



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 14 OF 2013

KIAMOKAMA TEA FACTORY PLAINTIFF

VERUS

ABEL MOGAKA 1ST DEFENDANT

STANLEY MACHOKA 2ND DEFENDANT

STEPHEN MOTIRI 3RD DEFENDANT

EVANS MABURI 4TH DEFENDANT

RICHARD MOIBI 5TH DEFENDANT

RULING

The Application

1. By the Notice of Motion dated 25th November 2013, the Plaintiff/

Applicant seeks an order of temporary injunction seeking to restrain the defendants (Respondents) herein from proceeding to hold an Extra Ordinary General meeting as requisitioned in the notice dated 29th October 2013 or at all pending the hearing and determination of the application inter partes in the first instance and in the longer term until this whole suit is heard and determined. The applicant also prays for an order declaring the requisitioned meeting as illegal and void for all purposes. The Applicant also prays for costs. During the hearing of the application, counsel for the Applicant informed the court that he would leave the option of whether or not to summon the defendants to court to show cause why they cannot obey court orders in terms of prayer 5 of the application to the court's discretion.

2. The application is supported by the grounds that are set out on its face. It is also premised on the averments of Henry Nyabwengi in an affidavit sworn on 25th November 2013 and the annexures thereto. Mr. Nyabwengi is the Chairman of the Board of Directors of the Applicant and its Satellite Factory at Rianyamwamu Tea Factory and avers that he has been duly authorized to make and swear the Affidavit. Mr. Nyabwengi also swore a Further Affidavit dated 2nd December 2013 to buttress his depositions in the earlier supporting affidavit and the grounds appearing on the face of the application. The Further Affidavit is supported by annexures marked **HN1** to **HN7**.
3. The gist of the applicant's case is that it has transacted its annual general meeting business and extra ordinary meeting and that the reason why the respondents have called for another extra ordinary general meeting which has been done without following due process of law is to disrupt

the smooth operations of the Applicant and to disobey an express court order. The applicant avers that the balance of convenience in this case tilts in favour of the Applicant and that it would therefore be in the interests of justice for the court to grant the orders sought.

4. The application is opposed vide the Replying Affidavit sworn by Abel Mogaka on 29th November 2013 and a Supplementary Affidavit sworn on 2nd December 2013. The application is also opposed vide the Notice of Preliminary Objection dated 29th November 2013. The Preliminary Objection is premised on grounds that:-

- i. *The suit herein is fatally defective; incompetent and bad in law and the same ought to be struck out Ex-debito Justiciae;*
- ii. *The application dated 25th November 2013 is fatally defective and bad in law;*
- iii. *The entire suit is otherwise an abuse of the due process of court.*

5. The Respondents pray that the application be dismissed with costs to

themselves.

Background to the instant application

6. On the 12th July 2013, the Respondents herein issued a notice made pursuant to the provisions of **section 132** of the **Companies Act 1962**, calling for an Extra-Ordinary General meeting to be held at Ibacho Farmers' Society on 22nd August 2013 at 9.30 a.m. for the purpose of considering a resolution to remove Christantos Moindi (not a party to this suit) as a director of the plaintiff company. The said notice triggered the filing of the instant suit on 2nd August 2013. Contemporaneously with the suit the Applicant filed a notice of Motion dated 30th July 2013 seeking the following orders:-

1. *This Honourable Court be pleased to certify this matter as urgent and service thereof be dispensed with in the 1st instance.*
2. *This Honourable Court be pleased to issue a temporary injunction against the Defendants/Respondents restraining them from holding themselves as directors, executive committee members and/or officers of the Plaintiff/Applicant and from transacting any business on behalf of the plaintiff in whatsoever manner pending the interparties hearing and determination of this application.*
3. *This Honourable Court be pleased to issue a temporary injunction against the Defendants/Respondents restraining them from proceeding to hold an extraordinary general meeting as requisitioned in the notice dated 12th July 2013 or at all pending the interpartes hearing and determination of this application.*
4. *This Honourable Court be pleased to issue a temporary injunction against the Defendants/Respondents restraining them from holding themselves as directors, executive committee members and/or officers of the Plaintiff/Applicant and from transacting any business on behalf of the Plaintiff in whatsoever manner pending the interpartes hearing and determination of this suit.*
5. *This Honourable Court be pleased to issue a temporary injunction against the Defendants/Respondents restraining them from proceeding to hold an extraordinary general meeting as requisitioned in the notice dated 12th July 2013 or at all pending the interpartes hearing and determination of this suit.*
6. *Costs of this application be provided for.*

