



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

WINDING CAUSE NO. 1 OF 2014

IN THE MATTER OF KAPCHEBET TEA FACTORY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CAP.486 LAWS OF KENYA)

**IN THE MATTER OF SECTION 189,191,219,22,224,234,239,240,241,242,243,252 AND 253 OF
THE COMPANIES ACT, CAP 486 LAWS OF KENYA.**

AND

IN THE MATTER OF THE INHERENT POWERS OF THE COURT

BETWEEN

DAVID BETT LANGAT.....1ST PETITIONER

ISMAIL GULAMALI.....2ND PETITIONER

VERSUS

STEPHEN KIPKATAM KENDUIYWA.....1ST RESPONDENT

JOEL KIMUTAI SANG.....2ND RESPONDENT

JOSEPH KIPKURUI NGETICH.....3RD RESPONDENT

RODERICK MITEI KENDUIYWA.....4TH RESPONDENT

JONAH KIPKEMOI KETER.....5TH RESPONDENT

KAPCHEBET TEA FACTORY LIMITED.....6TH RESPONDENT

RULING ON DIRECTIONS

On 28th May 2014, Miss. Muthee, learned advocate for the Petitioners appeared *ex-parte* before this court to argue the Notice Motion dated 26th May 2014. In the Certificate of Urgency accompanying the aforesaid Motion, the learned advocate urged this court to certify the Motion as urgent because the Respondents were blatantly misappropriating the funds belonging to Kapchebet Tea Factory Ltd to the

extent that the company may not meet its financial obligations and may force creditors to take over the management of the same. Miss. Muthee further beseeched this court to issue *ex-parte* the following orders:

1. **The application is certified as urgent and service be dispensed with at the first instance;**
2. **That this Honourable Court do issue an injunction prohibiting the 1st -5th Respondents by themselves, their agents, assignees, employees and/or servants from transacting in the affairs of the Kapchebet Tea Factory Limited.**
3. **That pending hearing and determination of this application and petition all assets and liabilities of Kapchebet Tea Factory Limited (The Company) be vested in the Interim Liquidator.**
4. **That the Honourable Court to give or make any such and further order as deemed appropriate, fair and just in line with the provisions of the Company's Act.**

In a reserved ruling delivered on 30/05/2014, this court certified the Motion urgent as prayed in prayer 1. This court declined to grant *ex-parte* prayers 3,7 and 11 because it was of the view that the orders are so drastic and may affect the operations of the company hence there was need to hear all the parties to this dispute.

When the aforesaid Motion came up for interpartes hearing on 10th June 2014, the Respondents through their respective counsels appeared and sought to be given sufficient time to file their responses. Mr. Wasuna, learned advocate for **Joseph Kipkurui Ngetich**, the 3rd Respondent raised the following concerns:

- i. **That the pleadings and documents served upon his client were photocopies hence they should not be regarded as proper pleadings.**
- ii. **The documents/pleadings served were not paginated hence it was difficult for him to make references and respond.**
- iii. **Some documents annexed to the affidavit had missing pages.**
- iv. **That some documents could not easily be read.**

Mr. Wasuna asked this court to direct the Petitioners' advocate to compile, file and serve upon him proper pleadings taking into account the above concerns. Mr. Miruka, learned advocate for **Stephen Kipkatam Kenduiywa** and **Roderick Mitei Kenduiywa**, the 1st and 4th Respondents respectively adopted the submissions of Mr. Wasuna. Mr. Opolu, learned advocate for **Joel Kimutai Sang, Jonah Kipkemoi Keter** and **Kapchebet Tea Factory Ltd**, the 2nd, 5th and 6th Respondents respectively, too adopted the submissions of Mr. Wasuna. Mr. Opolu further pointed out that the order setting aside the orders of 17th February 2014 was not annexed to the documents his client was served. Miss Muthee, learned advocate for the Petitioners appreciated the concerns raised by the Respondents advocates and asked for time to rectify the same. Miss. Muthee stated that the process server found it difficult to trace and serve the Respondents hence the late service.

