REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO 525 OF 2013

AGRICULTURAL DEVELOPMENT CORPORATION OF KENYA......................PLAINTIFF

Versus

NATHANIEL K. TUM...1ST DEFENDANT

SOET (K) LIMITED...2ND DEFENDANT

RULING

The Application

[1] The Applicant, **AGRICULTURAL DEVELOPMENT CORPORATION OF KENYA (ADC),** filed a chamber summons dated 28th November, 2013 seeking for two significant orders. One is for a temporary injunction to restrain the defendants, their servants and or agents from calling for and or holding the extra-ordinary general meeting of the shareholders of Kenya Seed Company set for 10th December, 2013 or on any other further notified date pending hearing of the application inter partes and the suit, and the other prayer was for costs. The limb for a temporary injunction pending the hearing of the application in question was disposed of through a partial order which the court issued on 5.12.2013 as shall be borne out later. I propose to first deal with the partial order and its reasons then proceed to determine the substantive prayer for a temporary injunction pending the hearing of the suit.

THE PARTIAL DECISION AND IT REASONS

[2] Immediately the learned counsels for the parties finished making their submissions, which were eminently rational arguments, the court made a partial order on 5th December, 2013 with a promise- which is also a legal obligation on the court- that it will give the reasons for the partial decision at some later date. That course was taken for good reason as it will emerge below. Now is the time I fulfilled the promise I made, which I hereby do in the rendition below. The partial decision was in the following terms:

a) That the Extra Ordinary General meeting intended to be held on 10.12.2013 is hereby stayed pending the determination of the application dated 28.11.13.

b) That, meanwhile, the court cannot allow an illegal situation to continue. In that connection, KSC shall convene an AGM within 60 (sixty) days from the date hereof, and the shareholders who shall participate are only those shareholders who attained their

shares before 2001 and not out of the 2001 share issue.

c) The final decision and the reasons for the partial decision shall be rendered on notice but before 45 days lapse.

[3] I was accordingly guided by the peculiar circumstances of this case and the applicable law. These circumstances were;

a) That KSC is a public company in which ADC, a State Corporation, commands majority shareholding (52.88%) before the impugned share issue of 2001;

b) That KSC also has private shareholders who make up 47.12% shareholding;

c) That KSC has not held an annual general meeting since 2003, thus operating contrary to the provisions of the Companies Act;

d) That the state of affairs in (c) illegal is not only sad but illegal, which invariably; offends the law; affects the rights and property investment of the shareholders; the operations and legal status of KSC as a juristic person; thus exposing the company to severe legal penalties;

e) That the said unhealthy state of affairs is attributed to legal disputes and un-certainty about the true shareholders of KSC which then obscures the members who should participate and vote in the general meetings, and shape the company's operations. The 2001 share issue has been seriously contested and adverse judicial comments have been made even by the Court of Appeal regarding that issue. But, the validity of the 2001 share issue remains unresolved, and is directly in controversy in **NAIROBI HCCC NO 575 OF 2004.**

f) That for as long as the 2001 share issue and the intended special general meeting scheduled for 10.12.2013 are the substantive subjects of pending court cases, , it is not fit to have allowed the said special meeting to take place as scheduled before determination of this application. It was, therefore, necessary to make an intermediate order to preserve the subject matter of those cases.

[4] As I have already stated, both sides of the divide presented eminent arguments on the matter. But, two things immediately stood out; 1) that KSC had not had an Annual General meeting since 2003; and 2) there were impediments which prevented it from calling for an Annual General Meeting, to wit, court cases and the unresolved status of shareholding in KSC which was caused by the impugned 2001 share issue. I will not, however, decide on the status of shareholding in KSC in this ruling since that issue is directly in controversy in another pending suit. Nonetheless, the overall impression I formed from the above circumstances and the interest of justice impelled the court to step into the matter ***suo moto*** in order to dispel the illegal situation from persisting. It did so by requiring KSC to convene a general meeting within 60 days, which was reasonable period of time in the circumstances, and also designated the shareholders who are entitled to vote at the meeting convened pursuant to the order of the court. That course of action neither compromised the pending suits nor the rights of parties in the suits. It was a course that properly rests on and is supported by law; section 135 of the Companies Act offered valuable guide to the court in reaching at that decision. It is for those reasons that the court made the above partial order.

PARTIES' POSITIONS ON THE APPLICATION RESUMED

Grounds of application

[5] The application is founded on the following grounds:

1) That notice requisitioning for the extra-general meeting is defective as it does not conform to section 132 of the Companies Act.

