



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 147 OF 2010

MAKOMBOKI TEA FACTORY CO. LTD.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH MWANGI MBOTE.....1ST DEFENDANT/APPLICANT

HUDSON MOFFAT KAMAU MBUE.....2ND DEFENDANT/ APPLICANT

JOSEPH KINUTHIA GITONGA.....3RD DEFENDANT/ APPLICANT

JOSEPH MUTURI MARITE.....4TH DEFENDANT/ APPLICANT

BENSON MWANGI.....5TH DEFENDANT/ APPLICANT

FRANCIS GICHUI KARANJA.....6TH DEFENDANT/ APPLICANT

RULING

This ruling is the outcome of the Motion dated 15th December 2011 in which the defendants namely: **Joseph Mwangi Mbote, Hudson Moffat Kamau Mbue, Joseph Kinuthia Gitonga, Joseph Muturi Marite, Benson Mwangi** and **Francis Gichui Karanja** sought for the following orders:

- (a) That the Honourable Court be pleased to certify this matter as urgent and dispense with service in the 1st instance.***
- (b) That a temporary injunction be issued against the Plaintiff, its agents and or servants from holding the intended annual general meetings as advertised on the Daily Nation dated 9th December 2011 and to be held on 13th January 2012 at Makomboki.***
- (c) Costs be provided for.***

The application is supported by the affidavit of Hudson Moffat Kamau Mbue. **Makomboki Tea Factory Co. Ltd**, the Plaintiff herein, opposed the Motion by relying on the replying affidavit of John Kennedy Omanga and grounds of opposition.

I have considered the material placed before this Court and the oral submissions of Mr. Sane, learned advocate for the Defendants and those of Mr. Kibicho, learned advocate for the Plaintiff. Let me set out in brief the background of this dispute in determining the Motion. The substantive suit is expressed in the Plaint dated 26th October 2010 in which the Plaintiff seeks for judgment against the Defendants in the following terms *inter alia*:

(a) A declaration that the extra-ordinary General Meeting held on 23.10.2010 was unlawful, illegal, null and void.

(b) A permanent injunction to restrain the defendants from entering the Plaintiff's premises or from interfering with the management, operations, assets and business of the Plaintiff.

(c) An order of injunction to restrain the Defendants from holding themselves out as directors or officials of the Plaintiff Company.

(d) A declaration that the resolutions passed or reached on 23.10.2010 are null and void ab-initio.

(e) Costs of the suit.

Pending the hearing of the suit, the Plaintiff obtained an order of injunction to restrain the Defendants from entering the Plaintiff's premises and or from interfering with its management, operations, assets and business. The Plaintiff also managed to obtain a temporary order of injunction to restrain the Defendants from holding themselves out as directors and or officials of the Plaintiff company pending the hearing of the suit. The suit is yet to be fixed for hearing. Learned counsels appearing in this suit recorded a consent order in which they agreed to have the substantive suit fixed for hearing within the next 60 days from 5th January 2012. On 9th day of December 2011, the Plaintiff advertised in the Daily Nation Newspaper of the same date a notice of the Company's Annual General Meeting to be held on 13th January 2012. The aforesaid notice is what provoked the Defendants to take out the current Motion, the subject matter of this ruling.