After taking into account the submissions of learned counsels from both sides this court issued orders directing the Petitioners' advocate to compile, file and serve upon the Respondents a fresh bundle of pleadings encompassing the concerns raised by the Respondents' counsels. The matter was then stood over to 19th June 2014 for further orders and directions. On the aforesaid date, the Respondents advocates confirmed having been served with new bundles of pleadings but this time round they each pointed out that they had been served late hence they needed time to file their responses. Miss. Muthee admitted the process server effected service too late in the day. She acknowledged that the Respondents' advocates needed time to respond to the Motion. Mr. Wasuna raised two issues and asked this court to

give directions.

First, he stated that the pleadings he was served with was drastically different from what he was previously served. Secondly, he pointed out that he has now been served with two sets of documents and he does not know which one to respond to. Mr. Miruka on his part did not raise any new issue save that he needed time to file his clients' response. Miss. Muthee provoked a heated debate when she asked for interim conservatory order to preserve the assets of the 6th Respondent and protect the same from being wasted and plundered. Miss. Muthee urged this court to grant the order in exercise of its inherent power to protect the company from collapsing. Mr. Miruka urged this court not to grant the order since there is no wastage taking place and in any case the order asked for was never prayed for in the Motion. Mr. Opulu pointed out that this court gave clear directions when the Motion came up for hearing ex-parte on 30/5/2014. In other words, Mr. Opulu was of the view that parties must be heard before such drastic orders can be given. He further complained that the Petitioners are seeking to be given orders similar to those sought in Kericho H.C.Misc.Appl. No 6 of 2014. It was argued that if the orders are given the court will have sanctioned the death of the 6th Respondent to the utter detriment of more than 10,000 tea farmers who deliver tea leaves to the 6th Respondent's Tea Factory. Mr. Wasuna adopted the submission of Mr. Opulu.

I have taken time to set out the background of the dispute. I have also taken into account the submissions of learned counsels. Let me put the record straight that the Motion dated 26th May 2014 was certified urgent on 30th May 2014. The same should be expeditiously heard and determined because its pendency will put some unnecessary anxiety on the parties to this dispute. Mr. Wasuna has raised one critical issue. He has stated that he has been served with two petitions and he does not know which one to respond to. With respect, I do not envy the position Mr. Wasuna has been placed. However, the solution lies on the directions given by this court on 10th June 2014. The Petitioners' advocate was directed to compile, file and serve a proper set of documents after taking into account the concerns raised by the Respondents' advocate.

It meant that the documents and/or pleadings served before 10th June 2014 should have surrendered to the Petitioners' advocate or in the alternative the same should be disregarded. In view of the above findings, I am constrained to direct that the Respondents should only respond to the pleadings served after 10th June 2014. Having determined the preliminary issue raised by Mr. Wasuna, let me now consider the request made by Miss. Muthee. She has beseeched this court to grant an interim order to protect the 6th Respondent from going to ruin. The Respondents have denied this allegation. It is a very serious allegation which this court cannot take lightly. Both the Petitioners' and Respondents advocates agree that there is no prayer in the Motion for grant of an interim order. In view of the drastic consequences resulting from such an order, there is need for an aggrieved party to make a formal request and can only be considered after hearing the parties. In so doing the court will make an informed decision after taking into account the views of both sides of the dispute. Consequently, I decline to grant the orders sought. It is in the interest of the parties to this dispute to have this matter given priority and expeditiously heard and determined. There is therefore need to set time lines. I have intentionally avoided to express any opinion on some of the issues raised touching on the merits or otherwise of the Motion and Petition to await the interpartes hearing of the dispute.

Dated, Signed and delivered in open court this 26th day of June, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Miss. Muthee for 1st Petitioner

Mr. Miruka for 1st and 4th Respondents

Mr. Opolu for 2nd, 5th and 6th Respondents

Mr. Wasuna for 3rd Respondent

Kashindi for Receiver Managers who have been appointed by K-Rep Bank