



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CIVIL CASE NO 8 OF 2015

HARUN MNJAU.....PLAINTIFF

VERSUS

SAGALLA RANCHERS LTD.....1ST DEFENDANT

PETER M. NGUTA.....2ND DEFENDANT

RULING

INTRODUCTION

1. The 1st Defendant's Notice of Motion application dated 11th December 2015 and filed on 14th December 2015 was brought under the provisions of Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 40 Rule 1,2 & 3 of the Civil Procedure Rules 2010 and all enabling provisions of the law. Prayers Nos (1) and (2) of the said application were spent. It sought the following remaining orders:-
 1. **Spent.**
 2. **Spent.**
 3. **THAT the Court be pleased to issue permanent orders barring Harun Mnjau, Wilmot Mwadilo, Amos Nyatta and Peter Mwamodo or any other person acting under them from stopping, interfering, disrupting in any manner with the 1st defendant (sic) General Meeting scheduled to take place on the 19th day of December 2015.**
 4. **THAT costs of this application be provided for.**
2. The matter had filed under Certificate of Urgency was listed for *inter partes* hearing on 17th December 2015. Before the same could commence, two (2) preliminary issues arose. The first related to the Notice of Motion application that was dated 16th December 2015 and filed on 17th December 2015 by M/S George Kabebe Advocate seeking to have Wilmot Mwadilo, who had been cited in the prayers of the 1st Defendant's present application enjoined in the suit as an interested party and the second relating to the Affidavit that had been filed and served upon the parties herein by one Mwapulu Mwanyasi Joseph.
3. In respect of the first issue, parties informed the court that the said application by the proposed Interested party was now spent as they had by consent agreed that his name be struck out of the said 1st Defendant's application. His name was accordingly struck out.
4. Regarding the second issue, the Plaintiff was emphatic that the Affidavit of Mwapulu Mwanyasi Joseph ought to be expunged from the court record as it was irregularly filed as the deponent was not a party to the suit herein. On the other hand, Mr Moses Kurgat representing the 1st and 2nd

Defendants argued that no prejudice would be suffered by the Plaintiff if the said Affidavit remained on the court record as the said deponent was an independent party and was merely placing before the court, relevant matters that would assist it in making a just determination of the case herein.

5. In its Ruling, the court determined that the said deponent was not a party to the suit herein and that he had not moved the court in a proper manner to be enjoined in the proceedings herein. The manner in which he purported to participate in the proceedings herein was not a procedural technicality that could be excused in the light of the new Constitutional dispensation that mandates the court to administer justice without undue regard to procedural technicalities. The court therefore expunged the said Affidavit from the court record.
6. The Plaintiff did not file any Grounds of Opposition or a Replying Affidavit. Instead, he filed a Notice of Preliminary Objection dated 16th December 2015 on 17th December 2015, which all parties agreed could be heard together with the 1st Defendant's present application. The Ruling herein is therefore based on the oral submissions by the parties in respect of the said Plaintiff's Preliminary Objection and the 1st Defendant's said application.

THE 1ST DEFENDANT'S CASE

7. The 1st Defendant's application was supported by the Affidavit of its Chairman, Eliud T. Mwamunga. The same was sworn on 11th December 2015.
8. The 1st Defendant averred that, through its Company Secretary, Victor Were, it issued a valid Notice for an Annual General Meeting (hereinafter referred to as "AGM") for 13th September 2014. However, on 11th September 2014 and 12th September 2014, the Plaintiff filed similar applications in **SPMCC No 150 of 2014** and **HCCC No 116 of 2014** respectively seeking to stop the said AGM.
9. It stated that the Plaintiff did not serve it with the orders stopping the said AGM but instead served the Registrar of Companies not to effect changes to the directorship of the 1st Defendant.
10. It added that the mandatory AGM had not been held in over a year, it had caused its said Company Secretary to issue a thirty (30) days' notice in the daily informing members of the holding of the AGM on 19th December 2015. It was apprehensive that the Plaintiff and other parties would disrupt the said meeting as they had intimated of carrying out such an action.
11. It was therefore its prayer that the orders it had sought be allowed because if the same was not granted, it would never hold an AGM which was contrary to the statutory provisions.