2) That said notice is signed by a person who is not a bona fide shareholder.

3) That the defendants are aware that Kenya Seed Company Ltd has not held annual general meetings due to the illegal and botched attempt to privatize the company which generated additional shareholders; a state of affairs which is yet to be rectified.

4) Earlier attempts by Kenya Seed Company Ltd to convene annual general meeting were thwarted on two occasions by court action commenced by the 1st defendant and his proxies.

5) The Court of Appeal at Kitale in CA NO 137 OF 2005 confirmed that Kenya Seed Company Ltd is a state corporation and the attempt to privatize it through resolution dated 26.6.2000 was null and void.

6) Unless the defendants are restrained, the majority shareholders in the Kenya Seed Company Ltd (KSC) will suffer irreparable and severe prejudice which cannot be compensated by damages.

Applicant's submissions

[6] Mr Nyaencha, learned counsel for the Plaintiff/Applicant (hereafter the Applicant) ably argued the case for the Applicant. He amplified the above grounds which I find to be a comprehensive summary of the averments in the affidavit of J.M. KIHARA sworn in support of the application. He urged that the share issue floated in 2001 was illegal and had been declared null and void by the High Court and the Court of Appeal in previous decision where the issue arose. He relied on the remarks by both courts on the matter. He submitted further, that the share issue of 2001 is a subject of an existing court case being **NAIROBI HCCC NO 575 OF 2004.** According to him, the impugned share issue has the effect of completely changing the shareholding of KSC, thus effectively reducing the majority shareholding of ADC.

[7] Mr Nyaencha continued: KSC has on some two previous occasions tried to convene a general meeting but the efforts were thwarted by the 1st Defendant and his proxies through court cases which they filed to stop a general meeting from taking place. That fact has made it extremely difficult for KSC to hold a general meeting.

[8] He gave the reasons why the Extra-Ordinary General Meeting scheduled for 10.12.2013 should be stopped. He submitted that it will be prejudicial to ADC as the majority shareholder to allow the special general meeting to take place before the actual shareholding of KSC has been settled by the court because; 1) the defendants' shareholding arose from the 2001 share issue; 2) the said share issue was declared null and void by the court in **COURT OF APPEAL at ELDORET CA NO 137 2005** and **KITALE HC MISC APP NO 1 OF 2004;** 3) the defendants have no locus standi to convene a special general meeting; and 4) the notice calling for the Extra-Ordinary General Meeting does not conform to section 132 of the Companies Act, for it did not give the 21 days' requisition notice to the Directors of KSC before calling for the meeting. The notice combined both acts in one which was in total disregard of the provisions of section 132 of the Companies Act. He contended that, that ground alone is enough for the meeting to be stopped.

[9] KSC is a strategic public company on food security in Kenya and should not be placed in the hands of majority private shareholders. It is, therefore, in the interest of the public for KSC to be protected by the law through an injunction against the meeting scheduled for 10.12.2013. He concluded by saying that the Applicant has satisfied the principles for the grant of temporary injunctions enunciated in **GIELLA v CASSMAN BROWN.**

Defendant's submissions

[10] Mr Alfred Nyairo for the Defendants opposed the application. He urged that although KSC is a public company, it has a private shareholding of up to 47% as at 31.12.2000. The said private shareholding was acquired before the impugned 2001-share-issue. And, the defendants have annexed Share Certificates pre-dating 2001 share issue. They have also annexed documents to show that KSC recognizes the private shares and paid interim dividends to the defendants on the shares acquired before the 2001 share issue. That fact has not been challenged. Secondly, the defendants purchased more shares in 2001 in addition to what they owned previously. Mr Nyairo holds the view that, the comments that the High court and the Court of Appeal made about the share floatation of 2001, were but obiter dictum as there was no substantive decision that was made on the issue. That is what prompted the applicant to file case number **NAIROBI HCCC NO 575 OF 2004** so that a substantive decision on the matter is made. That case is still pending in court.

[11] That notwithstanding, KSC has continued to operate without accountability to the shareholders, including the defendants. The company has not been filing annual returns with the Registrar of Companies; it has not published its balance sheet or its profit and loss account since 2003. These are the failures which prompted the defendants to requisition for an Extra-Ordinary Meeting; the defendants' investments in the company are at risk, as such failures enumerated above, may cause the company to be struck off the Register of Companies under section 125, 131 and 148 of the Companies Act. Should the said risk attach, the property of the company will become ***bona vacantia*** to the Government; and the property of and or investments by the defendants will be lost.

