REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Case 271 of 2008

MWANGI KIRIGWI …..…….…..……..PETITIONER

VERSUS

KENYA TEA DEVELOPMENT AGENCY LIMITED..…1ST RESPONDENT

IKUMBI TEA FACTORY COMPANY LTD…...…….....2ND RESPONDENT

JOHN KENNEDY OMANGA ……...…..…..3RD RESPONDENT

RULING

In the petition dated 31st March, 2008, the petitioner describes himself as a farming member of the 2nd respondent and shareholder registered as 1K940032. He also states that he is a director of the 2nd respondent company and a small scale tea grower in the area served by the 2nd respondent. He says that it was the intention that all the factories established and managed by the 1st respondent to have similar memorandum and articles of association. And that the 2nd respondent has two categories of shareholders as provided for under Article 8 in that the shares of the company are issued to founder shareholders and commercial shareholders. The founder shares are allotted to persons, co-operative societies or bodies corporate who are bona fide tea growers in the geographical areas served by the 2nd respondent. The founder shareholders have full voting rights but do not participate in the dividend and surplus or the returns of the companies. While on the other hand, the commercial shareholders of the company have the right to participate fully in the dividend and surpluses as well as in the return of the capital of the 2nd respondent. He alleges that in an attempt to dilute and change the categories of the shareholding, the 1st and 3rd respondent allowed the directors of the 2nd respondent to make changes contrary to the spirits and express provisions contained in the memorandum and articles of association of the 2nd respondent.

The petitioner complains that by allocating bonus shares on founder shares, the voting of members will become disproportionate, thereby denying members of the equal rights to vote and/or participate in any changes anticipated in the articles. And in paragraph 19 of the petition he states;

"THAT despite provisions in the company articles aforesaid, the 1st and 3rd Respondents have secretly and without involving the members as provided for under Articles 8(6) proceeded to amend the articles 8(2), 8(3) and 8(4) so as to allocate bonus shares on Founder Shares to the Shareholders based on tea produced in 2006 – 2007 as proposed below:-

FACTOR/FORMULA

To arrive at the factor/formula for issuance of the Bonus shares, the proposed total amount of proposed shares of 200,000 to be issued has been divided from the total receipt of green leaf of 13,502,309 Kgs the company received from 1st July 2006 to 30th June 2007.

The actual amount of green leaf a grower delivered within the period above, multiplied by the factor of 0.015 will determine his/her bonus shares".

It is clear that the main claim of the petitioner as set out in paragraph 19 of the petition relates to alteration of the Founder shares of the company by way of creation of additional bonus shares to the shareholders. And as a result the petitioner prays;

(i) That the allotment of bonus shares made pursuant to the advise of the 1st, 2nd and 3rd Respondents to the holders of Founder Shares in breach of articles 8(6) and (14) of the Articles of Association of the 2nd Respondent Company and such allotment if done as such be declared null and void

(ii) That holders of bonus shares as allocated be restrained from participating in the nomination of Directors and/or election of directors of the 2nd Respondent Company.

(iii) That the nomination and election of the Directors of the 2nd Respondent Company be based on the shares held by Founder shareholders each member holding 5 shares.

(iv) That any proposal to issue and/or offer bonus shares be placed before the members for voting as provided for under article 8(6) of the 2nd Respondent company's Articles of Association.

(v) That the 1st and 3rd Respondents, their servants, agents, employees or howsoever from interfering with the Duties of the Directors and/or the members of the 3rd Respondent Company.

The Respondents through their advocates raised a preliminary objection and what has fallen for my determination is the preliminary objection dated 8th February, 2007. It is also important to note that pursuant to the petition, the petitioner filed an application dated 2nd April, 2007 in which he seeks temporary orders to abide the final hearing and determination of the petition. No doubt the petitioner is a director of the 2nd respondent company. There is also no doubt that the alteration of the bonus shares was done in a board meeting on 26th September, 2007. That meeting created and resolved the creation of bonus shares which the petitioner is against. It is undisputed that the petitioner attended the meeting of 26th September, 2007. There was also another meeting of 2nd October, 2007. And the final meeting was 28th January, 2008 in which all the previous resolutions were approved. Again in attendance was the petitioner. It is uncontested that in all those meetings the issue of bonus shares were discussed and approved.

Mr. Kipkorir learned counsel for the respondents submitted that the jurisdiction of this court is donated by section 74 of Cap 486 laws of Kenya which relates to objections to any variation of shares in the shareholding of the company. He also submitted that section 74 must be read together with section 344 which creates the rules to be followed by the High court. Rule 5 and 10 states;

(5) The rights conferred upon the holders of the shares of any class issued with preferred or other rights shall not, unless otherwise expressly provided by the terms of issue of the shares of that class be deemed to be varied by the creation or issue of further shares ranking *pari passu* therewith.

(10) The company shall not give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company nor shall the company make a loan for any purpose whatsoever on the security of its shares or those of its holding company, but nothing in this regulation shall prohibit transactions mentioned in the proviso to section 56(1) of the Act.

