



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
MISC.APP. CASE NO.6 OF 2014

DAVID BETT LANGAT - 1ST APPLICANT

ISMAIL GULAMAN - 2ND APPLICANT

VERSUS

STEPHEN KIPKATAM KENDUIYWA - 1ST RESPONDENT

JOEL KIMUTAI SANG - 2ND RESPONDENT

JOSEPH KIPKURUI NGETICH - 3RD RESPONDENT

RODERICK MITEI KENDUIYWA - 4TH RESPONDENT

RULING

Pursuant to the amended Notice of Motion dated 25th February 2014, the applicants obtained *ex parte* the following orders *inter alia*:

1. *That this Honourable court be and is hereby pleased to allow the Applicants through their duly appointed auditors to inspect and investigate the affairs of the company and more particularly conduct a forensic audit of the company's financial status and to avail a report of their findings within 60 days from the date of the said appointment and/or audit.*
2. *That this Honourable court be and is hereby pleased to compel the Company Directors, auditors, corporate secretaries, bankers, suppliers and staff to cooperate and assist the said auditors by producing documents giving such evidence as may be demanded by the said auditors from time to time in the discharge of their duties.*
3. *That the Respondents by themselves, their employees, agents, personal representatives and assignees be and are hereby restrained from interfering with the Applicants investigative activities and access of the company's offices and financial records pending the hearing and determination of this application.*

When the aforesaid Motion came up for *inter partes* hearing, Mr. Mssrs. Opolu and Miruka learned

advocates for the 2nd Respondent and 1st and 4th Respondents respectively applied for the aforesaid orders to be set aside. Miss. Muthee learned advocate for Applicants urged this court to extend the orders instead of setting them aside. This ruling is the outcome of those submissions.

I have considered the rival submissions. It is the Respondents' submission that the orders were executed by people who are strangers to the court and may not be under the control and direction of the court. Mr. Opolu further pointed out that the applicants have used the exparte orders to paralyze the business and operations of Kapchebet Tea Factory Ltd, yet the aforesaid Company is not a party to this suit. It is also argued that the order could not be executed against the company because it was never directed at it. The learned advocate further pointed out that the court did not have jurisdiction to grant the orders authorizing the directors to investigate each other yet they did not come to court within the provisions of Sections 165 – 172 of the Companies Act. This court was further urged to find that the sections which the motion is premised envisages an investigation triggered by the Registrar of Companies and not the court, in which case the court will be required to appoint the investigators and or the inspectors. Miss. Muthee, on her part, defended the manner in which the Applicants used to obtain the orders. She cited the provisions of Section 211 of the Companies Act as the provision which permitted the applicants to approach the court.

There is no doubt that the main complaint the applicants have raised is that they have been excluded from running the affairs of the company hence they are in the dark as to what is happening. They claim that they do not know the financial status of the company hence the need carry out a forensic audit of the company affairs. The applicants further aver that the Respondents have denied them a chance to investigate or inspect the books of accounts. It is not also in dispute that the Respondents and the Applicants are directors and or shareholders of Kapchebet Tea Factory Limited. It is further not in dispute that the company is not a party to these proceedings. With respect, the issues raised by Mr. Opolu are so pertinent in the administration of company affairs that they should not be taken lightly. In my view, the dispute before this court is basically that involving directors/shareholders of the company. The orders sought and issued have obviously affected the company which is not a party to these proceedings. The Motion is premised on Sections 165 – 172 of the Companies Act. I am convinced by the submissions of Mr. Opolu that under Sections 165 and 166 of the Companies Act, the law enjoins the court to appoint the inspectors and or investigators on the application of the members to investigate or inspect the affairs of a company.

In the case before this court, the applicants have arrogated themselves the power of appointing those investigators and or inspectors. Those people cannot be under the control and directions of the court. In the circumstances I find Mr. Opolu's oral application to be well founded. Consequently, the exparte orders issued on 18th February 2014 and subsequently extended thereafter are hereby set aside.

Dated, signed and delivered in open court this 9th day of April 2014

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicants

.....for the Respondents