THE PLAINTIFF'S CASE

12. The grounds of the Plaintiff's Preliminary Objection can be summarised as follows:-

1. **THAT the joinder of Voi RMCC No 150 of 2014 Wilmot Mwadilo vs Sagalla Ranchers Ltd and Voi SRMCC No 195 of 2015 Amos Nyatta vs Abdistar Haji & Another with the present suit was unprocedural as there was no order for consolidation of the said suits.**
2. **THAT the joinder of Wilmot Mwadilo, Amos Nyatta and Peter Mwamodo and Patrick Mbinda was unprocedural as leave of the court was not obtained to enjoin them.**
3. **THAT the suit herein was filed in relation to the AGM that was to be held on 13th September 2014 and consequently, the 1st Defendant's application which related to the AGM that is scheduled to be held on 19th December 2015 was not a subject matter of the suit herein as it had not filed a counter-claim herein.**
4. **THAT the 1st Defendant's application was not hinged on the prayers in the suit herein.**
5. **THAT the 1st Defendant's application was an abuse of the court process.**

LEGAL ANALYSIS

13. It did appear from the submissions of the parties that the following two (2) issues were presently before the court for determination:-

- a. **Whether or not the Preliminary Objection could be sustained; and**
- b. **Whether or not the 1st Defendant was entitled to the injunctive orders it had sought in its application.**

14. The court deemed it fit to address the said issues under separate heads as shown hereinbelow.

I. PRELIMINARY OBJECTION

15. In his submissions, the Plaintiff reiterated the grounds set out in his Notice of Preliminary Objection and argued that this court had no jurisdiction to grant the 1st Defendant the orders it had sought in its application.
16. On the other hand, the 1st Defendant argued that a preliminary objection must be capable of disposing of a matter without leaving any remnants for determination. It referred the court to the cases of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696** and **El- Busaidy vs Commissioner of Lands & 2 Others [KLR (E&L)1** to buttress its point. In the latter case, it had been held that the preliminary objection that had been raised therein was not a preliminary objection as the issue of limitation under Section 136(1) of the Government Lands Act Cap 280 (Laws of Kenya) (now repealed) stood to be decided on evidence.
17. What could constitute a preliminary objection was well set out in the celebrated case of case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd** (Supra) in which the Court of Appeal stated thus:-

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

18. Against the backdrop of the holding in the case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd** (Supra), the Plaintiff's submission that the joinder of **Voi RMCC No 150 of 2014 Wilmot Mwadilo vs Sagalla Ranchers Ltd** and **Voi SRMCC No 195 of 2015 Amos Nyatta vs Abdistar Haji & Another** with the present suit was unprocedural as there was no order for consolidation of the said suits would not amount to a preliminary objection.
19. From a perusal of this court file that had been transferred from the High Court of Kenya Mombasa, it did appear to this court that the 1st Defendant's Notice of Application dated 9th April 2015 and filed on 10th April 2015 seeking to consolidate the suits as aforesaid was yet to be heard and determined. However, even if the 1st and 2nd Defendants had purported to consolidate suits without leave of the court as had been averred by the Plaintiff, the same would still not have amounted to a preliminary objection.
20. Further, the court did not also find favour with the Plaintiff's submissions that the joinder of Amos Nyatta or Peter Mwamodo in the matter herein was unprocedural or that leave of the court was required before they could be named in the 1st Defendant's application. Indeed, any restraining order could only be served on persons who had been cited in a prayer failing which they would not be bound by the orders of the court. This argument did not therefore amount to a preliminary point of law that was capable of disposing of the 1st Defendant's present application.
21. The only issue the court found to come close to a preliminary objection but which appeared more as a ground of opposition was the Plaintiff's argument that the suit herein was filed in relation to the AGM that was to be held on 13th September 2014 and not the AGM that is scheduled to be held on 19th December 2015.
22. He argued that the suit was his and the Defendants could not ride on it. The 1st Defendant submitted that it filed the present application to avoid a multiplicity of suits and that in any event, the suit herein was not a preserve of the Plaintiff. It placed reliance on the case of **Prisca Wanjiku Kimanga & Another vs Musa Shariff Ahmed & Another [2007] eKLR** in which the defendant therein was granted an injunction.
23. The 1st Defendant also relied on a Treatise written by A.O. Imiete titled **“Circumstances under**

