



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

**Misc. Appli. 354 of 2006**

**STEPHEN NJENGA WAWERU**

**PAUL MBUI**

**MICHAEL NDIRANGU WAHOTHI**

**STEPHEN KIARIE NJENGA**

**JANE WANJIRU KAMAU**

**PETERSON MWANGI GATHONJIA**

**JOSEPH RANJI NJENGA**

**MICHAEL GITAU MACHIBU**

**JOSEPH KIMANI KANGETHE.....APPLICANTS**

**Versus**

**REGISTRAR OF COMPANIES.....RESPONDENT**

**ISAAC NJENG KAMUNGE )**

**JOSEPHAT KINYANJUI MBUGUA )**

**JOSEPH NJATHI )**

**HENRY NYABUTO OMAE )**

**CATHERINE WAMAITHA MATHERI )**

**JULIUS IRUNG MWANGI )**

**BERNARD GAITHO KARINGA )**

**SAMUEL MUNGER ).....INTERESTED PARTIES**

**RULING**

The ex parte Applicants, Stephen Njoya Waweru, Paul Gitau Mbui, Michael Ndirangu Wahothi, Stephen Kiarie Njenga, Jane Wanjiru Kamau, Peterson Mwangi Gathinja, Joseph Ranji Njenga, Michael Gitau Machibu and Joseph Kimani Kangethe seek the leave of this court to commence Judicial Review proceedings against the Registrar of Companies. Isaac Njenga Kamunge, Josephat Kinyanjui Mbugua, Joseph Ngethi, Henry Nyabutu Omaa, Catherine Wamaitha Matheri, Julius Irungu Mwangi, Benard Gaitho Karinga, Samuel K. Kariuki and Fred Munga are named as Interested Parties.

The Applicants seek the following orders:

- (1) That the court be pleased to grant leave to the Applicants to apply for an order of certiorari to remove into the High Court and quash the decision of the Respondent as set out in the letters dated 27<sup>th</sup> May 2008 and 10<sup>th</sup> June 2008 to register the Interested Parties as directors of Mukuyu-ini Farmers Co. Ltd.;
- (2) That the Hon. Court do grant leave to the Applicants to apply for an order of mandamus directed at the Respondent compelling her to cancel and or revoke the registration of the Interested Parties as directors of Mukuyu-ini Farmers Co. Ltd.;
- (3) That the court be pleased to grant leave to the Applicants to apply for an order of prohibition prohibiting the Respondent from recognizing the Interested Parties as directors of Mukuyu-ini Farmers Co. Ltd.;
- (4) That the leave granted as sought above do operate as a stay of the decision of the Respondent to registrar be Interested Parties and or any actions of the Interested Parties in representing, holding themselves and/or exercising and/or purporting to exercise any powers vested in the directors of Mukuyu-ini Farmers Co. Ltd. pending the hearing and determination of the Notice of Motion and further orders of this court;
- (5) Costs of the application to be provided for.

The Chamber Summons is premised on a statutory statement and verifying affidavit of Stephen Kiarie Njenga both dated 13<sup>th</sup> June 2008 and a further affidavit dated 27<sup>th</sup> June 2008. Though the Respondents opposed the Chamber Summons they did not file any reply. The firm of Macharia Kenneth appeared on behalf of the Interested Parties who filed a notice of preliminary objection dated 28<sup>th</sup> June 2008 and a replying affidavit which is undated but filed in court on 26<sup>th</sup> June 2008.

Mr. Kamwendwa who argued the application on behalf of the Applicants urged that they are challenging the decision of the Registrar of Companies to register the Interested Parties as directors of Mukuyu-ini Farmers Co. Ltd. The letter of the Assistant Registrar, Mr. Mosoti, is dated 27<sup>th</sup> May 2008 (SKM 6). That the Applicants objected to the Registration (SKM 7 & 8) and by letter of 30<sup>th</sup> May 2008 from the District Officer Kiambaa, he said that the extra ordinary general meeting did not take place on 3<sup>rd</sup> May 2008. That is the meeting in which elections would have been done. Vide a letter of 5<sup>th</sup> June 2008, the Registrar's office indicated that they had established that the meeting of 3<sup>rd</sup> May 2008 did not take place and they had withdrawn the letter of 27<sup>th</sup> May 2008 in which the Interested Parties were recognized as the Directors of the said company (SK 9). Counsel submitted that the court had in Misc 421/06 ordered that the Applicants and Interested Parties hold a joint Annual General Meeting and that had the Respondents carried out enquiries they would have found that no such meeting took place and would not have registered the Interested Parties as directors. That the Applicants were not heard before the Interested Parties were registered as directors and that is a breach of the cardinal principle of natural justice that nobody should be condemned unheard. That the actions of the Registrar are unreasonable, biased, and an illegality. Counsel relied on Misc Application 747/06 **REP V REGISTRAR OF SOCIETIES ex parte UHURU KENYATTA.**

Counsel was opposed to the replying affidavit of the Interested Parties which is jointly sworn by the Interested Parties for reasons that it is fatal and should be struck out.

