



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 246 of 2008

**MWANGI CHARLES MAHINDA 1ST PLAINTIFF
EDWARD KINGS ONYANCHA MAINA 2ND PLAINTIFF**

VERSUS

**KENYA COMMERCIAL BANK LTD. 1ST DEFENDANT
SUSAN OUTA MUDHUNE 2ND DEFENDANT
SUSAN NKIROTE OMAGA 3RD DEFENDANT
PETER WANYAGA MUTHOKA 4TH DEFENDANT
ERNEST & YOUNG 5TH DEFENDANT**

RULING

This application is brought by way of a Chamber Summons dated 9th August, 2010, and taken out under the provisions of a variety of Statutes. These are the **Judicature Act**, the **Anti-Corruption and Economic Crimes Act**, the **Civil Procedure Act** as well the **Civil Procedure Rules**.

The application is also brought under a certificate of urgency on the grounds, *inter alia*, that the Defendants, jointly and severally, together with non parties, have scheduled to make a listing of the KCB Shares Rights Issue, July 2010, on the Nairobi Stock Exchange on Thursday, 19th August, 2010, which will render the instant application and/or suit nugatory unless a temporary injunction and/or orders sought herein are granted forthwith.

The substantive specific orders sought by the Applicants are –

1. ***That this Honourable Court be pleased to certify the instant application extremely urgent and fit to be determined on an emergency priority basis and an inter partes hearing date granted forthwith by the Court itself to fast track the hearing of the application.***
2. ***That pending the determination to the instant application, the Honourable Court be pleased to grant and issue a temporary injunction refraining forthwith the Defendants, jointly and severally, together with non parties, from listing the KCB Shares Rights Issue, July, 2010 scheduled for the 19th day of August, 2010 on the Nairobi Stock Exchange enabling commencement of transactions involving the shares of Kenya Commercial Bank Ltd.***
3. ***That pending the determination of the instant suit, the Honourable Court hereby be pleased to order the KCB Shares Rights Issue, July, 2010 a nullity ab initio.***

After perusing the application and hearing the 2nd Plaintiff in person, I find that the urgency of this matter lies in the fact that the date of listing and commencement of trading of new shares at the Nairobi Stock Exchange is scheduled for 19th August, 2010 which is tomorrow. By any standards, that application would, *prima facie*, have been urgent save for what I have to say hereunder.

The next issue is whether the Applicants should be granted a temporary injunction restraining the Defendants from listing the Shares Rights Issue, which exercise is scheduled for tomorrow. I note from a Circular letter dated 18th June, 2010 and dispatched to the Bank's shareholders that during the 39th Annual General Meeting held on 7th May, 2010, the shareholders approved the increase in authorized share capital and the raising of additional capital through a Rights Issue. The Circular letter also incorporates a time-table of a series of events which would culminate in the listing and commencement of trading of the new shares at the Nairobi Stock Exchange on 19th August, 2010. From this chronology of events, the Applicants had reasonable time to file this application for the same to be heard during the Court's normal

term instead of waiting to move the Court under a certificate of urgency to hear the matter during the Court's Vacation. The apparent urgency, therefore, has been created by the Applicants' failure to move the Court timeously. Secondly, the injunction sought is of such great moment that it ought to be granted after a well informed canvassing by all the parties. I don't think it will be proper to grant it *ex parte* at the instance of the Applicants who have come to Court at the last moment.

After months of preparation for tomorrow's event, of which the Applicants were no doubt aware, I think it would be unfair to allow the Applicants to precipitate and capitalize on a crisis which was within their ability to avoid. A Court of justice should avoid such eventualities. For the above reasons, I find that it would be unreasonable, unjust and inequitable to grant the temporary injunction sought at this late hour. To grant it would be tantamount to allowing the Applicants to steal a march on the Respondents and would also be playing to the gallery. A Court of justice should steer clear of such eventualities.

The dilatory conduct of the Applicants has deprived this application of the poignant urgency which it would have carried if they had come to Court timeously. For what it is worth, I direct that the application by Chamber Summons dated 9th August, 2010, be and is hereby certified urgent and served for hearing *inter partes* during the Vacation on a date to be given by the Registry on priority basis.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of August, 2010.

L. NJAGI
JUDGE