



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL CASE NO. 39 OF 2010.

TRANS NZOIA TEACHERS ENTERPRISE CO. LTD..... PLAINTIFF.

VERSUS

BEN K. SIBOE..... DEFENDANT.
TRANS NZOIA WEST TEACHERSWEST CO LTD..... DEFENDANT.

R U L I N G.

1. The plaintiff is a limited liability company, it filed this suit in its own name, the verifying affidavit is sworn by one **William Natwati** who claims to be the chairman of the plaintiff. The suit is drawn and filed by **Trans Nzoia Teachers Co. Ltd.** The plaintiff is seeking for a declaration that the Special General Meeting convened by the defendants on 7th May, 2010 is unlawful, be cancelled as null and void. Secondly, a permanent injunction to restrain the defendants by themselves, or their agents from convening a Special General Meeting on 7th May, 2010. On 20th May, 2010, the applicant file a chamber summons application under the provisions of Order 39 of the Civil Procedure Rules seeking for orders that the defendant or their directors, agents or servants be restrained from presenting the names of new board of directors for registration. This application is premised on the grounds stated on the body of the application and the matters deposed to in the supporting affidavit for **William Natwati** dated 19th May, 2010.
2. On 30th June, 2010, the 1st respondent filed a notice of motion seeking for an order to discharge, vacate and set aside the interim orders of injunction that was issued by this court on 15th June, 2010. This application is supported by the grounds stated on the body of the application and the supporting affidavit by **Ben Siboe** sworn on 30th June, 2010. The applicant also filed an affidavit sworn by the same deponent **William Natwati** on 9th July, 2010. The two applications were heard together in the interest of judicial time and more so because one application will determine the other.
3. According to **Mr. Kaosa** learned counsel who was subsequently instructed to represent the plaintiff, the application dated 19th May, 2010 is merited because the persons sought to be restrained from being registered as new directors of the plaintiff company are strangers who were elected secretly at a General meeting held on 7th May, 2010. The said directors issued a notice dated 17th May, 2010 threatening to take over the offices of the plaintiff. It is contended that the directors of the plaintiff are legally in office and the defendants staged a *coup de tat* and purported to take over the plaintiff.
4. It was further argued that the meeting held on 7th may, 2010 was not called by the plaintiff's

members but by the members of **Trans Nzoia West Teachers Ltd.** Which is a separate entity altogether. Thus the defendant cannot purport to elect officials for another company. The plaintiff has over 1600 members that comprise its membership and for a meeting to take place, there must be a quorum and the meeting of 7th May, 2010 did not have quorum which is 10% of the total members.

5. This application was opposed; **Dr. Sifuna** learned counsel for the respondent submitted that this suit as well as the application for injunction which were filed by **William Natwati** was a non-starter. William lacks *loci standi* in law to bring a suit on behalf of a company which is a separate legal entity from its directors and membership. It is trite that a company can not file a suit in its own name but through an advocate or the board of directors. The suit must be authorized by a board resolution. There was no resolution authorizing **William Natwati** to file this suit. Counsel made reference to the case of; GATIMU FARMERS CO. LTD. VS. SOLOMON MBUGUA & ANOTHER [2004] eKLR in which **Kimaru – J,** held that:-

“There was no resolution of the company authorizing him to file this suit. Having considered the arguments made it is the finding of this court that since Gatimu Farmers Company Ltd, (the purported plaintiff in this case) could not be said to be aggrieved by the election of the defendants as its directors, then the suit allegedly filed by the plaintiff does not disclose any reasonable cause of action. The defendant’s application has merit. The same is allowed. The plaint tiled on 16th of July, 2001 is hereby ordered struck out with costs.”

6. In this case the verifying affidavit by **William Natwati** does not mention the resolution that authorized the filing of the suit. The applicant has also not annexed a copy of the resolution. Therefore the court cannot speculate whether a resolution exists but to find that the entire suit which in any event is only seeking to stop a meeting for a date that passed is a non starter. Secondly this application was never served upon 2nd defendant and it is curious the plaintiff wishes to proceed with this matter without the second defendant. It is also probable that the second defendant does not exist. The letters annexed to be plaintiff’s application are signed by a **Mr. John Mwangi** as the chairman and he was never joined to this suit.

7. No reasons have been disclosed why the first defendant has been sued when the letters purportedly written on behalf of the second defendant are not even signed by the first defendant. Moreover the persons sought to be restrained from being registered as directors of the plaintiff that are; **John Mwangi, David Wekesa and Douglas Alusa** who are not parties to this suit. The suit against the 1st defendant should be struck out. In any case the suit has been overtaken by events because it was stopping a meeting scheduled for 7th May, 2010 which has already passed. The second order of a permanent injunction cannot issue against a company in any event the orders are not supported by the prayers in the plaint. The suit is defective; it cannot be the basis for granting interim orders of injunction because the test on whether or not to grant a temporary order of injunction have not been met.

8. In analyzing the issues that fall for determination in this application, the first issue is whether this suit is properly before this court. I wholly agree with the exposition of the law by **Kimaru J.** in the case of **GATIMU FARMERS** (supra) this suit was drawn and filed by Trans Nzoia Teachers Enterprises Ltd. And the verifying affidavit is drawn by William Natwati. There is no resolution attached to the suit, there is also no averment that the verifying affidavit was sworn pursuant to a board resolution. The 1st defendant is a member of the plaintiff and claims that he is not aware of any resolution passed by the plaintiff to file a suit against its own member.

9. It is trite law that a company can only act through a resolution passed by its members at a general meeting or by a resolution passed by the board of directors. In the absence of a resolution sanctioning the filing of this suit, it can be said that the company is not before this court. The suit is a non-starter and it should be struck out. The second issue whether the orders of injunction issued on 15th June, 2010 should be confirmed does not arise because the suit is incompetent it does not meet the threshold of establishing a prima facie case with a probability of success. Furthermore the parties sought to be restrained, are not parties to this suit, how can orders be made against parties who are not before the court. The 2nd

defendant was also never served with the summons if indeed it exists as an entity.

10. The grounds for issuing an order of injunction are sequential if the application does not meet the first test there is no point of going into the second test. For the aforesaid reasons, the entire suit and application are unmeritorious, they are hereby struck out. Cost shall be paid by William Natwati as there is no basis to connect the plaintiff with this suit which was filed by William Natwati.

Ruling read and signed on 2nd December, 2010.

MARTHA KOOME.
JUDGE.