As to the allegation that the Applicants are not members of the Mukuyu-ini the Applicants annexed certificates from the company as proof of membership.

As for Mr. Kamwendwa's disqualification from representing the Applicants because he used to act for Mukuyu-ini, Counsel submitted that the company was not a party to the suit and there is no evidence that he has used information obtained from Mukuyu-ini against the Respondents. That the Respondent will not suffer any prejudice. Counsel relied on the following cases;

1. **RELIANCE BANK LTD V ROMANUS ODHOCH & ANOTHER HMISC CA 46/98**
2. **H.T. FIRE AFRICA LTD V GHARIEB NRB HCC 665/03**
3. **QUASAR LTD V METRO PETROLUM LTD NRB HCC 240/05**

That the preliminary points that have been raised are not points of law in terms of the decision in **MUKISA BISCUIT MANUFACTURERS CO. LTD. V WEST END DISTRIBUTORS LTD (1969) EALR 696.**

He also urged that based on the decision in **HADKINSON V HADKINSON (1952) 2 ALL ER** that mere disobedience of a court order is not a bar to a party being heard.

Mr. Macharia, Counsel for the Interested Party opposed the Chamber summons relying on the affidavit sworn in reply by Isaac Njenga Kamunge and 2 others and the notice of preliminary objection filed. The first point raised by the Respondents is that the Applicants are not bona fide members of Mukuyu-ini Farmers Co. Ltd. and have no locus standi to bring the application, that the Applicants are in contempt of a court order issued by court in HCC 620/07 **Peter Kimunya Njoroge suing on behalf of Mukuyu-ini Farmers Co. Ltd. v Stephen Waweru & 3 Others** the Applicants herein and lastly that Kamwendwa & Co. Advocate are not competent to act for the Applicants herein as he previously represented Mukuyu-ini Farmers Co. Ltd. in several other matters and is in breach of Advocates Rules.

In respect of the court order in 620/06 Counsel submitted that the Applicants were ordered to deposit 5 million within 24 hours but they failed to obey that the order should be obeyed unless discharged (Hadkinson v Hadkinson). That the Applicants should not be heard till they purge the contempt.

Counsel urged that the Registrar acted within the law in recognizing the Interested Parties as directors because of the letter of 9<sup>th</sup> June 2008 in which the DO Kiambaa withdrew his letter of 30<sup>th</sup> May 2008 and asked the Registrar not to make any decision based on that letter.

Counsel also submitted that this application is overtaken by events because the Applicants have admitted that their mandate expired on 18<sup>th</sup> June 2008 and this court cannot order a reinstatement.

That the Applicants have abused this court process in that when they appeared before this court and were ordered to serve the Chamber Summons, they then moved the Kiambu Senior Principal Magistrate's court with an application (Ex 16) in which they sought orders of injunction to issue against the Interested Parties who were named as defendants. That court declined to grant any orders as it read mischief in the application, that it was meant to derail the meeting of 21<sup>st</sup> June 2006.

It was also submitted that in HMisc 421/06, Justice Emukule ordered that the Interested Parties and Applicants call an Annual General Meeting which the Interested Parties duly complied with and had a on 16<sup>th</sup> June 2007 but applicants refused to cooperate and instead presented their own records to the Registrar and the Registrar had the lists with different sets of Directors both are dated 18<sup>th</sup> June 2007 (JKM 4).

Mr. Mosoti, appearing for the Respondent only drew the courts attention to the letter dated 9<sup>th</sup> June 2008 which the Applicants never exhibited to their application. It was written by the D.O. of Kiambaa

withdrawing an earlier letter written by him dated 30<sup>th</sup> May 2008 in which he had said the meeting of 3<sup>rd</sup> May 2008 never took place. That it is after receipt of that letter that the Registrar decided to recognise the Interested Parties as directors.

I have considered the Chamber Summons application, the grounds filed by the Applicants, and Interested Parties and all submissions on record. There is no doubt that the Applicants and Interested Parties have been engaged in an unending wrangles over the directorship of Mukuyu-ini Farmers Co. Ltd. It is evident from the proceedings they have had before the various courts – HMisc 421/06 involving the same parties before Justice Emukule, HMisc 620/07 before Justice Rawal, and 210/04 all over leadership of the company and HC 354/08.

The wrangles have been fuelled particularly by the Registrars office which is supposed to oversee the settlement of such disputes. It is evident from what happened in this case. On 18<sup>th</sup> June 2007, the two warring parties were able to file records with the Company's Registries that they were the bona fide directors. How could the Registrar's office manage to receive records from the two sides without noticing that the other was on record as the directors.

