



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 504 of 2010

KURI TEA FACTORY LIMITED.....PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AGENCY LIMITED..... 1ST DEFENDANT

KTDA HOLDINGS LIMITED.....2ND DEFENDANT

JOHN KENNEDY OMANGA3RD DEFENDANT

COMMERCIAL BANK OF AFRICA4TH DEFENDANT

THETA TEA FACTORY COMPNAY LIMITED.....5TH DEFENDANT

RULING

1. In a plaint drawn and filed in court on 22nd July, 2010 by the firm of Sichangi and Company Advocates, the Plaintiff pleaded in paragraphs 12, 14, 15, 22 and 23 that the founder shareholders and directors of the Plaintiff since incorporation were Benard Njiiru, Patrick Kamungara, Patrick Kimata, Samwel Wamurao and James Maina Ngunjiri. Ben Achode Malingu was appointed Company Secretary on 13th July, 2010. That all the corporate books of the Plaintiff were in the premises of the 1st and 3rd Defendant whom the Plaintiff had learnt had manipulated its records in an attempt to allot shares to the 5th Defendant with whom the Plaintiff did not have any agreement. Finally, that the Defendants had intended to change and distort the corporate structure and shareholding of the Plaintiff through a planned extra-ordinary General Meeting requisitioned by the 5th Defendant for the 26th July, 2010.

2. On filing the Plaint, the Plaintiff obtained exparte order restraining the holding of the requisitioned meeting of 26th July, 2010 as well as the 3rd Defendant from holding himself out as the company secretary of the Plaintiff. Those orders and pleadings were served upon the Defendants. Before any Defence or answer to the application for injunction could be filed, on 26th July, 2010, the firm of J.B Kibicho & Company filed a Notice of Change of Advocate to act for the Plaintiff in place of the firm of Sichangi & Company Advocates.

3. On 28th July, 2010, the firm of Sichangi & Company took out a motion on notice under Section 56 of the Advocates Act, Section 3A of the Civil Procedure Act and the former Order III Rules 1 and 2 of the Civil Procedure Rules seeking orders to restrain the firm of J.K. Kibicho and Company from acting for the Plaintiff, the striking out of all the documents filed by the said firm on behalf of the Plaintiff and that

the said firm be sanctioned under Section 56 of the Advocates Act. The grounds for the motion were set out in the body of the motion and the Supporting Affidavit of Patrick Kungu Kimata sworn on 27th July, 2010.

4. The issue of representation was argued before Hon. Njagi J, on 12th October, 2010. The parties also filed their respective written submissions dated 12/08/2010 and 8/10/2010 by Ms Sichangi & Company and 30/7/2010 and 12/10/2010 by J.K. Kibicho and company respectively. When the matter was mentioned before me on 20th March, 2013, the parties agreed that I should write a ruling on that motion. This then is the ruling on the issue of representation.

5. The firm of Sichangi & Company, Advocates (hereinafter “Ms Sichangi”) contended that the basis of the suit is that the Defendants including the 5th Defendant were interfering with the management of the Plaintiff, that upon being served with the orders of injunction the 5th Defendant placed an advertisement in the Sunday Nation intimating that the Board of directors of the Plaintiff has been dissolved and the operations of the Plaintiff would henceforth be carried out by the Board of Directors of the 5th Defendant, that instead of responding to the suit papers the directors of the 5th Defendant and the 3rd Defendant had decided to mutate themselves into the Plaintiff and purported to appoint the firm of J.K. Kibicho & Co to act for the Plaintiff. Ms Sichangi further submitted that the 5th Defendant was not a holding company of the Plaintiff in terms of Section 154 of the Companies Act, that the 5th Defendant did not have any powers to remove the Plaintiff’s Board of Directors and appoint its own board as that of the Plaintiff, that Articles 87, 88, 89, 90 and 91 of the Memorandum and Articles of the Plaintiff were clear as to how the directorship of the Plaintiff was to be appointed and replaced. That the purported removal of the board of directors of the Plaintiff by the 5th Defendant did not follow the procedure laid down in the Articles of the Plaintiff or Section 185 of the Companies Act.

