



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL CASE NO. 115 OF 2010.

TRANS NZOIA TEACHERS ENTERPRISES CO. LTD.....PLAINTIFF.

VERSUS

JOHN MWANGI)
DAVID C. WEKESA).....DEFENDANTS.
DAUGLAS ALUSA)
BEN K. SIBOE)

R U L I N G .

1. The chamber summons dated 8th December, 2010 seeks for temporary orders of injunction to restrain the respondents, their agents or servants from representing and registering with the Registrar of Companies, a new board of directors comprising of **John Mwangi, David C. Wekesa** and **Dauglas Alusa** as per the minutes of elections conducted on 7th May, 2010. The applicant also sought for an order to restrain the respondent from interfering with the management, operations and the accounts of the plaintiff until this suit is heard and determined interparty.

2. This application is supported by the grounds stated on the body of the application and the matters deposed to in the supporting affidavit sworn by **William Natwati** on 8th December, 2010. According to the applicant, on 22nd January, 2010, the 4th respondent and Trans Nzoia West Teachers Company Ltd, were advised by the Registrar of Companies to hold a meeting under section 132 (2) of the Companies Act. That is when the 4th defendant under the auspices of Trans Nzoia West Teachers Company Ltd. Purported to requisition for a general meeting in which the 1st, 2nd and 3rd respondent were elected as directors of the plaintiff.

3. It is further contended by the applicant that Trans Nzoia West Teachers Com. Ltd is not a shareholder of the plaintiff and the elections it held were illegal and cannot affect the plaintiff. Moreover, the plaintiff has 1,600 members and according to the memorandum and articles of association, a quorum of 10% of the total membership is mandatory. According to the minutes attached to the affidavit, there was no quorum, thus the number of the members who attended the general meeting did not form the quorum. The court was urged to declare the meeting null and void and the respondents be restrained from taking over the affairs of the plaintiff.

4. In further arguments, **Mr. Kaosa**, learned counsel for the plaintiff submitted that this suit is not *res judicata* because an earlier suit being HCCC No. 39 of 2010 Kitale which was between Trans Nzoia Teachers Enterprises Ltd. Vs. Ben Siboe and Trans Nzoia West Teachers Com. Ltd was struck out on technicality. He urged the court to find that the application meets the threshold for granting an interim order of injunction as per the principles set out in the case of; **Giella vs. Cassman Brown Ltd. [1973] EA.**

5. This application was opposed; counsel for the respondents relied on replying affidavit sworn by **John Mwangi** on 17th December, 2010. The respondents also filed a notice of preliminary objection and all the points of law were argued together in the interest of judicial time. It was submitted that the applicant led by **Mr. William Natwati** came to court in bad faith because they have not conducted the affairs of the company in accordance with the provisions of the Companies Act. Moreover the affairs of the plaintiff had been run by **William Natwati** who filed this suit without a proper resolution as required by the Company's Act. It was contended that the outgoing directors who instituted this suit failed to file annual returns and audited accounts of the company. There are also several allegations of mismanagement of the company's accounts and alterations of the companies' memorandum and articles of Association without the requisite resolution of the shareholders.

6. The suit by the plaintiff was also challenged because it was supported by a resolution passed by persons who were not directors of the plaintiff. Mr. Sifuna, learned counsel for the respondent submitted that the respondent properly requisitioned for a general meeting after the plaintiff failed to call for a meeting of shareholders. The meeting was properly conducted on 7th May, 2010 and the respondents were elected as directors in compliance with the provisions of the Companies Act.

7. The above is the summary of the salient matters raised for and against this application. The principle element to determine in this application as in all applications seeking for orders of injunction is whether the applicant has established a prima facie case with a probability of success. Secondly, irreparable harm which will not be compensated for in damages would arise if the injunction is not granted. Lastly, if the court is in doubt, the matter should be determined on the balance of probabilities. The court of Appeal has explained what constitutes a prima facie case in the case of **MRAO LTD VS. FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS [2003] KLR 125** the court of appeal held that;

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

8. The applicant's case as I understand it is that a letter by the Registrar of Companies authorized the 4th defendant and Trans Nzoia West Teachers Com. Ltd. to requisition for a general meeting when indeed Trans Nzoia Teachers Com. Ltd. is a total stranger to the plaintiff. However, a perusal of the minutes which are attached to the application, it is not shown anywhere that Trans Nzoia West Teachers Co. Ltd. is the one that requisitioned for the meeting. The applicant further contends that there was no quorum and that the notice of requisition was not properly served upon the directors of the plaintiff. On the other hand, the respondent contend that they requisitioned for a general meeting and they were directed to do so by the Registrar of Companies as the directors of the plaintiff had failed to comply with the Companies Act to call the meetings, file returns and audited accounts of the plaintiff.

9. In the face of these allegations and counter allegations and the fact that the Registrar of Companies had directed that a general meeting be held through a requisition as provided for under section 132 (2) of the Companies Act. I am not persuaded that this application meets the threshold of granting an order of injunction. This is because the respondents too contend that they indeed issued the requisition and since the plaintiff did not call the meeting, they proceeded to do so which is provided for under section 132 (3) of the Companies Act as follows:-

“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.”

10. Going by the above provisions of the law, which is further compounded by the fact that the applicant contends that there was no quorum on 7th of May, 2010. While the respondent claims that the plaintiff's outgoing directors interfered with the records of the company, which matter that can be resolved after hearing oral evidence, those issues cannot be resolved by affidavit evidence. On the issue of whether the plaintiff will suffer irreparable harm, the respondents are also shareholders of the plaintiff just like the directors who are claiming that they are entitled to remain in office. Thus I do not see what irreparable harm the respondents would cause the plaintiff as they are also shareholders of the plaintiff. In the upshot, this application cannot be granted. The matter should proceed for hearing after the parties have complied with the requirements set out in the Civil Procedure Rules. This application is dismissed costs shall be in the cause.

Ruling read and signed this 6th day of May, 2011.

M. KOOME.

JUDGE.