- which a Defendant can be granted an injunction against the Plaintiff in a case**” and referred the court to the case of **Blackmore vs Glamorganishire Canal Navigation (1832) I MY K 154** that had been addressed therein to buttress its submission that it could competently file its present application in the suit herein.
24. Counsel for the Plaintiff vehemently objected to the production of the said Treatise on the ground that it was an interpretation of the case of **Blackmore vs Glamorganishire Canal Navigation** (Supra) by A.O. Imiete whose qualifications were not known.
25. Although the court took the liberty of searching for the said case **Blackmore vs Glamorganishire Canal Navigation** (Supra) in <https://books.google.co.ke/books?id=Om0DAAAQAAJ>, it did not find the full text of the said case. In its research, the court noted that the said case had been cited in another Treatise headed **“Hilary Term, 1836”**.
26. A search of several other websites did not yield any tangible results. As a result, the court was unable to ascertain the *ratio decidendi* of the said case or if the same had any relevance to this case. It would have added more value to this matter had the actual case been presented to court for consideration of its holdings.
27. As the court was unable to analyse the relevance of this case to the circumstances herein and the said Treatise of A.O. Imiete was merely persuasive and not binding on the court as was ably conceded by the 1st Defendant, the court will say no more about it.
28. Having said so, the court also took the liberty to peruse the reliefs that had been sought by the Plaintiff in his Plaint dated and filed on 12th September 2014. The same showed that he had sought judgment against the Defendants for:-
- A declaratory order that the Special General Meeting scheduled to be held by the defendants on 13/9/2014 is null and void for all purposes.**
 - An injunction to restrain the defendants from holding a Special General Meeting or any other meeting either on 13/9/2014 on any other date unless such a meeting is properly constituted.**
 - Costs of this suit and interest thereon.**
 - Any other relief that this Honourable Court deems fit.**
29. As was rightly pointed out by the Plaintiff, a prayer in an application must have a correlation to the reliefs sought in a suit, which may include a plaint or a counter-claim. This court had occasion to deal with the issue of relevance of prayers in an application vis-à-vis the reliefs in a plaint in the case of **Shirin Jiwa vs Ismailia Co-operative Society Limited [2015] eKLR** in which stated as follows:-
- “...It was evident that although the Plaintiff had argued that her application was in line with the prayers that she had sought in her Plaint, the orders sought in the application herein had no relation to the reliefs sought in the Plaintiff. The prayers were distinct. It is irrespective that the matters at issue arose out of the same transactions as had been contended by the Plaintiff for the reason that they purported to create a totally new cause of action. They had no relationship whatsoever with the subject matter of the suit as had been rightly pointed out by the Defendant...the court did not see the nexus of that prayer to the reliefs that the Plaintiff had sought in her Plaint.”**
30. It is evident that the Plaintiff had sought to restrain the Defendants from calling for the meeting of 13th September 2015 **or any other meeting on any other date unless such a meeting is properly constituted** (emphasis court). As at the time of hearing the application herein, there was no indication that the Plaintiff had withdrawn this relief from his Plaint.
31. Consequently, the 1st Defendant could therefore comfortably hinge the prayers in its application on the suit herein as the same had sought to restrain it and the 2nd Defendant from calling any other meeting, which could by inference include and was not limited to the AGM that is scheduled to take place on 19th December 2015. The **“or any other meeting on any other date unless such a meeting is properly constituted”** in Prayer (b) in the Plaintiff’s case was clear and needed no further elaboration. The 1st Defendant did not therefore need to have filed a counter-claim herein to file its present application as had been contended by the Plaintiff.
32. Hence, the court was not persuaded by the Plaintiff’s submissions that any of the grounds in his

Preliminary Objection could be sustained herein with a view to disposing of the said 1st Defendant's present application.

QUIA TIMET INJUNCTION

33. As the Preliminary Objection raised by the Plaintiff was not sustainable in the circumstances of the case herein, the 1st Defendant's application was essentially unopposed. However, granting of the orders it had sought was not automatic and had to be tested against the principles of granting an injunction.
34. The 1st Defendant argued that it was entitled to a *quia timet* injunction as the conduct of the Plaintiff and the persons named in its application had shown that they were intent on never having the 1st Defendant's AGM held at any given time. It pointed out that since the Plaintiff filed the suit herein, he had never prosecuted the same, which inaction was prejudicing its Shareholders and was also putting the directors at risk of facing legal sanctions for failing to hold the AGM within the timelines mandated by the law.
35. It referred the court to the case of **Kwality Candies & Sweets Ltd vs Industrial Development Bank Ltd [2005] eKLR** in which it was held that:-

“... "A quia timet action is not based upon hypothetical facts for the decision of an abstract question. When the Court has before it evidence sufficient to establish that an injury will be done if there is no intervention by the Court – it will act at once and protect the rights of the party who is in fear, and thus supply the need of what has been termed protective justice. It is a very old principle.

Sir E. Coke, 2nd Institute, P 299 says that – "Preventive justice excelleth punishing justice"”