6. It was further submitted that the 5th Defendant was in contempt of the Court orders granted on 22nd July, 2010 as its action of purporting to remove the directors of the Plaintiff was the very action that had been restrained by the court. That the Replying Affidavit of J.K. Kibicho of 29/7/2010 was in breach of the law as this was a contentious matter, that the directors who purported to appoint the firm of J.K. Kibicho and company had not been elected in accordance with Section 184 of the Act and their action was a nullity, that the notification by Catherine Njeri Mburu was immaterial as she had not been appointed a company secretary of the Plaintiff. That the exhibits produced in the Further Affidavit of Charles Njoroge sworn on 26/08/2010 did not help the case of J.K. Kibicho & Company. The cases of **East African Safari Air Ltd –vs- Anthony Ambaka Kegode & Anor Milimani HCCC No.345 of 2004**, **Affordable Homes Africa Ltd –vs- Ian Anderson & 2 others HCCC No.524 of 2004** and **Mohamed Ashraf Sadique & Anor –vs- Mathew Oseko T/a Oseko and Company MISC.901,933-938 of 2007 (UR)** were relied on in support of the application. Ms Sichangi urged that the application be allowed.

7. Messrs J.K. Kibicho & Company, Advocates (hereinafter “Ms Kibicho”) opposed the application vide a Replying Affidavit of Daniel Mwangi Kibicho sworn on 29th July, 2010, a Further Affidavit of Charles Njoroge sworn on 26th August, 2010 and written submissions dated 30th July, 2010 and 12th October, 2010, respectively. Ms. Kibicho contended that they were properly appointed by the Plaintiff pursuant to a Board resolution passed on 23rd July, 2010. That Patrick Kungu Kimata was not a current director of the Plaintiff and he could therefore not swear the Affidavits in Support of the application. That the 5th Defendant held 74% shareholding in the Plaintiff. That the directors of the 5th Defendant were the same directors of the Plaintiff at the time the 5th Defendant obtained a loan of US\$4,100,000/- from the 4th Defendant in 2005 which was used to set up or construct the Plaintiff factory. That it was at all times known by the outgoing directors of the Plaintiff that the Plaintiff was a subsidiary of the 5th Defendant, that the present directors of the Plaintiff are Charles Njoroge, Peter Kiarie, John Kinyanjui, Peter Wairia Muiru Gicunji, Joseph Wakimani and Catherine Njeri Mburu.

8. It was submitted by Ms. Kibicho that the incorporation of the Plaintiff was conceived by the Board of

Directors of the 5th Defendant who wanted to expand access to tea farmers, that the directors of the 5th Defendant at the time were those of the Plaintiff who were removed on 23/7/10, that initially the 5th Defendant was allocated 75% of the authorised share capital of the Plaintiff which was paid up, that the 5th Defendant was the majority shareholder of the Plaintiff by virtue of the amount of money sunk onto the Plaintiff, that there has never been any separate elections for the directors of the Plaintiff from that of the 5th Defendant. That by virtue of Section 154 of the Companies Act, the Plaintiff was a subsidiary of the 5th Defendant. The cases of East Africa **Safari Air Ltd –vs- Anthony Ambaka Kegode (supra) and Dadan –vs- Maiji & 3 others HCCC No.913 of 2002** were relied on in opposing the application. Ms. Kibicho urged that the application be dismissed as they had been properly appointed.

9. I have critically considered the Affidavits on record and the submissions of Counsel. I have also considered the authorities relied on by the respective Counsel. The dispute herein is that of representation. That is, who amongst Ms. Sichangi and company and ms J.K Kibicho and company are properly on record for the Plaintiff. In other words, which of the two firms was properly appointed by the Plaintiff to act in this matter.

10. I should state that the matters which were addressed in detail by the Counsels, in my view, go to the very core of the dispute in this case. Having analysed all the documents presented and arguments advanced by the parties, I have formed the view that if this court makes any full determination on some or any of the issues raised in this application at this stage, it may be determining issues that are the very foundation of the dispute between the parties in this case. For example, making any conclusive findings as to whether or not the 5th Defendant is a holding company of the Plaintiff or whether the removal of the entire board of the Plaintiff and replacement thereof by that of the 5th Defendant might hinge in determining the very dispute contained in the Plaintiff. That in my view, would be premature as it would amount to making findings on hotly contested issues without tested evidence. Be that as it may, a determination one way or the other has to be made on the issue of representation.

