



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 104 OF 2011
KAMWANDU FARM SUPPLIES LTDPLAINTIFF
- VERSUS -
JOSEPH NDUNGU MUYA & 5 OTHERSDEFENDANTS

RULING

1. By a Notice of Motion dated 23rd March 2011, the plaintiff prays for an order that pending the hearing and determination of this suit, an injunction do issue:
 - a) Restraining the 1st and 2nd defendants from representing or misrepresenting themselves as the plaintiff's directors, and or impersonating the plaintiff's directors, with effect from 23rd April 2010, and further from purporting to transact business as the plaintiff's directors until a further resolution by the plaintiff and its members.
 - b) Restraining the 3rd defendant from convening and carrying out its 52nd Annual General Meeting scheduled for the 25th March 2011 from 11.00 am at Crowne Plaza Hotel, Nairobi, and or any other meeting where the plaintiff, as its member, has been excluded from participating.
 - c) Compelling the 3rd defendant to recognize Mr. John BM Muya as the rightful nominee of the plaintiff duly authorized to represent the plaintiff in all the activities and meetings of the 3rd defendant until further notice from the plaintiff.
2. The plaintiff also prays for costs of the application. The application is expressed to be brought under order 50 rule 1 of the Civil Procedure Rules as well as sections 1A, 1B, 3A and 63 of the Civil Procedure Act.
3. A supporting affidavit of John B.M. Muya sworn on the same date sets out the gist of the matter. There is also filed a further affidavit of the same deponent sworn on 20th April 2011. The deponent avers that he is a director of the plaintiff company.
4. It is instructive to observe at the outset that the proceedings herein were commenced by a plaint dated 23rd March 2011 (which has since been amended) supported by a verifying affidavit of the said deponent of even date. Although there are annexed minutes or an extract of the minutes of the plaintiff of 14 March

2011, no resolution under the seal of the plaintiff company was filed certifying that the deponent could swear the affidavits and as required by order 4 rule 1 (4) of the Civil Procedure Rules 2010.

5. I have looked at the ordinary board resolutions of the plaintiff passed on 23rd April 2010 under which the 1st and 2nd defendants “ceased being directors of the company for continually absenting themselves” from the board meetings of the company without “excuse” or “apology” and that the two remain only as ordinary shareholders. A return in Form 203 A has been exhibited as presented to the Registrar of Companies to reflect those changes.

6. The third defendant, Agrochemical Association of Kenya is sued through its officials and who have filed a Memorandum of Appearance and defence to the amended plaint.

7. The 1st defendant has also entered an appearance and defence to the amended plaint as well as a counterclaim for a declaration that he is the bona fide managing director of the plaintiff company. Of interest is a pleading at paragraph 13 of that defence dated 15th September 2011 that there have been 4 other related suits in Nakuru and Naivasha being:-

- i) NAIVASHA SPMCC 791 OF 2009 KAMWANDU FARM SUPPLIES LTD-VS-JOSEPH NDUNGU MUYA
- ii) NAKURU HCCC 70 OF 2010 ROBERT KAMAU MUYA-VS- KAMWANDU FARM SUPPLIES LTD
- iii) NAIVASHA PMCC 632 OF 2010 JOSEPH NDUNGU MUYA-VS-JOHN BOSCO MAKUMI MUYA
- iv) NAKURU HCCC 188 OF 2010 KAMWANDU FARM SUPPLIES LTD-VS-JOSEPH NDUNGU MUYA.

Some of those pleadings appear in the list of documents of the 1st defendant dated 16 September 2011. The 3rd defendant has also filed a list of documents dated 7th July 2011.

8. I have delved into that history of the pleadings for a good reason. The meeting sought to be stopped of 25th March 2011 being the 52nd Annual General Meeting of the 3rd defendant has since passed. In that sense, the court is being asked to act in vain. The prayers sought in the present Notice of Motion are identical or nearly identical to the principal prayers in the main suit. The dispute between the parties relates to the plaintiff company, a limited liability company whose Memorandum of Association and Articles of Association are annexed to the pleadings on record. As stated, there have been some proceedings in relation to certain aspects of management or control of the plaintiff by the parties. So that it is not entirely true for the plaintiff to aver in the plaint that there are no other suits. Fundamentally, there is a contest between the person called John B.M. Muya and the defendants in the suit over who is the proper and true director of the company. This appears clearly from the counterclaim by the 1st defendant aforementioned and from the pleadings of the 3rd defendant. The loser in this protracted contest would be the plaintiff company. A company being an inanimate juridical body can only act through its lawful directors. Those directors are its mind and will.

9. When there is then a contest as to who the proper directors are, or whether the 1st and 2nd defendants were properly removed from directorship or they are still in control of the company, the court would be acting blindly without full and tested evidence and on the basis of conflicting pleadings. I also note, going back to the history of the pleadings, that parties have taken various steps including filing lists of documents to prepare the suit for trial. So much so that if the court were to grant the interlocutory orders that are fairly final in nature and which as said are nearly identical to the principal prayers in the main suit, the trial of the suit would be prejudiced completely.

The principles for grant of injunctive relief in East Africa were well settled in the decision of *Giella vs CassmanBrown & Company*[1973] E.A. 358. Those principles are, first, that the applicant must show a prima facie case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

In addition, there is ample authority that an injunction, which is a discretionary remedy, may be denied despite fulfilling some of the conditions above, if the applicant has committed acts or misconducted himself in a manner that would not meet approval of equity.

10. The sum total of all these deliberations is that the plaintiff as directed by the mind and will of one John B.M. Muya has not demonstrated to court a prima facie case or achieved the threshold for grant of interlocutory relief laid out in *Giella Vs Cassman Brown & Company Limited* [1973] E.A. 358. Furthermore, and as per the deliberations above, it would not be in the interests of justice to grant the prayers sought in the motion at this stage. I also find that one of the prayers is for a mandatory injunction which should at an interlocutory stage be granted sparingly and only in the clearest of cases. This is not such a case. See the decision in *Locabail International Finance Ltd vs Agroexport and others* [1986] 1 ALL ER 901.

11. I would thus hesitate to exercise my discretion in favour of the Plaintiff/applicant on its motion.

12. In the result, the Plaintiffs Notice of Motion dated 23rd March 2011 is dismissed with costs to the defendants.

It is so ordered.

DATED and DELIVERED at NAIROBI this 28th Day of October 2011.

**G.K. KIMONDO
JUDGE**

Ruling read in open court in the presence of
Mr. Obwayo for the Plaintiff

No appearance for the Defendant.