[11] It was his submission that the 1st defendant has, in the past, engaged KSC to hold an annual meeting but in vain. The 1st defendant even sought intervention of highly placed relevant government officials on the matter, which efforts resulted into a meeting convened by the PS in the Ministry for Agriculture on 21.3.2013 where it was agreed that an AGM or EGM for KSC should be convened. KSC was represented in the meeting. According to Mr Nyairo it was generally agreed that an AGM was necessary and should be convened. Subsequent to the said meeting, the secretary of KSC sent a draft notice for a proposed AGM to the 1st defendant. But no formal or official notice was ever given for an AGM and none has been convened to date. He sympathized with KSC and submitted that one would understand the frustrations of KSC to convene an AGM, but it is the same frustration which has forced the 1st defendant to convene an EGM especially after the impediments to convene a meeting were removed when the cases were withdrawn. He made a terse reference to the notice calling for the EGM and submitted that the defendants fully complied with the requirement of the law in requisitioning the EGM herein.

[12] Mr Nyairo summed up; that the running of KSC without any accountability to its shareholders is unconstitutional, undemocratic, unfair and oppressive; AGM is generally the accepted principle and mechanism of accountability of companies. Ten years is a long time for a company to run without participation of the shareholders. Now that all the previous cases which impeded the calling of an AGM are out of the way, there is no reason why an AGM should not be convened. The court should consider the interests of all shareholders not just of a few of them. He asked the court to dismiss the application.

<u>COURT'S RENDITION</u>

Grant of temporary injunctions

[13] This is a case for a temporary injunction. The legal dimensions for the grant of temporary injunctions were well settled in **GIELLA V CASMAN BROWN & CO LTD (1973) EA 358** that they cannot be called upon to justify their existence. The guiding principles are:-

a) An applicant must show a prima facie case with a probability of success;

b) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and

c) When the court is in doubt, it will decide the application on the balance of convenience.

[14] At the centre of this application I see two important issues for determination; one of a company operating without accountability to the shareholders; and the other on how an Extra-Ordinary General Meeting should be requisitioned under section 132 of the Companies Act. The two issues also seem to me to be the linchpin of the suit itself, but the learned counsels extensively submitted on them when arguing their respective cases, thus placing them for determination by the court. I also reckon that, determination of whether a temporary injunction is deserved in this case is inextricably bound to the determination of the two issues. I will, therefore, determine the two issues which I have framed below:

1) Whether KSC flouted the law when it continued to carry out its business for about 10 years without calling for an AGM; and

2) Whether the intended Extra-Ordinary General Meeting convened by the defendants through a notice dated 11.11.2013 was properly requisitioned as provided in section 132 of the Companies Act.

Annual General meeting: KSC default

[15] Accountability of a company to its shareholders and the law is an important facet in the operation of the corporate entity; which throws me back to the already familiar subject of corporate personality of a company as it is ordinarily taught in the early years of university education. I find myself re-stating the celebrated legal innovation in **SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L.;** that a company is a legal entity distinct from the its shareholders and the directors, in other words, it is a juristic person-a legal person- with corporate legal personality separate from those who compose it. Except, however, a company operates through human agents- the board of directors who are appointed in accordance with the Article of Association and registered with the Registrar of Companies. Therefore, the directors assume the responsibility of ensuring that the company abides by all legal requirements; all that will preserve its juristic personality and property; and avoiding default that would attract serious legal sanctions, or affect its juristic personality and assets. The legal requirements include; accountability of its business to the shareholders and to the law; operations; directorship; liabilities; assets; payment of taxes, only to mention but a few. Besides liability on the directors, if a company fails to observe the legal responsibilities and obligations set out in law, it will face serious legal penalties and sanctions; some default may occasion temporary disablement but there are others which are dire and may lead to its de-registration or winding-up. Should the gravest of the consequences for non-compliance with the law attach, the juristic existence of the company is decimated and the property may fall ***bona vacantia*** to the government.

[16] One of the legal mechanisms of accountability by a company is annual general meeting. See Section 131(1) of the Companies Act below.

131 Annual general meeting

(1) Every company shall in each year hold a general meeting as its annual general meeting in addition to any other meetings in that year, and shall specify the meeting as such in the notices calling it; and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

Provided that, so long as a company holds its first annual general meeting within eighteen months of its incorporation, it need not hold it in the year of its incorporation

or in the following year.