11. At the beginning of this ruling, I did set out what the Plaintiff's complaint in this suit was, the intended meddling in the affairs of the Plaintiff, period. That being the case, I would consider the cases put forward by the respective Advocates without making any firm findings that might prejudice the trial of the suit, if at all.

12. The contention by Messrs Sichangi is that they were properly instructed to commence the present proceedings which they did on 22nd July, 2010. That the purpose of the suit was to restrain the Defendants from interfering with the affairs or management of the Plaintiff. That on being served with the restraining orders, the 3rd and 5th Defendant disobeyed the said orders by purporting to pass a resolution by the 5th Defendant to remove the Board of Directors of the Plaintiff and replace the same with that of the 5th Defendant. That the subsequent purported appointment of Ms. J.K. Kibicho and company to take over the conduct of the matter was invalid, null and void. On their part Ms Kibicho's position is that since the 5th Defendant was a majority shareholder and a holding company in and of the Plaintiff, it was entitled to control the Plaintiff including making decisions as to who is to sit in the Board of Directors of the Plaintiff. That the 5th Defendant having exercised that power and replaced the previous Board of the Plaintiff with a new Board that duly appointed them to act in this matter, they are properly on record.

13. In order to have a proper perspective of the respective Counsels' positions, perhaps it behoves this court to consider the nature and background of this suit. This dispute was triggered by the 5th Defendant on 10th June, 2010 when it requisitioned for an extra-ordinary General meeting of the Plaintiff to be held on 26th July, 2010. That requisition was set out in paragraph 20 of the Plaintiff as follows:-

“REF: REQUISITION FOR AN EXTRA-ORDINARY GENERAL MEETING

Pursuant to Section 132 & 141 of the Companies Act CAP 486 Theta Tea Factory Company Limited being the majority shareholder hereby wish to requisition for an Extra-ordinary General meeting to be

held not later than 2nd August, 2010, to consider the following business:-

1. ORDINARY BUSINESS

(I) INCREASE OF AUTHORISED SHARE CAPITAL

That the authorized share capital of the company be increased from Shs.399,900,000/- divided into 480,000 ordinary shares (class A ‘founder’) and 79,500,000 ordinary shares (class B ‘commercial’) of Shs.5/= each, to Shs.750,000,000/- divided into 150,000,000 ordinary shares (Class B ‘commercial shares’) of shs.5/- each by the creation of an additional 70,500,000 ordinary shares (class B ‘commercial’) of the company.

2. SPECIAL BUSINESS

(II) CHANGE OF NAME

“RESOLVED THAT pursuant to the provisions so Section 20 of the Companies Act CAP 486 and other applicable provisions of the Companies Act if any, and subject to the availability of name and the approval of the Registrar of Companies the name of the company be changed from KURI TEA FACTORY LIMITED to NDARUGU TEA FACTORY COMPANY LIMITED and the name Kuri Tea Factory Company Limited and the name Kuri Tea Factory Company Limited wherever it appears in the memorandum and Articles of Association and their documents be substituted by the new name in due course.

(III) Alteration of article 14 of the company’s memorandum and articles of association

RESOVED THAT pursuant to provisions of Section 19 of the Companies Act CAP 486 and other provisions of the Companies Act if any, that Article 14 of the Articles of Association be and is hereby altered to read as follows:-

That Theta Tea Factory Company Limited being the largest shareholding group in the company shall have the right to appoint all the directors of the company subject to the following conditions:-

a) The Director appointed must be a Director of theta Tea Factory.

b)The Director appointment shall cease automatically to be a Director once their directorship ceases at Theta Tea Factory Company Limited

c) That Theta Tea Factory Company Limited shall exercise this provision as a majority shareholder until when the loan advanced to Kuri Tea Factory Company Limited amounting to Kshs.475,983,344.55 shall be fully repaid.

SIGNED BY DIRECTORS OF THETA TEA FACTORY COMPANY LIMITED.”

