

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 17 of 2008

MATHINGIRA WHOLESALERS COMPANY LTD PLAINTIFF

VERSUS

KIMWATU KANYUNGU DEFENDANT

RULING

An interlocutory application by Notice of Motion dated 27th February 2008 by the plaintiff is the subject of this ruling. The plaintiff by the present claim averred that the defendant who is no longer the Chairman of the Board of the Directors of the plaintiff has continued to act as a Chairman despite his removal by a resolution dated 13th October 2007. In so acting the plaintiff averred that the defendant had committed acts of fraud relating to the financial standing of the Plaintiff Company. In its plaint the plaintiff has prayed for permanent injunction against the defendant restraining him from holding himself out as the Chairman of the Plaintiff Company. Further the plaintiff seeks an order for the defendant to refund money allegedly taken from the plaintiff's account. In the Notice of Motion the plaintiff seeks the temporary injunction pending the hearing and the determination of this suit restraining the defendant from holding himself as the chairman of the Plaintiff Company. In the other prayer the plaintiff seeks a mandatory injunction against the defendant to compel him to deliver to the plaintiff the Company Seal, Memorandum and Articles of Association, Cheque Books, Auditor's Account and the Property files of the plaintiff. In his affidavit in support James Kanyi Waiganjo who describes himself as the Chairman of the Plaintiff Company enumerated the directors of the Plaintiff Company. He stated that a resolution had been passed by the board of the Plaintiff Company on 13th October 2007 whereby the defendant was removed as the chairman of the Plaintiff Company and his authority or mandate to run the Plaintiff Company was withdrawn. That on that day the board appointed Waiganjo as the new chairman of the Plaintiff Company. Accordingly he stated that the defendant had no right to run the Plaintiff Company. In violation of that resolution that the defendant had without authority operated the bank account of the plaintiff in the following manner. That he misrepresented himself to Equity Bank and withdrew Kshs.75,824.65 from the Plaintiff Company's account in that bank. Unlawfully collected Kshs.18,000 from one of the companies the plaintiff has an investment in. Further opened a Bank Account with National Bank of Kenya in the name of the Plaintiff Company by misrepresenting himself as the chairman. By also making further misrepresentation before Kenya Commercial Bank and thereby causing the bank's refusal to recognize the present office holders of the Plaintiff Company. That the defendant had also refused to surrender the Company Seal. The deponent further stated that the defendant had wrongly detained the Memorandum and Articles of Association of the Company. On 12th February 2008 that the defendant without authority instructed a rent collection agency to collect rent from tenants from the Plaintiff Company's property. These acts which the plaintiff stated were interfering and disrupting the running of the company had caused considerable loss and damage to the company. That unless an injunction was granted the company would be exposed to further loss.

The application was opposed. The defendant's counsel began by arguing that the application was incompetent for having relied on section 3A of the Civil Procedure Act. My immediate response to that submission is that the plaintiff was seeking restraining orders and also mandatory injunction. Mandatory injunction is not provided for under Order XXXIX. Accordingly the application is not incompetent for

having relied on that section. Having so found the argument by the defendant's advocate that the application should have been by Chamber Summons rather than Notice of Motion is defeated because having relied on that section the plaintiff rightly brought the application under Notice of Motion. The defendant further argued that order L rule 15 had not been complied with by the plaintiff. That order provides that every summon at the foot of it shall bear the following words;-

“If any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken as the court may think just and expedient.”

It is clear that those words are intended to alert a party who is being served with an application that if he fails to attend the court could make orders against him. Bearing those words in mind it becomes clear that the mischief which that rule sought to address was where a party would be served and would not be aware that if he fails to attend court that orders may be granted against him. Failure therefore to put those words at the foot of the application would only become relevant if a party did not attend court and orders were granted against him. That is not the case here. The defendant was served and did attend and therefore there is no prejudice suffered for failure to put those words. The defendant further argued that the meeting held on 13th October 2007 did not comply with sections 131 and 132 of the Company's Act. That the callers of that meeting failed to state whether it was an AGM meeting or an extraordinary meeting being convened. That the convener of the meeting failed to state whether those in attendance met the criteria of shareholding as required by the Companies Act. The defendant therefore concluded that the meeting of 13th October 2007 was illegal and a resolution passed by that meeting was unenforceable. Accordingly the defendant stated that he is the legitimate chairman of the Plaintiff Company.

The defendant in opposing the application stated that certain legal provisions had not been fulfilled in passing the resolution of 13th October 2007. That argument can only be relevant in an application to nullify the appointment of the board members at the meeting of 13th October 2007. It cannot be used to legitimize the defendant's carry on the duties of chairmanship as he has sought to do. The defendant also argued that his removal was not in accordance with the Memorandum and Articles of Association. The defendant in making that allegation did not annex the Articles of Association. Having failed to do so and since he had a burden to prove non-compliance the court rejects that argument. See section 107 of the Evidence Act. Having considered the arguments brought before me I am satisfied that the defendant has met the principles of granting an injunction as enunciated in the celebrated case of *Giella v Cassman Brown & CO Ltd [1973]E.A.* Those principles are as follows;-

“An applicant must show a prima facie case with a probability of success. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. When the court is in doubt, it will decide the application on the balance of convenience.”

The applicant has shown a prima facie case with probability of success and has shown the acts of defendant could lead to irreparable loss.

Accordingly I grant the following orders;-

- 1. Pending the hearing and the determination of this suit the defendant, his agent or servant or any person acting under his instructions is restrained from holding our himself as the Chairman of Mathingira Wholesalers Company Ltd. The defendant is restrained from interfering with the management and business operations of that company.***
- 2. A mandatory injunction is issued against the defendant compelling him to release to the Plaintiff Company the Company Seal, its Memorandum and Articles of Association, cheque books, certificate of registration and property files to the Plaintiff Company.***
- 3. The plaintiff is awarded costs of the Notice of Motion dated 27th February 2008.***

Dated and delivered at Nyeri this 5th day of May 2008.

MARY KASANGO

JUDGE