[17] It bears repeating, that an Annual General Meeting serves two important purposes: in one sense as a mechanism for accountability to shareholders and the shaping of the business of the company; and in another sense as an act of compliance with the law. Accountability to the shareholders is best described by the activities which take place in an Annual General Meeting and include; presentation of profit and loss account, and balance sheet; relevant information on the assets and operations of the company; directorship; share dividend and public share issue, if any, is to be undertaken. Compliance with the law is assessed on the company's adherence to the legal requirements set out in the Companies Act especially the making of returns on its operations; the general meetings and resolution it has made during the year, tax returns, directorship of the company, shareholding and so on and so forth. If it does not do the things set out in law, the law has prescribed the penalty thereto.

[18] It is not in dispute that KSC has not held an Annual General Meeting since 2003. I am perplexed to note that, in spite of the difficulties it initially faced from the court cases, the company did not make any serious attempts to cause a general meeting to be convened particularly after the ''offending'' cases had been withdrawn. More trouble is found to fathom that it continued to carry out its business without caring to adhere to or make amends with the law; an act which exposed the company to serious legal penalties and sanctions under sections 125, 131 and 148 of the Companies Act. As a matter of great emphasis, that kind of operation by KSC was in contravention of the law and would entitle any member to seek redress in court; and such suit would certainly be considered within the exceptions to the rule in **FOSS v HARBOTTLE (1843) 67 ER 189**. But the court is mindful that KSC is a public company, which inclines the court to preserve the public property and investment in the company. Meanwhile, lapses such as the ones herein could be cured through an Annual General Meeting where appropriate resolutions are made and then returns are filed with the Registrar of Companies in accordance with the Companies Act. The court order made on 5.12.2013 just presented the company with that golden opportunity to carry out the amends during the General Meeting convened in accordance with the said order. Consider what the court stated when it delivered its partial decision on the matter that:

> ***''The issues raised are serious; that a public company can run for that long without calling for an AGM. AGM, I agree with counsel for the Respondents, is one of, if not the single mechanism, through which a legal person accounts to its shareholders. Accountability is one of the requirements of the law, a company must abide by if it is to retain its juristic personality that has been given by law''.***

Requisition of Extra-Ordinary General Meeting: S. 132 of the Companies Act.

[19] The second issue I should determine is about convening of extraordinary general meeting on requisition. The exercise is governed by section 132 of the Companies Act which provides:

1. ***The directors of a company, notwithstanding anything in its articles, shall, on the requisition of members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company, or, in the case of a company not having a share capital, members of the company representing not less than one-tenth of the total voting rights of all the members having at the said date a right to vote at general meetings of the company, forthwith proceed duly to convene an extraordinary general meeting of the company.***
2. ***The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more requisitionists.***
3. ***If the directors do not within twenty-one days from the date of the deposit of the requisition proceed duly to convene a meeting, the requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves convene a meeting, but any meeting so convened shall not be held after the expiration of three months from the said date.***

4. ***A meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors.***
5. ***Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were in default.***
6. ***For the purposes of this section the directors shall, in the case of a meeting at which a resolution is to be proposed as a special resolution, be deemed not to have duly convened the meeting if they do not give such notice thereof as is required by section 141.***

[20] For the sake of clarity, let me breakdown the important aspects of section 132 of the Companies Act. The section requires that:

1) A requisition should be deposited at the registered office of the company by members of the company.

2) The requisition notice must state the objects of the meeting, and must be signed by the requisitionists. It may be accompanied by other documents signed by the requisitionists.

3) The requisition for an Extra-Ordinary General Meeting should be by members who hold at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company with the right of voting at general meetings of the company, or, in the case of a company not having a share capital, members of the company representing not less than one-tenth of the total voting rights of all the members having at the said date a right to vote at general meetings of the company.

4) The requisition for a meeting should require the directors to convene the meeting within 21 days.

5) It is only when the directors fail to convene a meeting within twenty-one days from the date of the deposit of the requisition that the requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves convene a meeting.

6) The meeting so convened must be held within three months of the expiry of the twenty one days given to the directors.

7) The meeting called by the requisitionists in accordance with (5) should adhere to the normal procedure for calling of a general meeting.

