



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

**Civil Case 12 of 2008**

**SAMUEL KANGERE GATOTO & 3 OTHERS ..... PLAINTIFFS**

**VERSUS**

**STEPHEN WAWERU NJENGA & 6 OTHERS .....DEFENDANTS**

**RULING**

On 15<sup>th</sup> January 2008, the plaintiffs filed an application for injunction seeking to restrain the defendants from holding themselves out or acting in any manner as the directors of Mbo-I-Kamiti Farmers Company Ltd (*hereinafter referred to as "the Company"*). They further prayed for *status quo* be maintained as it existed prior to 26<sup>th</sup> November 2007 as regard the directorship of the company pending the hearing and determination of the suit. The plaintiffs claimed that the change of directors effected by the defendants on 4<sup>th</sup> December 2007 was fraudulent and had been obtained through misrepresentation. The said application was presented to the court under certificate of urgency. When the plaintiffs appeared before the court, they were ordered to serve the application upon the Respondents (Defendants).

The hearing date of the application was taken *ex parte* by the plaintiffs. The application was fixed for hearing on 25<sup>th</sup> February 2008. On that day, the plaintiffs' counsel represented to the court that he had served the hearing notice of the scheduled date to counsel for the defendants. Warsame, J. being satisfied that the defendants had been duly served, granted the plaintiffs' application for injunction, the absence of the defendants notwithstanding. The defendants were aggrieved by the said decision of the court and on 5<sup>th</sup> March 2008 filed a notice of motion under **Order XXXIX Rule 4** of the **Civil Procedure Rules** seeking an order of the court to discharge and/or set aside the order of injunction which was granted as against them on 25<sup>th</sup> February 2008. The defendants contended that the plaintiffs had obtained the said order by fraudulent and deliberate misrepresentation of the facts to the court. The defendants stated that the plaintiffs had concealed and suppressed material facts when presenting their application for injunction. They further contended that the order sought adversely affected the affairs and operations of Mbo-I-Kamiti Farmers Company who were not parties to the suit. The defendants were of the view that the plaintiffs lacked the requisite *locus standi* to institute the present suit in their capacity as shareholders of the company. The application was supported by the annexed affidavit of Edward Miring'u Gicharu, the 2<sup>nd</sup> defendant. The application is opposed. John Kinge and Bernard Njuguna swore replying affidavits in opposition to the application.

At the hearing of the application, this court heard the rival submissions made by Mr. Kibe on behalf of the defendants and by Mr. Ojuro on behalf of the plaintiffs. The two counsels basically reiterated the contents of the application and the respective opposing affidavits filed by their clients. The issue for determination by this court is whether the defendants made a case to enable this court set aside the order of injunction issued by the court on 25<sup>th</sup> February 2008. **Order XXXIX Rule 4** of the **Civil Procedure Rules** grants this court jurisdiction to discharge, vary or set aside an injunction earlier granted if an aggrieved party makes an appropriate application to the court. In the present application, the injunction which was obtained by the plaintiffs restrained the defendants from performing their duties as directors of the company. The defendants' claim is that they were duly elected as directors of the company by the shareholders on 26<sup>th</sup> November 2007. They were duly registered as directors of the company on 17<sup>th</sup> December 2007 by the Registrar of Companies. The directors who were ousted from office and replaced

by the defendants were dissatisfied with their removal from office and duly filed a judicial review application for orders certiorari and prohibition to quash the decision of the Registrar of Companies which confirmed the defendants as directors of the company. The said application for judicial review was slated to be heard on 28<sup>th</sup> April 2008 before this court delivers its ruling.

On assessment of the facts of this case, it is therefore clear that the issue in dispute in the present suit and the issue in dispute in the judicial review application pending before the Constitutional and Judicial Review Division of the High Court is the same; it concerns the determination of who are the legitimate directors of Mbo-I-Kamiti Farmers Company Ltd. The plaintiffs, who are shareholders of the company, are obviously interested parties in the outcome of any decision that would emanate from the court regarding the legitimate directorship of the company. In their suit before this court, the plaintiffs did not disclose to the court that there was already another existing suit which dealt with the same issue regarding the determination of who are the legitimate directors of the company. The plaintiffs did not enjoin the company as a party to this suit. It is evident that the plaintiffs in the present suit have sought to influence the day-to-day management of the company by seeking the court's intervention in the determination of who the directors of the company should be. The plaintiffs have even gone ahead to withdraw certain sums from the company's account at Equity Bank. It is therefore clear that the plaintiffs should have made the company a party to these proceedings. The plaintiffs had other avenues to resolve the dispute as regard the management of the company; As shareholders they were at liberty to call a special general meeting to ventilate their grievance against the defendants in their capacity as directors of the company. Filing suit, would be a last resort when all else has failed. Further, it is not granted that all disputes involving management of companies are justiciable.

Upon evaluation of the facts in support of the application, it is evident that the plaintiffs obtained the said order of injunction by concealing material facts from the court. They failed to disclose that there was an existing suit which dealt with the dispute regarding directorship of the company in the Judicial Review Division of this court (See **Nairobi HC Misc. Civil Case No. 1287 of 2007 – Mbo-I-Kamiti Farmers Company Ltd. vs. The Registrar of Companies**). They further failed to disclose that the suit against the defendants was filed against the said defendants in their capacity as directors of Mbo-I-Kamiti Farmers Company Ltd. It was therefore necessary before the said order was obtained which affected the operations of the company, that the company be enjoined to the suit. I therefore hold that the defendants have established a case to enable this court set aside its order of injunction issued on 25<sup>th</sup> February 2008. The said order was obtained after the plaintiffs had failed to disclose to the court material facts which were relevant to the determination of the matters in dispute. The application dated 5<sup>th</sup> March 2008 by the defendants is hereby allowed with costs. The order of injunction issued by the court on 25<sup>th</sup> February 2008 is hereby set aside and is declared to be of no legal effect.

**DATED** at Nairobi this 8<sup>th</sup> day of **May, 2008**.

**L. KIMARU**

**JUDGE**