



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 512 OF 2010

ERERI COMPANY LIMITED.....PLAINTIFF

- VERSUS -

SIMON KAMAU GITAUFIRST DEFENDANT
FRANCIS KARIUKI MURANGA SECOND DEFENDANT
STEPHEN KAMAU KUNGUTHIRD DEFENDANT
NEPHAT GICHUHI KINYANJUI FOURTH DEFENDANT
STEPHEN NDUNGU NJENGAFIFTH DEFENDANT
GEOFFREY MUIRURI MUCHAISIXTH DEFENDANT
GIKONYO NDIRANGU SEVENTH DEFENDANT
KAMAU MURIGUEIGHTH DEFENDANT

RULING

1. The plaintiff company has filed a plaint against the defendants for an order to compel the latter to return various assets of the company. Contemporaneous with the suit, the plaintiff filed a notice of motion dated 27th July 2010 praying that the defendants do return to the company the following assets;

- (a) Plaintiff's offices at Longonot Farm (LR 8622)
- (b) Original title document to the Plaintiff's parcel of land number L.R. 8622(Longonot Farm)
- (c) Record Books for Nanyuki Eleri Farm's assets
- (d) Record Books for Longonot Eleri Farm's assets
- (e) Livestock Records for both Nanyuki and Longonot farms
- (f) The Plaintiff's books of account from 1983 to 2009
- (g) 1983 plaintiff's members register.
- (h) All Company books collected from Oyieko & Company. Accountant and Auditors.

2. I will return to this matter later but it is instructive to note that the items listed at (a) to (h) above are word for word with the main prayer in the suit.

3. The principal grounds of the motion are that the 1st to 6th defendants are all former directors while the 7th and 8th defendants are former managers of the company. On 12th February 2010, the High Court issued an order that elections of the board of directors of the plaintiff be held on 12th March 2010 at the plaintiff's Longonot farm at 11.00 am. That order is attached to the affidavit of Njuguna M. Kungu sworn on 27th July 2010 in support of the application. Also attached is a confirmation of the election of directors by Doris Githua, an assistant Registrar of Companies and by F.S.M Ng'ang'a a senior deputy Registrar General of Companies (exhibits "MK1" and MK2A"). The plaintiff thus avers that there is no contest that

the defendants were voted out as directors, and, importantly that the assets in their possession including the head title over the company's title number LR No 8622 Kijabe (Longonot) belong to the company. The plaintiff avers that the former directors or managers have no right to keep the company's assets and thus the prayers for interlocutory mandatory injunction to compel the defendants to return the said assets.

4. The defendants oppose the motion. Their key reply is found both in a replying affidavit of the 2nd defendant sworn on 21st September 2010 and in the grounds of opposition dated 14th September 2010. The motion is first attacked on the basis that a mandatory injunction should not be issued at the interlocutory stage except in the clearest of cases. Support for that proposition is laid from the decisions in *Mucuha vs Ripples Ltd* [1990-1994] E.A. 388 C.A.K, *Kenya Railways Corporation vs Thomas M. Nguti* Civil Appeal No 210 of 2004 (unreported) and *Locabail International Finance Limited vs Agroexport et al* [1986] 1 ALLER 908.

5. The defendants assert that this is not such a clear case because the defendants do not have in their possession the assets the plaintiff claims. They aver that those assets were collected as evidence by government officers in criminal case No 2482 of 1982. On conclusion of the case, they say that one Peter Kamau Muchiri in collusion with Criminal Investigation Department officers carted away the assets while some of the assets are exhibits in HCCC No 3746 of 1998 and HCCC 3200 of 1990 *Joseph Kamau Musa and others vs Ereri Company Ltd and others*. The defendants further aver that in the supplementary affidavit sworn on 11th October 2010 in support of the motion, it is admitted therein that one James Muchiri took away 4 title documents from the Registrar of Lands at Nairobi.

6. The replying affidavit of Francis Kariuki Maranga, the 2nd defendant, sworn on 21st September 2010 challenges the legality of the affidavit in support of the motion on being "contra-statute" in breach of Civil Procedure Act and the Evidence Act. That is a matter I am prepared to overlook in view of article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act in order to do substantial justice to the parties. The defendant raises issues of share qualifications by the present directors at paragraphs 6,7,8,9 and 10 of the aforesaid replying affidavit.

Those averments are countered by the plaintiff in the supplementary affidavit of Njuguna Ndungu sworn on 11th October 2010 wherein the present directors assert that they have acquired the requisite shareholding in the company.

7. The defendants assert that the elections held on 12th March 2010 pursuant to the order of court of 12 February 2010 were irregular. I have found this a little strange in view of the clear order of court and the returns made by the company and confirmed by the letter of Doris Githua, Assistant Registrar of Companies (exhibit "MK2A").

8. The plaintiff avers that the head title over LR No 8622 is in possession of the defendants for two reasons. First, exhibit "MK 10A" is a letter from the Principal Registrar of Titles returning the said title to the company on 25th August 1994 because surrenders lodged with it could not be registered due to a court order in HCCC 3200 of 1990 aforesaid.

Secondly, no proper subdivisions could have occurred because the company never convened the requisite meetings of members between 1984 and 1988 and there was, in any event, a court order prohibiting the subdivision.

