



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Commercial Suit 31 of 2009

1. ISMAIL GULAMALI
2. DAVID BETT LANGAT
3. KAPCHEBET TEA FACTORY LIMITED.....PLAINTIFFS/APPLICANTS

-VERSUS-

1. STEPHEN KIPKATAM KENDUIYWA
2. JOEL KIMUTAI SANG
3. JOSEPH KIPKURUI NGETICH
4. RODERICK MITEI KENDUIYWA
5. JONAH KIPKEMOI KETER
6. MUGO MUNGAI
7. ASSOCIATED REGISTRARS LTD.
8. REGISTRAR OF COMPANIES.....DEFENDANTS/RESPONDENTS

RULING

The applicants' Notice of Motion dated 23rd September, 2009 was brought under ss.1A, 1B and 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Orders XII rule 6, XXXIX rules 2, 2A and 3 of the Civil Procedure Rules. The Plaintiffs/Applicants' were seeking orders restraining 6th defendant from acting or purporting to act as 3rd plaintiff's secretary until the hearing and determination of this application; restraining 6th defendant from acting or purporting to act as 3rd plaintiff's secretary until the hearing and determination of the suit; nullifying 8th defendant's letter dated 16th January, 2009 purporting to be the CR12 of 3rd Plaintiff as at 16th January, 2009 and in the alternative, compelling by mandatory injunction 8th defendant to rectify its records relating to the shareholding of 3rd plaintiff so that 1st Plaintiff's shares as per 3rd Plaintiff's register read 50,312 instead of 21,562.

In the grounds founding the application it is stated as follows:

- (i) *At all material times before 29th December, 2008 3rd plaintiff's share capital was Kshs. 2,300,000/= divided into 115,000 shares of Kshs. 20/= each; and with the exception of 1,725 shares bearing a nominal value of Kshs. 34,500/=, all the shares had been taken up by 1st and 2nd plaintiffs and 1st – 5th defendants.*
- (ii) *The 1st plaintiff was allotted 50,312 shares in 3rd plaintiff, at a special general meeting of 3rd plaintiff held on 25th May, 2005 – and for this, 1st plaintiff was issued with share certificate No. 2 which has not been cancelled or nullified.*
- (iii) *The nominal value of 50,312 shares held by 1st plaintiff in 3rd plaintiff is Kshs. 1,006,240/=, and 1st plaintiff has paid the sum in full.*
- (iv) *On 29th December, 2008 1st – 5th defendants held a secret meeting of the board of directors, and purported to take away 28,750 shares from 1st plaintiff and to distribute these among themselves.*
- (v) *The 1st plaintiff did not agree to transfer any of his shares to any of the 1st – 5th defendants and did not execute any*

transfer of any of his shares in favour of those defendants.

- (vi) *In paragraphs 7,8 and 9 of its defence dated 10th September, 2009 and filed on 15th September, 2009 the 8th defendant admits that the registration of the transfer of 1st plaintiff's shares in favour of 1st – 5th defendants was done without any instrument of transfer executed by 1st plaintiff; that the document purporting to be a resolution dated 29th December, 2008 is not on its records; that no payments were made to 8th defendant on the purported presentation or lodging of the said resolution; and that, therefore any registration of a change in the shareholding of 3rd plaintiff or any certificate issued by 8th defendant concerning such change was done in error and by mistake.*
- (vii) *As 8th defendant has admitted that the certificate, CR 12 or letter dated 16th January, 2009 was issued in error and by mistake, it is fair, just and equitable that the letter, certificate or CR 12 be nullified without waiting for any other issue to be determined.*
- (viii) *The 1st – 7th defendants have admitted that 6th defendant was not appointed as 3rd plaintiff's secretary; and therefore 6th defendant is not authorized to act as such secretary or to transact any business on behalf of 3rd plaintiff.*
- (ix) *It is fair and just that the fraud committed and the misappropriation of 3rd defendant's funds be addressed at the earliest opportunity, to save 3rd plaintiff from collapsing.*
- (x) *The 6th defendant continues to illegally and fraudulently discharge the duties of 3rd plaintiff although he was not appointed to do so, and although 3rd plaintiff has another secretary, one Charles Kioko Muthusi who has not ceased to be the secretary of 3rd plaintiff.*

The detailed facts relating to the application are set out in the supporting affidavit of **Ismail Gulamali** sworn on 23rd September, 2009, and that of **David Bett Langat** sworn on the same date; and to these depositions **Joseph Kipkurui Ngetich**, the 3rd defendant, swore a replying affidavit dated 14th October, 2009.

Learned counsel, **Mr. Kinyua** submitted that 8th defendant, who raises no opposition to the plaintiffs' claim, admits that there had been a theft of 1st plaintiff's shares, and an unlawful registration of shares illegally transferred from 1st plaintiff; and since 1st – 5th defendants admit that the plaintiff's shares were fully paid for, it is urged that this question need not be taken to the trial stage.

Counsel submitted that 1st – 5th defendants had no lawful authority to take 1st plaintiff's shares, and that there was no basis in law for these defendants to make the counterclaim that 1st and 2nd plaintiffs had ceased to be shareholders. Counsel urges that 1st plaintiff's shares were protected under the Constitution as private property, which, by virtue of the guarantees in s.75 of that document, could not be taken away in the manner it was purportedly done by 1st – 5th defendants.

Learned counsel submitted that the defendants had failed to respond to the dozensome grounds set out in the application, or indeed to some of the elements in the applicants' depositions: in particular, the replying affidavit by **Joseph Kipkurui Ngetich** failed to respond to the claim that 1st plaintiff's shares had been taken away unlawfully.

In response, learned counsel **Mr. Opulu**, for 1st – 7th defendants, urged that 1st and 2nd plaintiffs lacked *locus standi* to file the suit for and on behalf of 3rd plaintiff – for there was no letter from 3rd plaintiff confirming 3rd plaintiff's instructions to their advocates to file suit.

Counsel contended that “the plaintiff's suit and Notice of Motion are incompetent and incurably and fatally defective” on certain grounds: that the suit was *res judicata*; that the suit against 8th defendant is incompetent because “the 1st and 2nd plaintiffs should have filed an application for judicial review under the provisions of section 89 of the Civil Procedure [Act] and Order **LIII** of the Civil Procedure Rules for orders of prohibition or certiorari or mandamus against the 8th defendant, the Registrar of Companies.”

It is obvious that the facts relating to the suit herein are minutely detailed; and this has led to many of the contending points taken up by counsel, appearing somewhat abstract and substantially technical. Counsel for the respondents, for instance, has attributed incompetence to many aspects of the suit and the application, but without supplying full illustration and justification to the claims made. This state of affairs makes a clear case for emerging questions of merit to be ventilated at full hearings; and on this account I would not, as proposed by learned counsel for the plaintiffs/applicants, dispose of certain controversial issues at this stage.

From the application, the depositions, and the submissions of counsel, however, *prima facie* status attends a number of the prayers made by the applicants; and I will, therefore, make orders in favour of the applicants as follows:

- (a) *The 6th defendant is hereby restrained from acting or purporting to act as 3rd plaintiff's secretary until the hearing and determination of the suit.*
- (b) *The 8th defendant's letter dated 16th January, 2009 purporting to bear the description CR 12 and emanating from 3rd plaintiff*

is hereby declared to be null and void ab initio.

(c) The defendants shall bear the costs of the application.

SIGNED

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J. B. OJWANG

JUDGE

DATED and DELIVERED at MOMBASA this 26th day of February, 2010.

Coram:

Court Clerk: *Ibrahim*

For the Plaintiffs/Applicants:

For the Defendants/ Respondents: