discerned from the counter-claim and the application itself. The Applicants in their defence and counter claimed that the Respondents owe the company some specified amount of money and are also accused of acts of omission and commission which led the company suffer losses. It also claimed that the Respondents have failed to tender their resignation as directors thereby affecting the smooth running of the company. The respondents have also been accused of defrauding the company of some specified amount of money.

12. From the counter-claim this Court finds that the counter-claim raises triable issues but the relevant question that needs to be answered is whether the Applicants have made out a *prima facie* case against the Respondents herein. The question as to what constitutes a *prima facie* case has been settled in a number of authorities. In the case of **MRAO LTD -VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 125** the Court of Appeal sitting in Mombasa made the following observations:

*“So what is prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal of the latter.”*

13. The Applicants have placed scant material before this Court to establish a *prima facie* case. There are correspondences which have been annexed to the application in support and the same cannot be interpreted to be an infringement of the Applicants’ rights. The Applicants were merely seeking to secure their interests. This fact is made more pronounced by the Respondents’ response to the application casting doubts about the status of the Applicants in relation to the company. The letter from Registrar of Companies exhibited by the Respondents as “EGN 1” and

- dated 28<sup>th</sup> May, 2015 show on the face of it that the Respondents impugned actions could be fair since any further dealings done in the current situation will not only lead to more disagreements but the interests of all the parties in this case and 3<sup>rd</sup> parties may be adversely affected unless the funds due to the company are held in safe custody until such a time that bona fide directors of the companies are identified.
14. But perhaps more important is the nature of the reliefs that the Applicants are seeking in their application. It should be noted that applications under **Order 40** of the **Civil Procedure Rules** are in their nature temporary but a look at the prayers sought in the motion before this Court show that the reliefs are permanent and final. They are not sought on interlocutory basis which should have been the case. In view of their finality, this Court finds that the same is an abuse of the court process as all the issues must be subjected to full trial before final reliefs can be granted. In this regard this Court finds the prayers under paragraph 2, 3, 4 and 5 are untenable in law. Prayer 3 in particular sought to direct Total (K) Ltd., who is not a party in these proceedings to honour their obligations. It is against the rules of natural justice to condemn a party or make adverse orders against a party without according it a chance to be heard.
  15. This Court further finds that the reliefs sought in the application are too general and lack specificity. The Applicants have sought to injunct the Respondents from issuing orders, directives, threats or instructions to “3<sup>rd</sup> parties” and the 3<sup>rd</sup> parties are not named and it could refer to anyone or anything in the world and therein lies the danger. The prayer is not specific and too general. Injunctions will not normally issue under such circumstances.
  16. It is also important to note that an injunction being an equitable remedy are not normally available where damages would adequately compensate a wronged party. The Applicants in their counter-claim have specified amounts they claim from the Respondents. They have not however, specified or demonstrated that their loss would be irreparable. This Court finds that the loss if any can adequately be compensated by an award of damages.
  17. This Court finds further that the Applicants have not come to this Court of equity with clean hands. The Respondents have made serious allegations against them in the replying affidavit and though the Applicants submitted that the same was oppressive and scandalous, there was no response filed to deny the same. Of course this Court finds that the Respondents’ claims are really overboard and should be (if at all true) a subject of criminal process. This is because there was no evidence placed before court that a complaint had been reported to Criminal Investigation Department of the Police or that attempts had been made to prosecute the culprits for the crimes that have been committed. That is however, besides the point. What is important is the fact that the Applicants never filed any rebuttal to lay a basis for invoking of **Order 19 rule 6** of the **Civil Procedure Rules**. They are as such left with soil in their hands making them incapable of moving this Court for an equitable remedy because as always he who comes to equity must do so with clean hands.
  18. One other issue which I find compelling to comment in order to set the record straight is the ruling of this Court delivered on 18<sup>th</sup> February, 2015 where I declined to compel the Applicants to call for an annual general meeting. This Court did not stop the company or any of the shareholders from convening meetings as deemed necessary. If anything in view of the wrangles and challenges that the company faces, regular meetings are a necessity to bring sanity and solutions vide resolutions to save the company and the interests of the shareholders and their investments.
  19. This Court also finds it odd and indeed illegal that the company has not been making returns and paying taxes as required. This is another illegality that taints the hands of the Applicants in their quests for the reliefs sought in the application now before Court. The Court cannot exercise its discretion in favour of such parties. This Court finds that the balance of convenience tilts against granting the order 1 sought in the application as doing so will perpetuate an illegality and the wrangles in the management of the company rather than end it. This Court was urged by the Applicants to preserve the subject matter in this suit pending and the same is desirable but that cannot be achieved in an environment of endless wrangles which is likely to happen if orders sought were to be granted. If there are wrangles between the shareholders of the company and disputes of how the money is to be utilized how then can Total (K) Ltd., be directed to make payments? Furthermore with different instructions coming from different quarters with regards to payments it is not hard to understand the difficulty Total (K) Ltd., faces in deciding which between the two factions are bona fide directors to enable them deal with them. This Court cannot

in the circumstances order or direct Total (K) Ltd., at this stage to do one thing or the other in regard to their contractual relationship.

20. At this stage I must however, refrain from making any determination on the merits of the case or defence and the counter-claim. A decision on the merits and the demerits must as a matter of course await the substantive consideration of the facts and evidence laid before court at the trial.

21. In the light of the foregoing, this Court finds that the application before Court has failed to meet the threshold for granting of temporary reliefs under the law as the reliefs sought in the first place as illustrated are not temporary. They are final and cannot be granted at this stage before a full trial. The application has not also satisfied the requirements or principles to grant the reliefs. The application is accordingly dismissed with costs. It is so ordered.

***Dated and delivered at Kerugoya this 24<sup>th</sup> day of July, 2015.***

**R. K. LIMO**

**JUDGE**

24.7.2015

Before Hon. Justice R. Limo J.,

Court Clerk Mbogo

Parties absent

No appearance of parties

**COURT:** Ruling signed dated and delivered in the open court in the absence of parties and their counsels.

R. K. LIMO

**JUDGE**

24.7.2015