36. The Plaintiff argued that a party seeking a *quia timet* injunction must demonstrate irreparable damage. On its part, the 1st Defendant contended that its apprehension was borne by the fact that there was a possibility of the Plaintiff and the persons named in its application disrupting the AGM that was scheduled for 19th December 2015 bearing in mind that he had obtained orders to stop the AGM that was to be held on 13th September 2014.
37. Notably, the Plaintiff did not adduce any evidence to rebut the 1st Defendant's assertions. Indeed, he did not commit himself not to interfere with the said AGM or expressly deny that the Notices for the AGM had been issued as had been contended by the 1st Defendant or proffer any plausible explanation why the AGM scheduled to take place on 19th December 2015 should not be held. He merely stated that the Notices the 1st Defendant had referred to were not annexed to the 1st Defendant's application.
38. If the history of the several cases filed in different courts in this matter is anything to go by, the court was of the view that the 1st Defendant's apprehension of the Plaintiff's disruption of the meeting was not misplaced. It was immaterial that Eliud T. Mwamunga did not disclose in Paragraph 15 of his Supporting Affidavit who disclosed to him the information or how the 1st Defendant came to learn that **“Harun Mnjau, Wilmot Mwadilo, Amos Nyatta, Patrick Mbinga and Peter Mwamodo held a meeting and vowed to make sure the Annual General Meeting does not take place on the 19th December 2015.”**
39. Contrary to what the Plaintiff had contended, the Notice of the 2nd AGM had been attached to the 1st Defendant's present application and marked Exhibit “ETM 7”. The List of Shareholders was also annexed and marked Exhibit “ETM 8”. Having said so, the 1st Defendant did not furnish the court with proof that it had notified its Shareholders in the required manner, of the AGM that was to take place on 19th December 2015 despite it stating in Paragraph 14 of its Supporting Affidavit **“that the notice was published in the daily for wide advertisement to all shareholders.”**
40. It was not sufficient to have annexed a List of the members without proof that they were indeed aware that the AGM would be held on 19th December 2015. If it had indeed advertised the holding of the said AGM in the daily as it had alleged, nothing would have been easier than for it to have

- annexed a copy of the said advertisement.
41. Whilst the court fully appreciates the import of the mandatory statutory provisions requiring all companies to hold their AGMs annually as provided in Section 131 of the Companies Act Cap 486 (Laws of Kenya), it cannot permit an illegality by condoning the holding of an AGM without proper notice having been issued as it would be unprocedural and irregular. Indeed, no Shareholder or member of a company should be shut out from attending an AGM to discuss the affairs of a company he has an interest in merely because he has had no notice of such a meeting being held.
 42. Accordingly, having considered the pleadings, the affidavit evidence and case law that was relied upon by the parties herein in support of their respective cases, the court found that in the absence of proof of notification of the AGM scheduled to be held on 19th December 2015 to its Shareholders and members by the 1st Defendant, the court was not satisfied that the said Shareholders and members had sufficient notice to attend the said AGM. It would be unlawful if the same was held as constituted and must be cancelled forthwith.
 43. Weighed against the principles of when an injunction can be granted set out in the case of **Giella v Cassman Brown (1973) EA 360**, the court found and held that despite being apprehensive of the likely actions by the Plaintiff and the persons named in its application, it would not be entitled to a *quia timet* injunction as it had sought in its application.
 44. Indeed, the 1st Defendant could not seek protective justice from the court when it had not shown that it had fully complied with the strict provisions of the law as far as the calling of the AGM of 19th December 2015 was concerned. For this reason, the court was not persuaded that it could even grant the 1st Defendant restraining orders as it had sought on a balance of convenience.
 45. However, the Plaintiff cannot be allowed to hold all other Shareholders and members of the 1st Defendant at ransom. He had also not moved to prosecute its case since filing the same. As a perusal of his reliefs in the Plaint reveals that the Plaintiff had no problem with the 1st Defendant holding any AGM provided it was properly constituted, then the same should be held as practicable possible provided that the 1st Defendant fully complies with the law.
 46. The 1st Defendant did not furnish the court with its Memorandum and Articles of Association. For that reason, the court was unable to stipulate the period of the said notice. Suffice it to say, that the Notice for the next AGM must be in accordance with the said Memorandum and Articles of Association.

DISPOSITION

47. For the foregoing reasons, the upshot of this court's ruling was that the Plaintiff's Notice of Preliminary Objection dated 16th December 2015 and filed on 17th December 2015 was not merited and was therefore not upheld. The same is hereby dismissed.
48. The court also found that the 1st Defendant's Notice of Motion application dated 11th December 2015 and filed on 14th December 2015 was not merited and the same is hereby dismissed.
49. The AGM scheduled for 19th December 2015 is hereby cancelled. However, to facilitate the holding of the next 1st Defendant's AGM, the court hereby directs that the 1st Defendant shall cause to be issued a valid Notice of the 2nd AGM, which notice it shall cause to be published in the Daily Nation and The Standard within the next seven (7) days from the date of this Ruling.
50. The court wishes to warn all person(s) that any person(s) who shall act in any unlawful manner to disrupt the said AGM once lawfully constituted from being held and/or to cause it not take place for whatever reason without any lawful or reasonable cause will be in contempt of this court's orders.
51. Bearing in mind that the 1st Defendant did not annex proof of advertisement of the Notice to hold the AGM that is scheduled to be held on 19th December 2015 as it had alleged and the fact that the Plaintiff has not been keen to prosecute his case since inception, the court hereby directs that each party shall bear its own costs.
52. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of December 2015

J. KAMAU

JUDGE