7. The said application was canvassed before Hon. Mr. Justice Muriithi who rendered a decision in the following terms:-

- a. *Pending the hearing and determination of the plaintiff's suit herein, the Defendants are restrained from presenting themselves as the directors of the plaintiff and from holding the meeting*

- scheduled for the 22nd August 2013.
- b. However as the issue of the alleged inventory, loss of Kshs.16,363,844/= is still live, the Defendants will be at liberty to pursue the holding of the extra ordinary general meeting notwithstanding the pendency of this case if they **strictly** comply with the provisions of **section 132** of the **Companies Act** with respect to the special majority of the requisitionists in terms of the shareholding and the notice period of 21 days [Emphasis is mine].
8. Consequent upon the said orders, the Respondents have requisitioned for an extra ordinary general meeting for 5th December 2013 at the Kiamokama Tea Factory Company Ltd Grounds for considering the following resolutions to be proposed as ordinary resolutions:-

“1. That Mr. Henry Nyabwengi be and is hereby removed as director of the company.

2. That Mr. Thomas Ondara be and is hereby removed as director of the company.

3. That Mr. Moses Nyandusi be and is hereby removed as director of the company.

4. That Mr. Benjamin Matonda be and is hereby removed as director of the company.

5. That Mr. Christantus Moindi be and is hereby removed as director of the company.”

9. It is this notice calling for the extra ordinary meeting of the Applicant on 5th December 2013 that drove the Applicant to file the instant application on grounds that the Respondents have not complied with the Companies Act; that the requisition is contrary to the court order on record and finally that the planned meeting is a nullity.
10. In the affidavit in support of the application, the deponent avers that the Applicant has, prior to the requisition taken steps to address any grievances advanced by the shareholders and in particular:-
- That the Board did write a letter to ICPAK complaining about the conduct of the auditors;*
 - That the Board through its Secretary called for an extra ordinary general meeting;*
 - That the meeting was well attended;*
 - That the complaint to ICPAK, Notice of the meeting and minutes of the said meeting are exhibited for the Court and for the Respondents to see.*
11. The applicant also contends that the requisition for 5th December 2013 was made in bad faith and not in compliance with the law and further that the Respondents are using illegally constituted meetings to disparage the character of the Applicant and its associates.
12. On their part, the Respondents contend that there is nothing untoward about the calling of the extra ordinary meeting scheduled for 5th December 2013; that the said meeting is regular and was initiated through due process and the pre-requisite conditions fulfilled and that all the people who have requisitioned the meeting are alive and that in any event, the directors of the applicant are using all manner of tactics to evade the convention of an extra ordinary general meeting in an effort to cover up farmers’ grievances. The Respondents are convinced that the instant application is an abuse of the due process of the Court, and they urge the court not to allow itself to be used by the directors of the Applicant to abuse its processes which it should seek to defend and protect.

The Submissions

13. When this matter came up before me for hearing on 3rd December 2013, the parties agreed and quite wisely so, in my view, to combine the main application with the Preliminary Objection in view of the limited time available between now and the date of the Extra Ordinary General Meeting scheduled for 5th December 2013 at 9.30 a.m.

The Applicant's Submissions

14. Mr. Nyachiro Nyagaka, counsel for the Applicant submitted that in furtherance of the Court orders granted by Hon. Mr. Justice Muriithi on 21st August 2013, the Applicant convened and held an extra ordinary general meeting on 1st November 2013 and that inspite of the said meeting having been held and well attended, the Respondents still want to hold another similar meeting which is contrary to the subsisting court order and the law. Counsel also submitted that the Respondents have written letters to security agents, particularly to the OCS Ramasha police station (Letter dated 22/11/2013) asking for permission to hold an extra ordinary General Meeting on 5th December 2013 between 9.30 a.m -12.30 noon, the agenda of the meeting being **“—to discuss loss of inventory of Kshs.16,636,844/= (Sixteen Million Six Hundred Thirty Six Thousand Eight Hundred and Forty Four Shillings) as shown in the attached Auditors' Report.”**
15. Counsel also submitted that the Respondents did not strictly comply with the provisions of **section 132** of the **Companies Act** in requisitioning and convening the meeting scheduled for 5th December 2013. **Section 132** of the **Companies Act** provides as follows:-

“132 (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.

