



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Case 147 of 2009

JACKSON MIGWI NJOROGE1ST PLAINTIFF
LUKE KIRATHE GITAU.....2ND PLAINTIFF
DAVID MWANGI NDIRANGU.....3RD PLAINTIFF
JAMES MWANGI CHEGE.....4TH PLAINTIFF
GERALD KIMANI GITOGO.....5TH PLAINTIFF
NAHASHON KURIA CHURU.....6TH PLAINTIFF

VERSUS

GITHAMBO TEA FACTORY COMPANY CO. LIMITED.....1ST DEFENDANT
JULIUS MERU KAMAU.....2ND DEFENDANT
DANSON MWANGI KAMAU.....3RD DEFENDANT
JOSEPH KAGONDU KARANU.....4TH DEFENDANT
JOHNSON THEURI MWANGI.....5TH DEFENDANT

RULING

This ruling is the offshoot of two applications, that is, the Chamber Summons dated 29th September 2009 and the Notice of Motion date 5th October 2009.

In the Chamber Summons dated 29th September 2009, Miss Mwai, learned advocate for the Plaintiffs, has indicated that the Plaintiffs will only be seeking for prayer 3, that is:

“a temporary order of injunction do issue the Defendants restraining the defendants, their agents, servants from purporting to excise the Ichiche area from the 1st Defendant’s territories, to remove or disenfranchise the growers and shareholders of the 1st Defendant or in any other way from interfering with their right to deliver tea to the 1st Defendant pending the hearing of this application inter partes and thereafter pending the determination of this Suit.”

In the Notice of Motion dated 5th October 2009, the 2nd and 5th Defendants are seeking for the following orders:

- 1. That this application be certified as urgent and the same be heard urgently and on priority basis.***
- 2. That there be an interim stay of the order of this court made on the 2nd October 2009 pending the hearing and determination of this application.***

3. ***That this honourable court be pleased to review and set aside its ex parte order made on 2nd October 2009.***

4. ***That cost of this application be provided.***

When the two applications came up for interpartes hearing, the Notice of Motion dated 5th October 2009 was treated as opposing the Summons dated 29th September 2009.

It is the submission of Miss Mwai, learned advocate for the Plaintiffs, that the Defendants should be restrained from purporting to excise the Ichiche area from the 1st Defendant's territories or remove or disenfranchise the growers and the shareholder of the 1st Defendant. It is said there was no lawful notice of the meeting. It is also argued that most of the agenda was already transacted conclusively at the 1st Defendant's Annual General Meeting held on 3rd April, 2009. The Plaintiffs further accused the 2nd, 3rd, 4th and 5th Defendants for not acting in the best interest of the 1st Defendant.

On his part, Mr. Njenga, learned advocate for the 2nd Defendant, urged this Court to dismiss the summons by allowing the Motion dated 5th October 2009. It is his submission that the application is an abuse of the Court process since it seeks to defeat the orders given by Lady Justice Koome. It is said the Honourable Judge authorized the meeting and even gave directions on how it was to be conducted. It is said all the parties were aware of the existence of the orders of Lady Justice Koome. Mr. Njenga further pointed out that a proper notice was given. The Plaintiffs were accused of material non-disclosure of the suit pending in Nairobi. Miss Mwai informed this Court that the Applicants were not aware of the Nairobi case. Mr. Gichuki, learned advocate for the 1st Defendant, informed this Court that there is an appeal preferred against the ruling of Lady Justice Koome delivered on 14th July 2009.

I have considered the grounds set out in the face of both the Summons dated 29th September 2009 and the Motion dated 5th October 2009. I have further looked at the affidavits filed for and against the two applications. I have already set out in brief what order the two applications seek. In my considered view, the most serious issue raised in all the arguments presented to me is whether or not the Plaintiffs are guilty of material non-disclosure! And whether by filing this suit and the subsequent application, they have abused the Court process. There is no doubt that on the 14th day of July 2009, a consent order was recorded before Lady Justice Koome in the following terms vide Nairobi H.C. (Milimani) C.C. NO. 436 of 2006:

1. ***“That the shareholders of the plaintiff Company are at liberty to requisition for an Extra Ordinary Annual General Meeting (AGM) within (7) days of this order and in terms of section 132 of the companies Act.***
2. ***That the said requisition to be deposited with the Company's Secretary of the Plaintiff's registered office at farmers building 8th floor Moi avenue Nairobi and a copy thereof to be deposited with the registrar of Companies within an even date.***
3. ***That the proposed Extra Ordinary AGM of the Company to be held on the 5th October 2009 and a notice of the said meeting to be signed by Directors of the said company within 21 days of the requisition and by way of a notice in the National Daily Newspaper. In default the requisitions are at liberty to issue a 21 days notice for the meeting.***
4. ***That the registrar of Companies to supervise and facilitate the conduct of the meeting of 5/10/09 including ensuring compliance of the law to conduct and attendance thereof.***
5. ***that the application dated 16th June 2009 is hereby marked as settled, each party to bear their own costs.”***

In the aforesaid suit, the Plaintiff was named as **GITHAMBO**

TEA FACTORY whereas the following individuals were named as the Defendants:

- **JULIUS MWERU KAMAU.**
- **DANSON MWANGI KAMAU.**
- **JOSEPH KAGONDU KARANU.**
- **JOHNSON THEURI MWANGI.**

Apparently the aforesaid individuals are also named as Defendants together with Githambo Tea factory Co. Ltd., in the suit before this Court. It is admitted by the 1st Defendant that it was aware of the pendency of the suit at Nairobi High Court. The Plaintiffs herein are said to be poor farmers who solely rely on proceeds of tea sales for their livelihood and those of their families. The record shows that the Plaintiffs in this suit were not aware of the pendency of Nairobi H.C.C.C. NO. 436 of 2006. It is possible they may have been aware of the existence of consent orders but they decided to use the names of the poor farmers to avoid being cited for contempt. Consequently I am convinced that the Plaintiffs are not guilty of material non-disclosure; hence they cannot be said to have abused the court process.

Having disposed of the preliminary issue, let me now consider the merits of the applications. It is now a matter of common knowledge that the meeting which was halted by an order of this Court was actually called in compliance of a consent order recorded before Lady Justice Koome on 14th July 2009. There is evidence that a Notice of Appeal has been filed to challenge the consent order before the Court of appeal. But the appeal is yet to be heard. The consent orders are still in existence. This Court cannot issue orders to contradict orders issued by a Court of concurrent jurisdiction. The best I can do in the circumstances is to set aside the orders of injunction issued in this suit. Pursuant to the provisions of *Section 6* of the Civil Procedure Act, the entire suit is stayed pending the outcome of the Nairobi H.C.C.C. (Milimani) Commercial Courts) 436 of 2006 and or the outcome of the subsequent appeal or pending further directions and orders. Costs shall abide the outcome of this suit.

Dated and delivered at Nyeri this 26th day of February 2010.

J. K. SERGON

JUDGE

In open court in the presence of the Gichuki for the 1st Defendant, Mr. Wambugu holding brief Njenga for 2nd – 5th Defendant. Kingori holding brief for Miss Mwai for Plaintiff.