It is the submission of Mr. Sane, learned advocate for the Defendants, that the Defendants' Motion should be allowed because if the Annual General Meeting takes place this suit will be rendered nugatory. It is alleged that the Annual General Meeting may proceed to vote on the issue relating to the deduction of the members' income to raise Ksh.40 Million to finance the Hydro-Power Project, an issue which is the subject matter of the substantive suit. It is also argued that the Annual General Meeting may proceed and pass a resolution to increase the shareholding of the Plaintiff company to the detriment of the Defendants. Mr. Kibicho, learned advocate for the Plaintiff strenuously opposed this ground arguing that the twin issues do not form part of the agenda of the Annual General Meeting scheduled for 13th January 2012. Let me start by stating that the issues relating to the financing of the hydro-power project and the increase of the Plaintiff's shareholding are some of the issues to be determined in the substantive suit. The question is, whether the suit will be rendered nugatory if the order is denied. It is not in dispute that the Plaintiff has called for its Annual General Meeting for 13th January 2012. It is clear from the agenda supplied, that the meeting will discuss and vote on the election of directors to replace those retiring by rotation. In this category, those eligible for re-election were invited to offer themselves for election. It is admitted by the Defendants that none of them have offered their candidature for election, despite having notice of the Annual General Meeting. I understand the Defendants' dilemma. They are of the view that they were duly elected on as directors of the Plaintiff company 23rd October 2010 though they did not assume office because of the orders of injunction issued against them on 19th November 2011. It is clear from the notice published and annexed to the affidavit of Hudson Moffat Kamau Mbue, that the agenda to be discussed in the Annual General Meeting scheduled for 13th January 2012 did not include the issue relating to the financing of the hydro-power project nor the issue relating to the increase of the shareholding of the Plaintiff company. I do not expect the Annual General Meeting to discuss important matters like those stated by the Defendants which were not in the agenda. In sum, I am convinced that in the circumstances of this case, the suit will not be rendered useless if the order sought is denied.

The second ground ably argued by Mr. Sane, is to the effect that the Defendants will suffer irreparable loss if the order for injunction is denied. It is stated that if the Plaintiff is not restrained, the Annual General Meeting may elect new directors to replace them as directors who were duly elected on 23rd October 2010. Mr. Kibicho, was of the view that the Defendants will not suffer any irreparable damage in that if the court finds them to have been validly elected in the Extra Ordinary General Meeting of 23rd October 2010, then they would be paid damages and lost earnings. I have anxiously considered the

rival submissions over this ground. With respect, I agree with the submissions of Mr. Kibicho, that the Defendants will not suffer any irreparable damage if the orders sought are denied. The Court of Appeal dealt with a near similar scenario like the one obtaining in this case in the case of Nicholas Mahihu =Vs= Ndim Tea Factory Ltd & Another Nairobi Civil C.A. Application No. 101 of 2009 in which the Court of Appeal at page 3 held *inter alia*:

“On the second consideration on whether the intended appeal is likely to be rendered nugatory, we find that even without speculating as to when the appeal might be fully determined, or the hearing in the superior court finalized, we find that the intended appeal would not be rendered nugatory as the applicant could still be compensated in damages. Thus, his loss if any, could still be quantified in terms of the lost earnings as a director of the 1st Respondent Company.”

It is obvious from the material placed before me that the Defendants have failed to establish the irreparable damage they would suffer if the order of injunction is denied.

The other ground which was argued before me is to the effect that if the Annual General Meeting is not halted then the orders issued by Justice Maraga on 19th January 2011 will have been breached. Mr. Kibicho was of the view that the ground is misplaced because the orders of Justice Maraga was in respect of the directors on rotation for the year 2010 and not those on rotation for the for the year 2011. With respect, I agree with the submissions of Mr. Kibicho.

The final ground argued by Mr. Sane was to the effect that the balance of convenience tilts in favour of granting the order of injunction to stop the Annual General Meeting scheduled for 13th January 2012. Mr. Kibicho was of the contrary view. I have carefully considered the rival submissions vis-à-vis the material placed before this court. It is important to restate that the notice calling for the Annual General Meeting for 13th January 2012 was advertised in the print media. The Defendants do not deny that they had sufficient notice of the meeting. They do not also deny that they were not barred from offering themselves for election or re-election as directors. They chose to exclude themselves as candidates for election as directors. In my view the Defendants have themselves to blame. The Defendants do not deny that the Plaintiff has incurred expenses in publishing the notice. In my view the party which will be more inconvenienced if the Annual General Meeting is put off is the Plaintiff. In the circumstances, it is only fair to have the application dismissed.

In the end, I see no merit in the Motion. The same is ordered dismissed with costs to the Plaintiff.

Dated and delivered at Nyeri this 6th day of January 2012.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Muthui holding brief for Sane for the Defendants/Applicants and Mr. Mwaura holding brief for Kibicho for the Respondent.