[21] Did the notice issued on 11.11.2013 convening an Extra-Ordinary General Meeting on 10th December, 2013 conform to the requirements of the law? Mr Alfred Nyairo without elaboration submitted the notice was proper. Mr Nyaencha, on the other hand, thought it did not and he cited two reasons; 1) that the notice dated 11.11.2013 did not give the mandatory 21 days to the directors; and 2) the said notice combined the two distinct steps in section 132 of the Companies Act and indeed called for a meeting straight away. On my part, I take the view that the notice fell far short of compliance with the law, and the non-compliance is a material one which cannot be diminished as a mere technicality, for it goes to the root of the company as a juristic person and the exercise of powers of management in a corporate entity. What is the nature of the violation? Although the notice stated the agenda for the meeting, it violated all the other principal legal requirements under section 132 of the Companies Act. The notice was not a requisition to the directors to convene an Extra-Ordinary General Meeting as required by section 132 of the Companies Act. Rather, it was a notice convening an Extra-Ordinary General Meeting on 10.12.2013. Section 132 is worded deliberately in a way that the directors are obliged to convene

the meeting within 21 days of the depositing of the requisition at the registered office of the company, and it is only if they do not convene a meeting within the prescribed period that the right for members of a company to convene an Extra-Ordinary General Meeting themselves arises. There are good legal and practical reasons why the law in section 132 of the Companies Act has been so tailored. The procedure therein:

1) recognizes the legal personality of the company which is distinct from its shareholders- see **SALOMON v SALOMON**;

2) reinforces the legal mandate and authority of the directors to convene the meeting of the company at first instance in accordance with the company's Article of Association**-** see **SHAW & SONS (SALFORD) LTD.** v. **SHAW [1935]2 K.B. 113, C.A** and Article 80 of Table A;

3) Gives the directors notice to convene the meeting and the agenda for the meeting as well as the intention of the requisitionists to convene one in the event of default by the directors;

4) provides a statutory departure from the provisions of the Articles of Association and Article 80 of Table A on powers of management of a company, thus, providing the shareholders with a defined legal avenue and process to hold the company accountable in the event of directors' dilatory conduct in convening meetings; and

5) Avoids superfluity of Extra-Ordinary meetings at the whims of members without proper basis or adherence to the law.

Any material departure from the prescriptions of section 132 of the Companies Act, oozes out the essence of the law on corporate existence of a company; and therefore, I should state, the procedure adopted by the defendants is overly and extravagant interpretation of section 132 of the Companies Act. If that procedure prevails, it will not only flout the corporate law, but would open the company to superfluity of meetings. I say these things in order to re-establish jurisprudence on this law which is guided by a sense of proportion and regularity in corporate law; a chariness of proliferation of unnecessary meetings which are not grounded on applicable legal principles; and the need to avoid a practice that gives no promise of sustainability of a company as a legal person.

[20] Further, the notice disclosed two requisitionists without saying whether the two held not less than one-tenth of such of the paid-up capital of the company with the right of voting at general meetings of the company. I concur with Mr Nyaencha that the notice dated 11.11.2013 for the meeting scheduled for 10.12.2013, materially violated section 132 of the Companies Act. The requisition should conform to the law if the meeting is to be properly-convened under section 132 of the Companies Act; or is to become the meeting of the company and the resolutions thereof should bind the company; and reasonable costs incurred by the requisitionists should be payable by the company.

[21] Applying the test in the case of **GIELA v CASSMAN BROWN,** the applicant has established a prima facie case with probability of success. The substantive issues pleaded in this suit are not frivolous, and it will be a great prejudice to the applicant if the meeting convened in violation of the law is allowed to take place before the issues in controversy are adjudicated upon and resolved by the court. In light of what I have stated above, the prejudice will cause irreparable damage that cannot be compensated by way of damages. One other consideration; the court ordered a general meeting to be convened within 60 days from 5.12.2013, and prudence demands that an injunction should issue against the proposed meeting. I need not utilize the third threshold because the court is not in any doubt on the matter. For those reasons I hereby issue:

1) A temporary injunction against the defendants restraining them, their servants and or agents from calling for and or holding the Extra-Ordinary General Meeting of

the shareholders of Kenya Seed Company which they had convened through the notice dated 11.11.2013 and had been scheduled for 10th December, 201,3 at any other date until determination of the suit.

2) Meanwhile, KSC should observe the order made on 5.12.2013 and convene an Annual General Meeting within the time prescribed in the order, and report back to court immediately the meeting has been so held.

3) Costs of the application are awarded to the applicant.

Dated, signed and delivered at Nairobi this 16th day of January, 2014.

F. GIKONYO

JUDGE

In the presence of:

Kinyua Court-clerk

No appearance For the Applicant

M/S Amboto for Nyairo For the Respondents

F. GIKONYO

JUDGE