



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

**Civil Case 59 of 2005**

**TRANS NZOIA INVESTMENT CO. LTD. :::::::::: PLAINTIFF.**

**VERSUS**

**JOSEPH WANAMBISI                    )  
ALFRED WANAMBISI & 3 OTHERS    ) ::::::::::: DEFENDANT.**

**R U L I N G.**

By an application by way of Notice of Motion dated 7<sup>th</sup> May, 2007, pursuant to sections 3, 3A and 63 of the Civil Procedure Act and Order XXXIX Rules 2A, (2) and (3) and Order L Rule 1 of the Civil Procedure Rules, the applicant seeks orders.

1. **THAT**, the application be certified as urgent and a hearing date be given on priority basis.
2. **THAT**, the Respondents/Defendants herein be detained in prison for six (6) Months, for disobeying the Injunction Order issued on the 1<sup>st</sup> Day of March, 2007.
3. **THAT**, the extra Ordinary Meeting held on 2/3/2007 contrary to the Order of the Court was null and void and in consequential.
4. **THAT**, the Respondents/Defendants be condemned to pay the costs.

The application is based on the grounds:

1. **THAT**, this Honourable Court on the 1<sup>st</sup> Day of March, 2007 put off an extra Ordinary General Meeting of the applicant herein, and which had been called by the Respondents herein.
2. **THAT**, the Injunction Order issued by the Court on 1/3/2007 was extracted and served upon the Respondents.
3. **THAT**, despite the service of the Court Order, the Respondents apparently proceeded to hold the offensive meeting.
4. **THAT**, the Respondents/Defendants have caused the District Officer Kiminini to call upon the Directors of the applicant herein to do handing over to them as the new Directors of the applicant herein, pursuant to elections purportedly held on 2/3/2007.
5. **THAT**, the Respondents are putting up posters in town to the effect that they are the new directors of the

applicant Company.

6. **THAT**, it is essential for the rule of law and good order that the authority and dignity of the court be upheld at all times.
7. **THAT** the application is further supported by the annexed affidavits of **RONALD SAWENJA WALUBENGO** and a supplementary affidavit of **ARCHIBALD WEKESA NYUKURI**.

The application is predicated upon the annexed affidavit of Ronald Sawenja Walubengo sworn on the 7<sup>th</sup> day of May, 2007 and a supplementary affidavit of Archibald Wekesa Nyukuri sworn on 7<sup>th</sup> May, 2008.

Ronald Sawenja Walubengo, a secretary director of the applicant deponed that he is duly authorized to swear this affidavit on behalf of the applicants.

That the honourable Court issued an order on 1<sup>st</sup> March, 2007 exhibited as "R.S.W1" which was served on the OCS Kitale by a process server Archibald Wekesa Nyukuri on the same day at 5.00 p.m.

That the same order was served upon the 1<sup>st</sup> respondent in his house, while the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents were served in the house of the 3<sup>rd</sup> respondent on the same day.

Last but not least, the 2<sup>nd</sup> respondent was served at Namanjalala center at the gate of Namanjalala Primary School.

That all the respondents refused to acknowledge receipt of the said court order.

That on 2<sup>nd</sup> March, 2003, at about 10.30 am he passed by Kenyatta Stadium where the meeting in issue was scheduled to take place so that he would alert the OCS in the event of disobedience of the order.

That the respondents did not hold a meeting at the said stadium. Instead there was a Primary Schools Sports meeting taking place at the said stadium.

That unknown to him the respondents in flagrant disobedience of the court order still held a meeting at some unknown venue.

At the said meeting, it would appear, some resolutions were made. Among them was that the secretary/director and chairman of Trans-Nzoia Investment Co. Ltd. do hand over the applicants legal documents and records to, **inter-alia**, the 1<sup>st</sup> and 5<sup>th</sup> respondents, allegedly pursuant to elections held at Kenyatta Stadium on 2<sup>nd</sup> March, 2007. In support of that is a self-explanatory letter marked "RSW2" to that effect.

That arising from the resolutions of the said meeting, the 5<sup>th</sup> defendant caused to be circulated within Kitale Town, to the members of the applicant, a notice informing members of the public that secretary/directors of the applicant and the rest of the directors were no longer directors of Trans Nzoia Investment Co. Ltd. The same is exhibited as "RSW3" is a copy of the said notice.