16. It was counsel's submission that the notice of 29th October 2013 by the Respondents did not call upon the Directors to call for a meeting within 21 days as required by the law, apart from the fact that the meeting has been convened to discuss matters that are subjudice. It was counsel's view that if the planned meeting is allowed to take place, there would be chaos and further that the meeting held by the plaintiff on 1st November 2013 deliberated on the issue of the loss of Kshs.16 million and noted that the issue has since been referred to ICPAK and is still pending arbitration. He urged court to allow the application.

The Respondents' submissions

17. Mr. O.M. Otieno for the Respondents submitted that because counsel for the plaintiff does not have the authority to act for the Applicant in this matter, there is therefore no competent suit before the court. Counsel contended that there is no resolution by the Applicant authorizing the firm of Nyachiro Nyagaka to act for it. Concerning the dispute that is before this court, namely the loss of Kshs.16.6 million; counsel submitted that the resolution upon which the firm of Nyachiro Nyagaka has relied is very specific in nature and does not include the above stated loss as one of the matters to be pursued by the said firm. The resolution which is the subject of counsel's submission is annexed to the Further Affidavit of Henry Nyabwengi and reads in part:-

“We, the Board of Directors of Kiamokama Tea Factory ---- in a meeting held today Monday 29th July 2013, do hereby appoint Nyachiro Nyagaka and Company Advocates to act on behalf of the Company on all matters related to the forgeries and those using false documents for the purported Special Annual General Meeting.”
[Emphasis is mine].

18. Counsel thus argued that the authority given to Nyachiro Nyagaka and Company Advocates is for matters other than the dispute now before court and urged the court to so find and to strike out the suit together with the instant application.

19. Regarding the notice issued by the Respondents on 29th October 2013, counsel submitted that the same was issued within the law and that the date fixed for the Extra Ordinary General Meeting falls outside the 21 days required for the notice and therefore that the Respondents did not have to wait for expiry of the 21 days notice before they could convene the meeting. Counsel also submitted that the purported Extra Ordinary General Meeting of 1st November 2013 was a hoax, hence the Respondents' decision to call for the meeting scheduled for 5th December 2013.

20. Commenting on the orders granted by Hon. Mr. Justice E. Muriithi on 21st August 2013, counsel submitted that the said ruling gave the Respondents the leeway to call for meeting to discuss matters beyond the Kshs.16.6 million and added that the matters itemized in the notice of 29th October 2013 are intertwined with the items that are due for discussion at the scheduled meeting on 5th December 2013.

The Applicant's Reply

21. In reply, counsel for the applicants submitted that the resolution

of 29th July 2013 clearly covers the issues at hand, and that it is immaterial that the resolution talks about a Special General Meeting and not an Extra Ordinary General Meeting.

22. Regarding the issue of the loss of Kshs.16.6 million, counsel submitted that the notice given by the Respondents was not for discussion of the said issue, but was for removal of the directors named in the said notice. Counsel submitted that such a move has to await the determination of the main suit since according to the orders of 21st August 2013, an Extra Ordinary General

- Meeting was to be convened to discuss the Kshs.16.6 million loss.
23. Concerning the Preliminary Objection in general, counsel submitted that the preliminary objection raised by the Respondents does not meet the threshold of what a preliminary objection is as set out in the well known case of **Mukisa Biscuit Manufacturing Company Limited –vs- West End Distributors Ltd [1969] EA 696**, in which the Court held at page 700 that “**a preliminary objection consists of a point of law which if argued as a preliminary point may dispose of the suit**” such as an objection to the jurisdiction of the Court, or 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.”
24. The court was also referred to the case of **Microsoft Corporation –vs- Mitsumi Computer Garage Ltd & another (Nairobi Milimani Commercial Court – CC No.810 of 2001)** in asking the court to apply the substantive justice principle enunciated in **sections 1A and 1B of the Civil Procedure Act**. Counsel also cited other authorities which this court

has had the opportunity to read though within very limited time.

25. Finally, counsel urged the court to find that the notice of 29th October 2013 by the Respondents does not have as its agenda, discussion of the Ksh.16.6 million, but removal of directors, while the request for security from the Ramasha police station OCS gives the agenda of the proposed meeting as discussion of the loss of Kshs.16.6 million. Counsel urged the court not to allow the meeting to proceed.