Mr. Kipkorir Advocate submitted that those provisions cited above together with section 74 sets out the mandatory provisions to be followed and that none of those provisions have been met by the petitioner. He submitted that:

(1) A petitioner under section 74 must by himself or through other shareholders he is representing be owners of a minimum of 15% of the shares created. In all the exhibits before court the petitioner has not shown the numbers of shares he owns.

(2) If he is representing other shareholders to make an aggregate 15% shareholding those other shareholders must give him the consent in writing. Here the petitioner has not disclosed whether he is acting on behalf or representing other shareholders and the number of shares held by them.

(3) The petitioner must have objected to the variation of the shares and the objection is either by way of declining to vote for their variation or refusing to give his consent. Again the exhibits show that the petitioner was present and there was no evidence of any objections raised by him.

(4) The petition must be filed within 30 days of the date when the first resolution was passed. In this case it is clear that the first resolution was passed on 26th September 2007 as exhibited by the petitioner himself and the petitioner was present. It is clear, that this petition was filed on 2nd April, 2007, 7 months after the first resolution.

In conclusion **Mr. Kipkorir** submitted that the petitioner has not fulfilled even one requirement, therefore has not established the jurisdiction of this court.

Mr. Mogeni learned counsel for the petitioner submitted that a preliminary objection is only required to cover the points of law and since the company did not follow the mandatory provisions of Article 8.1 and 8.6 then the petition must succeed. Article 8.2 deals in changing the bonus shares and it states that, it cannot be changed until Article 8.6 is complied with. He submitted that for the directors to exercise any powers to change the shares, they must comply with the memorandum and Articles of the Company. The actions of the directors in attempting to approve or issue shares which affects the shareholding under Article 8, without complying with Article 8.6 is ultra vires and therefore null and void.

It was the submission of **Mr. Mogeni** advocate that by attempting to act, the directors removed the operation of Article 8.6 which deals with amendment and alterations of shares. In his view directors' power to amend are subject to supervision of the law. He relied on section 24 of Cap 486. He stated that the effect of the alteration is meant to alter the true position of the company i.e. the voting capacity would have to change and the shareholding will no longer be equal.

I have considered the issues raised by the parties and in my view the issue for my determination is whether the petitioner has invoked the jurisdiction of this court in a proper manner. As is often said jurisdiction is everything and without it, a court has no powers to deal with the grievances and/or cause of action placed before it. It is for that reason that the issue of jurisdiction has to be determined at first instance. The basis of the preliminary objection by the respondents is section 74 of Cap 486. It is important to produce section 74;

"**(1) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorizing the variation of the rights attached to any class of shares in the company subject to the consent of any specified proportion of the holders of the issues shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than fifteen per cent of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the court to have the variation cancelled, and, where any such application is made, the variation shall not have effect unless and until it is confirmed by the court.**

(2) an application under this section shall be made by petition within thirty days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they appoint in writing for the purpose.

(3) On any such application, the court, after hearing the applicant and any other persons who apply to the court to be heard and appear to the court to be interested in the application, may, if it is satisfied, having regard to all the circumstances of the case, that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation, and shall, if not so satisfied, confirm the variation.

(4) The decision of the court on any such application shall be final".

The case before court concerns bonus shares and the farmers are not asked to increase their liability. It is clear that the shares of the Founder members are not being altered. The circumstances under which, a variation done by the company can be contested by a party is very clear under section 74 of Cap 486. It is important to show that, the variation was done unfairly and in a manner to prejudice the interest of the shareholders or a class of shareholders represented by the applicant seeking intervention of the court.

A petitioner seeking to nullify or cancel a variation undertaken by a company must make an application to court within 30 days after the date on which the consent was given or the resolution was passed. It is also mandatory for the petitioner to show that he is the holder of 15% of the shares issued of any class in the company or that he is acting on behalf of members and/or holders of not less than 15% percent of the issued shares. There is no evidence to show that, the petitioner is a holder and/or is representing members or holders of 15% shares in the company.

It is not the case of the petitioner that he did not sanction the resolution passed on 26th September, 2007. In all the exhibits before court the petitioner has not shown or demonstrated the number of shares he owns. And there is no

indication that he is acting on behalf of the other shareholders who own an aggregate 15% shareholding in the company.

The case of the petitioner is that alteration or variation was done in contravention of the Memorandum and Articles of the company. And in such circumstances it is required of him to bring himself within the mandatory requirements of section 74 of Cap 486. The petitioner has relied on section 24 of the Companies Act which deals with alteration of shareholdings that increases the liability of the shareholders and asking shareholders to make more contributions. I am in agreement with **Mr. Kipkorir** Advocate that the variation undertaken do not in any way increase the members and/or shareholders liabilities therefore, section 24 is irrelevant to the issues before court.

All in all it is my decision that the petitioner has not fulfilled the mandatory requirements of section 74 and therefore has not established the jurisdiction of this court. In short the petition before court is an abuse of the court process since it is in contravention of the mandatory requirements of the law**. I therefore uphold the preliminary objection dated 8th April, 2008. The petition is hereby struck out with costs to the respondents.**

Dated, signed and delivered at Nairobi this 23rd day of April, 2008.

M. A. WARSAME

JUDGE