Last but not least that the respondents have since attempted to enforce whatever may have been resolved on the meeting held on 2<sup>nd</sup> March, 2007 in flagrant disobedience of the Court order.

The affidavit of Richard Sawenja Walubengo was supported by the affidavit of Archibald Wekesa Nyukuri sworn on 3<sup>rd</sup> March, 2007. He confirmed service on the O.C.S. Kitale, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants on 1<sup>st</sup> March, 2007. That despite service the respondents refused to acknowledge or abide by the said order.

By a replying affidavit sworn on 14<sup>th</sup> May, 2007, Joseph Wanambisi the 1<sup>st</sup> respondent, for and on behalf of his co-respondents, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, denied all and singular the contents of the two affidavits in support. In particular he denied that none of the co-respondents were ever served with any court papers on that day.

The first respondent contends that on 2<sup>nd</sup> March, 2007 he attended the Annual General meeting of Trans Nzoia Investment Co. Ltd. which was conducted peacefully.

That prior to the said meeting the respondents had applied for a vacancy at Kenyatta stadium in Kitale which was duly approved by the Director of Social Services Municipal council of Kitale together with a payment receipt of Ksh. 1,500/= which is exhibited as “JW1”.

That the OCS was aware of the meeting and had given the respondents a permit for the same exhibit as “JW11”.

That the meeting had been announced by Kenya Broadcasting Corporation as Annual General meeting. A copy of the announcement and receipt in respect of payment is exhibited as “JW111”.

That the meeting which was held was an Annual General meeting pursuant to the provisions of the Companies Act (Cap 486) Laws of Kenya as opposed to the Extra Ordinary General meeting under section 132 of the Companies Act (Cap 486) Laws of Kenya.

That the said meeting was ordered by the Registrar of Companies pursuant to the provisions of section 131 of the Companies Act (Cap 486) Laws of Kenya.

That arising from the resolutions at the applicant’s company at the Annual General meeting of 2<sup>nd</sup> March, 2007 the Registrar of Companies effected changes in the directorship of the said company exhibit as “JW111”.

That the court order stopped specifically the Extra Ordinary meeting as opposed to the Annual General meeting which was scheduled for 2<sup>nd</sup> March, 2007.

That the application seeking orders stopping the Extra-ordinary General meeting of the plaintiff company scheduled for 6<sup>th</sup> May, 2005 was never amended to seek orders stopping the Annual General Meeting scheduled for 2<sup>nd</sup> March, 2007.

In a rejoinder to the replying affidavit, Ronald Sawenja Walubengo the Secretary/Director of the applicant company, swore a further supporting affidavit on 18<sup>th</sup> May, 2007 annexing a Notice exhibited as “RSW1” calling for an Extra ordinary Annual General meeting of the applicant company on 2<sup>nd</sup> March, 2007 at Kenyatta Stadium. He contended that the meeting had not been called by the secretary to the company nor the Registrar of companies under section 131 of the Companies Act (Cap 486) Laws of Kenya as alledged by the respondents.

In a rejoinder to the affidavit of Sawenja Walubengo sworn on 7<sup>th</sup> May, 2007 Joseph Wambisi swore that he calls a supporting affidavit on 23<sup>rd</sup> May, 2007. The thrust of his argument is that the orders prayed for in the plaint and in the chamber summons herein are at variance with the orders prayed for to stop the meeting scheduled for 2<sup>nd</sup> March, 2007. That in the absence of amendment to the plaint and the chamber summons the court lacks jurisdiction to give orders not specifically sought.

When the application came up for hearing 11<sup>th</sup> November, 2008 Mr. Kiarie, for the applicant, argued that the order made by the court putting off the Extra-Ordinary General Meeting of 2<sup>nd</sup> March, 2007 was extracted on the same day and served. That notwithstanding the respondents proceeded with the meeting. I was urged to find that the resolutions reached at the meeting of 2<sup>nd</sup> March, 2007 be deemed as null and void and inconsequential.

Mr. Mokuu, for the respondents on the other hand maintained that the application herein was made in the year 2005 intending to stop on Extra Ordinary Meeting which was scheduled for 14<sup>th</sup> May, 2005.

I am grateful to counsel which appeared before me for their able arguments and their input on law.