Issues for Determination

26. Having set out the Applicant’s as well as the Respondents’ cases, the following issues arise for determination:-
- Whether the Respondents in issuing the notice of 29th October 2013 and fixing the date for the Extra Ordinary Meeting on 5th December 2013 acted within the provisions of **section 132 (3) of the Companies Act**;*
 - Whether the Respondents’ preliminary objection dated 29th November 2013 meet the threshold set out in **Mukisa Biscuit case**?*
 - Whether the Applicants have met the threshold for the granting of an injunction as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] EA 358**;*
 - Who should bear the costs of these applications?*

Findings and Conclusions

27. Regarding the first issue, I am not persuaded that the Respondents herein, in issuing the notice dated 29th October 2013 and setting the date for the Extra Ordinary General Meeting acted within the provisions of **section 132 (3) of the Companies Act**. The subsection clearly provides that if the directors fail to act upon the notice within the 21 days indicated in the notice for them to convene the extra ordinary general meeting, then the requisitionists may themselves convene the meeting. In the instant case, the Respondents usurped the powers of the directors by purporting to give a notice and to fix a date for the extra ordinary general meeting before the expiry of the requisite 21 days’ notice.
28. I note from the order given by Hon. Mr. Justice Muriithi on 21st August 2013 at paragraph 14 that the Respondents were at liberty to pursue the issue of holding of an extra ordinary general meeting notwithstanding the pendency of this case “**if they strictly comply with the provisions of section 132 of the Companies Act with respect to the special majority of the requisitionists in terms of the shareholding and the notice period of 21 days.**” In the instant case, there is no indication by the Respondents as to how they stand in terms of special majority of shareholding nor have they complied with the 21 days notice. In the circumstances, I do not agree with counsel for the Respondents that the Respondents did not have to wait for the expiry of the 21 days notice before they themselves could convene the meeting. The law speaks for itself in **section 132 (3) of the Companies Act** so that any explanations tending to stretch the clear meaning of that provision is

not tenable.

29. While on this issue, it is worth noting that while the notice of 29th October 2013 gave the agenda of the meeting as removal of the directors of the company named therein, the letter dated 22nd November 2013 by the Respondents to the OCS Ramasha police station gives the agenda of the meeting as discussion of the loss of Kshs.16.6 million. In my humble view the Respondents are being less than candid as to the true intent of the proposed Extra Ordinary General Meeting. The apparent dichotomy in the proposed agenda for the meeting goes a long way in confirming the applicants' fears that the Respondents are acting in bad faith. While this court recognizes the Respondents' right to call for the Extra Ordinary Meeting for whatever agenda they may wish to discuss, it behoves them to uphold the law in doing so and to act candidly as well. They failed to do so in this case.
30. On the second issue of the Respondents' preliminary objection, I find and hold that the same does not meet the standards set out by the court in the **Mukisa Biscuit case** (above). First and foremost, there is evidence on record, and it is admitted by the Respondents that the firm of Nyachiro Nyagaka have the authority to represent the Applicant in all matters related to the forgeries, and use of false documents for the purported Special Annual General Meeting. In trying to convince the court that there was no such authority, counsel had to go beyond points of law to points of fact to find the required information to support the Respondents' claim that the said firm had no authority to act in the matter. This clearly shows that the point of argument by the Respondents is not a point of law which once argued would dispose of the suit. It tends to more towards points of fact. That being the position I find no merit in the Respondents' preliminary objection.
31. The third issue concerns the prerequisites for the granting of an injunction as set out in the **Giella case** (supra) which are that:-
- i. *an applicant must show a prima facie case with a probability of success;*
 - ii. *an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;*
 - iii. *when the court is in doubt, it will decide the application on the balance of convenience.*
32. In the instant case, the applicant is saying that non-compliance with the law by the Respondents is detrimental to its operations; that the acts of bad faith on the part of the Respondents are not for the good of the Applicant. Considering all the material before me, and taking into account the conduct of the Respondents so far, it is my humble view that the balance of convenience would tilt in favour of the Applicants in this case.
33. I hasten to add, like Hon. Mr. Justice Muriithi did, that the Respondents are at liberty to pursue the holding of an extra ordinary general meeting notwithstanding the pendency of the main suit so long as they fully comply with the provisions of **section 132** of the **Companies Act**.
34. In the premises and for the reasons stated hereinabove, I allow the plaintiff's application dated 25th November 2013 in terms of prayers 3 and 4 thereof. The costs of this application shall abide the outcome of the main suit.
35. Orders accordingly.

Dated, signed and delivered at Kisii this 4th day of December, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Nyachiro for Plaintiff/Applicant

Mr. O.M. Otieno for Defendants/Respondents

Mr. E. Mongare - Court Clerk