14.It is clear from the said requisition that the 5th Defendant intended that in that Extra-ordinary General meeting, drastic changes in the corporate structure, shareholding and management of the Plaintiff be effected. The management was to be fully controlled by the directors of the 5th Defendant. That was to be effected if the agenda sought to be presented at that Extraordinary General meeting was discussed and the proposed resolutions passed and adopted thereat. It is not in dispute that the Plaintiff did obtain on 22nd July, 2010 temporary orders that restrained the holding of that meeting that was intended for 27th July, 2010. Those orders were obtained and served on 22nd July, 2010. Without any such meeting being held, the 5th Defendant then purported to resolve by its own board of directors to remove the entire board of the Plaintiff on 23rd July, 2010 and install its board on the Plaintiff. By so doing, the entire management structure of the Plaintiff was changed!

15. The question that arises is, could the 5th Defendant achieve what it intended to obtain through the Extra-ordinary General Meeting through its own resolution suo motto? Was it open for the 5th Defendant to effect the changes in the management of the Plaintiff in the face of the orders that were made on 22nd July, 2010 and admittedly served? I do not think so. If the 5th Defendant was a majority shareholder and therefore the holding company of the Plaintiff, why was it requisitioning for the Extra-Ordinary General Meeting of 27th July, 2010? It is not lost to this court that the Plaintiff has denied that the 5th Defendant is a shareholder in the Plaintiff. It is also not lost to this court that the 5th Defendant chose not to oppose the suit in any way whatsoever and that the resolution passed on 23rd July, 2010 by the 5th Defendant and purported to be that of the Plaintiff was:-

“(i) THAT the firm of J.K. Kibicho of P.O Box 73137 – 00200 Nairobi is hereby appointed to represent KURI TEA FACTORY COMPANY LIMITED in NAIROBI MILIMANI COMMERCIAL COURTS HCCC NO. 504 OF 2010 in the place of Sichangi & Company Advocates.

(ii) THAT NAIROBI MILIMANI COMMERCIAL COURTS HCC NO.504 OF 2010 be withdrawn forthwith.”

16. It is very clear that the intention of the 5th Defendant in passing the said resolutions was that the conduct of the present suit be taken over by the firm of J.K. Kibicho & Company and thereupon terminate the present proceedings. Is it plausible that a named Defendant in a proceeding can in any circumstances, mutate itself to be a Plaintiff for purposes of terminating those proceedings? To my mind, there is much to it that meets the eye. A court of law will tread very carefully to allow such a step more so where there is a rival claim that the persons purporting to undertake such steps are doing so irregularly.

17. In any event, whether or not the 5th Defendant was a holding company of the Plaintiff, I hold the view that it was not open to it to circumvent the orders of the court of 22nd July, 2010. To my mind, all the issues regarding the alleged majority shareholding with power to control the Plaintiff is an issue of Defence but not one to be used to take over the conduct of and terminate proceedings. While there were no records from the Registrar of Companies produced to support the allegations put forward by the 5th Defendant, the Plaintiff produced the Memorandum and Articles which supports the contention of the Plaintiff as to the original shareholding and directorship of the Plaintiff.

18. In view of the foregoing, I am of the view that the purported appointment of the firm of J.K. Kibicho & Company, Advocates by the admitted directors of the 5th Defendant to act for the Plaintiff in this suit was irregular. The same was a clever way of avoiding the orders made by this court on 22nd July, 2010 and these proceedings generally. It follows that the Notice of Appointment of Advocate by the said firm filed on 26th July, 2010 was also null and void.

19. Accordingly, I allow the Notice of Motion dated 27th July, 2010 in terms of Prayer Nos. 1 and 2 thereof.

20. As regards prayer No. 3 in the circumstances of this case, this court does not feel compelled to sanction the said firm of Advocates as prayed. This is so to avoid a long protracted tussle that will only further delay the resolution of this dispute. But the court is alive to the fact that the conduct of the 5th Defendant and Ms J.K. Kibicho & Company was despicable and unacceptable. The same is contrary to Sections 1A and 1B of the Civil Procedure Act. In this regard, the firm of J.K. Kibicho & Company Advocate shall personally pay the costs and interests thereon for the application. Such costs be agreed upon within 14 days failing of which the same be assessed by the Deputy Registrar of this court and be paid forthwith, in default, execution do issue.

Orders accordingly.

DATED and DELIVERED at Nairobi this 19th day of April, 2013

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A. MABEYA

JUDGE