It is clear to me on the evidence available that an injunction order was made on 1<sup>st</sup> March, 2007 stopping the Extra Ordinary meeting scheduled for 2<sup>nd</sup> March, 2007. The orders states in part

***“That the Extra Ordinary General meeting***

***of Trans Nzoia Investment Co. Ltd, scheduled for 2<sup>nd</sup> March, 2007 is hereby now put off,  
until further orders of this court .....*”**

That order was served on the OCS Kitale and the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents in the house of the 3<sup>rd</sup> respondent. The second respondent was served at Namanjalala Centre at the gate of Namanjalala Primary School [see supporting affidavit of Ronald Sawenja Walubengo sworn on 7<sup>th</sup> May, 2007] and the affidavit of Service of Archibald Wekesa Nyukuri sworn on 3<sup>rd</sup> March, 2007 marked as ANN1 and “AWN2” respectively.

On the evidence on record, it is clear to me that notwithstanding service the respondents nevertheless held the meeting and made resolutions as per exhibit “RSW2” in the affidavit of Richard Sawenja Walubengo sworn on 7<sup>th</sup> May, 2007. The District officer Kiminini Division on the strength of said resolutions ordered that the applicants should hand over the company assets and do an accompanying report on 19<sup>th</sup> April, 2007 and thus provoked the application. In effect the District Officer was effecting the resolutions of the meeting of 2<sup>nd</sup> March, 2007.

In addition to the said District officers letter, Ibrahim Wayiengo Ogaro the purported new secretary of Trans Nzoia Investment Company Ltd. also issued a notice marked Exhibit “RSW 3” in the affidavit of Richard Sawenja to the Public. It is dated 30<sup>th</sup> April, 2009 and is to the effect that Erastus Walubengo, Wanyonyi Khaemba (chairman), Ronald Sawenja Walubengo (secretary), Kalori Esoso (member), Joseph Kiptoo (member) Paul Simiyu (Member) and other directors are no longer directors of the said company from 24<sup>th</sup> April, 2007. That the aforementioned are not authorized to undertake any transaction or business for and/or on behalf of the said company. That the new management will not be responsible for any transactions or loss arising from their activity.

The law relating to contempt of court is derived from section 5 of the Judicature Act (Cap 8) and order XXXIX Rule (3) of the Civil Procedure Rules. The Kenyan courts are enjoined by the aforesaid Act and order to follow the procedure and practice in England. As a general rule no order of court acquiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in issue. The copy of the order served must be endorsed with a penal notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. This requirement is the *sine-quo non*. The court must be satisfied that the terms of the injunction are clear and unambiguous. That the defendant has proper notice of the terms and that the breach of injunction has been proved beyond reasonable **doubt (see MWANGI WANGONDU VS. NARIOBI CITY COMMISSION (CIVIL APPEAL NO. 95/1988)**(unreported).

On my part, I am convinced on the available evidence, that service on all the respondents were properly effected. The order itself was endorsed with the Penal Notice thus:-

***“The respondents are warned that this is a valid court order which must be obeyed. Any disobedience thereto shall attract the penal process of the law to compel compliance. The sentence for disobedience is upto six (6) months imprisonment.”***

On the available evidence and a law, I am fully satisfied that the respondents are in contempt of court. I sentence each one of them to pay a fine of Ksh. 5,000/= in default each one of them shall be jailed for 6 months. This takes care of the of the first limb of the preliminary objection.

I have been urged on the second limb of the application to declare the extra ordinary Annual General Meeting held on 2<sup>nd</sup> March, 2007 in violation of the court order of 1<sup>st</sup> March, 2007 null and void and inconsequential. My reaction to this is that if any act is done in violation of the law it is void. If it is void it is in law a nullity. It is not only bad, but automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And any proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing

and expect it to stay. It will collapse (see **MACFOY VS. UNITED AFRICA CO. LTD. 1961**) 3 ALL ER 1169 at page **1172 (1)** Lord Denning delivering the opinion of the Privy Council.

Those are the orders I am capable of giving on this application.

Dated and delivered at Kitale this 11<sup>th</sup> day of November, 2009.

**N.R.O. OMBIJA.**

**JUDGE.**

Mr. Kiarie for Applicant.

Mr. Mokuu for Respondent.