9. I have heard all the rival submissions and considered all the pleadings on record. It is clear that the orders sought by the plaintiff in the motion are nearly identical with those in the suit. By granting the interlocutory mandatory injunction the court would largely have compromised the suit without the full benefit of tested evidence. For the court to grant the interlocutory mandatory injunction, the plaintiff's case must reach the threshold now well settled by the courts.

10. In *Mucuha vs Ripples Limited*, [1990-1994] 388, the court observed that "the principles for granting a

temporary mandatory injunction are that they will only be granted exceptionally and in the clearest of cases". I also find that the notice of motion, as said, is praying for return of the assets by way of a mandatory injunction. I have also observed that the principal prayers in the motion and the suit are identical. So much so that a grant of the interlocutory mandatory injunction would, in a word, compromise the suit and prejudice the trial in the absence of tested and full evidence on cross-examination. Authorities in this area abound and they hold, primarily that a mandatory interlocutory injunction ought not to be granted save only in special circumstances and in the clearest of cases. It can not be better said than in the decision of Locabail International Finance Limited Vs Agro Export et al [1986] 1 ALL E.R. 901 where their lordships held;

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being on a different and higher standard than was required for a prohibitory injunction".

See also the decision in Technomatic Limited T/A Promopack Company Vs Kenya Wine Agencies Limited Nairobi HCCC 398 of 2005 (unreported). That position has been stated clearly in Halsbury's Laws of England 4th Edition Volume 24 paragraph 848.

11. Is this such a clear case then? I have set out earlier the two returns by the Registrar of Companies (exhibits "MK 2A" and "MK1") that detail the elections of directors of the plaintiff on 12th March 2010 pursuant to the order of this court of 12th February 2010. In my view, the defendants lost their positions as directors and managers of the company and can not have any legitimate claim over custody of the company documents.

That position seems obvious and plain from those returns which have not been controverted by the respondents.

12. In a matter that dealt with a fairly similar situation in Isaac Njenga Kamunge and 9 others vs Stephen Waweru Njenga and 8 others Nairobi HCCC No 449 of 2008, Kimaru J held;

"As far as this court is concerned, the defendants, being no longer the directors of the company, have no business holding to the properties of the company. The defendants previously held the said assets of the company in their capacity as directors of the company. They have been ousted and removed from office. They lack legal capacity to retain possession of the company's properties.

It is clear from the foregoing that the plaintiffs' application is for granting. Special circumstances exist to enable this court grant the mandatory injunction at an interlocutory stage. The assets of the company are liable to be wasted if they remain in the hands of persons who are no longer recognized as directors of the 10th plaintiff. The plaintiff's application seeking to compel the defendants, by mandatory injunction to hand over to the plaintiffs all the books, documents, titles to land, the assets and all other properties belonging to the company is hereby allowed. The defendants are hereby ordered to hand over possession to the plaintiffs, of all the assets of the company that are in their possession in their capacity as the former directors of the company".

13. With regard to the defendant's claims that they are not in possession of the head title for LR 8622 Kijabe (Longonot) and that some documents are held by Criminal Investigation Department or as exhibits in court, I must say the affidavits of the plaintiff clearly controvert that position. But more important, the defendants have not placed clear or sufficient evidence at this stage to show that a proper subdivision scheme backed by company resolutions took place or that surrenders have been so registered. I have already referred to the letter of the Principal Registrar of Titles of 25th August 1994 returning the head title to the company which company was in control of the defendants. There is also another letter of 24th July 1998 from the Chief Land Registrar (exhibit "MK8A" in the supplementary affidavit of the

plaintiff's deponent) confirming that "the surrenders have never been registered in respect of LR No 2755/1, 2781/2, 2754 and 8622". I have also referred to the fact that there existed an order of this court in HCCC 3200 of 1990 prohibiting registration of the transfers.

14. As late as about 14th May 2009 (exhibit "MK2" as well as "MK10 A" in the affidavit sworn 11th October 2010) the Commissioner of Lands was confirming that the surrenders were not registered. The head title or original title over LR No 8622 could then only be in the possession of the respondents. And there is also the defendants exhibit "FKM 3" in the replying affidavit which says the director's minute book for 1979-1983 were collected by the 8th defendant on 20th May 1993 from CID Nakuru and he signed the inventory.

15. Given all of those circumstances, I am of the considered opinion that the continued possession of the assets, properties, titles, books and documents of the company by the respondents after the elections of 12th March 2010 is in contravention of the Companies Act and against the interests of the plaintiff company. To avoid wastage of the company's assets or further loss of the documents or assets, I am persuaded that on the basis of the affidavit evidence before me that the plaintiff has made out a case for grant of interlocutory mandatory injunction. It is clear to me that the arguments put forth by the defendants show that there are contested issues and that this is a long running litigation. But they do not change the plain fact that the respondents ceased being directors or managers of the plaintiff on 12th March 2010 and lost legitimate custody over the company's assets and documents.

16. For all the above reasons I find that the plaintiffs notice of motion dated 27th July 2010 has merits. I would thus allow the motion in terms of prayer number 2 thereof. I also grant the plaintiff costs of the application.

It is so ordered.

DATED and DELIVERED at NAIROBI this 4th day of November 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Gakaria for Macharia for Plaintiff.

Mr. Echesa for Bwire for Defendants.