Similarly on the occasion complained of herein, on 27<sup>th</sup> May 2008, Kennedy Mosoti acting for the Registrar, and who I believe is the Counsel herein, recognised the Interested Parties as the Directors of Mukuyu-ini Farmers as of that date. However on 30<sup>th</sup> May 2008 when the DO Kiambaa wrote to the Registrar that no meeting had taken place, the Registrar, Mr. Mosoti on 5<sup>th</sup> June 2008 reconfirmed the Applicants as the bona fide directors of Mukuyu-ini Farmers again. From these changes it is obvious that the Registrar's office upon receipt of information never verified or bothered to listen to the other side as to what the true position is. They did not bother to call for minutes of the meetings to find out whether an annual general meeting had been held, when was the last meeting held annual general meeting and another one due etc that. For the Registrar to recognize two sets of officers at the same time is indicative of how that office is incompetent or it is not serious about performing its duties. There would have been no need for the charges to be made in the directorship of the company several times in two weeks if the Registrar's offices bothered to take time to check, or verify or unless they had other ulterior motives in the registration of the different groups.

It is obvious that the Registrar's office never made enquiries as is required, and would be expected of them, to establish the bona fide directors. That is evident in their indecision as to which group are the bona fide directors and their decision would not pass the standard of reasonableness. It is made arbitrarily without any proper basis.

Is the undated affidavit filed by the Interested Parties incompetent? In my considered view, that affidavit cannot be regarded on account of the defect of it not being undated. It has been signed before a Commissioner of Oath and the defect does not go to the substance of the affidavit it will not be struck off. The defect is curable.

An objection was also raised to the manner in which the affidavit was sworn jointly by three persons. I find no law which prohibits more than one person swearing an affidavit. The affidavit is sworn in the first person in compliance to the provisions of Order 18 Civil procedure Rules. It is properly on record.

It is notable that the Applicant did not exhibit the letter from the DO of Kiambaa dated 9<sup>th</sup> June 2008. They only exhibited the letter of 30<sup>th</sup> May 2008 where that DO stated that the meeting of 3<sup>rd</sup> May 2008 never took place. That is the meeting where the Interested Parties were supposedly declared as directors. However the same DO wrote the letter dated 9<sup>th</sup> June 2008 exhibited by the Interested Parties, as NK 12. It reads as follows;

**“Further to my letter dated 30<sup>th</sup> May 2008, I wish to withdraw the contents of that letter. I would also wish to request that you should not make any decision based on the said letter. I regret the error.”**

The letter of 30<sup>th</sup> May 2008 indicated that no meeting took place. By withdrawing that letter of 3<sup>rd</sup> May 2008 it meant the meeting never took place and there is no ambiguity about it. The question is why did the Applicant fail to exhibit that letter? It is obvious the Applicant did not want the court to know that the DO who had said there was no meeting on 3<sup>rd</sup> May 2008 and therefore no elections, had withdraw that statement and said that infact it took place. That letter is what made the Registrar change the records again and recognize the Interested Parties as directors. The Applicants have a duty of candour and is expected to make a full and frank disclosure of all material facts relating to their case be they adverse their case or not. In **MICHEAL FORDHAM'S BK, JUDICIAL REVIEW HANDBOOK 3<sup>RD</sup> ED** the author says at page 352;

**“21.5 CLAIMANT’S DUTY OF CANDOUR. A claimant for permission is under an important duty to make full and frank disclosure to the court of all material facts and matters. It is especially important to draw attention to matters which are adverse to the claim in particular,**

- 1) **any statutory restriction on the availability of Judicial Review;**
- 2) **any alternative remedy;**
- 3) **any delay/lack of promptness and so need for the extension of time.**

**In facing upto adverse points, the claimant will have an early opportunity to explain why those points are not fatal and only the case should be permitted to proceed (i.e. confessed avoid). The duty of full and frank disclosure harks back to the time when permission for Judicial Review was ex parte (without notice to the defendant/Interested Party). That has changed.”**

In **KNFC V ECONET WIRELESS KENYA LTD HMISC APPLICATION 1621/05**, the court cited the case of **R V METROPOLITAN POLICE FORCE DISCIPLINARY TRIBUNAL ex parte LAWRENCE (1999) EL HC ADM 588** where the High court in England observed-

**“It is essential that parties who seek leave to move for Judicial Review should appreciate that they have a duty to make full disclosure of all potentially material facts to the court.....”**

In Kenya, Judicial Review proceedings are still made ex parte unless the court, like in this case, directs that they be heard inter partes. But even if heard inter partes, the duty still rests on the Applicant to disclose all material facts. The duty to disclose is important in that the party coming ex parte may obtain orders that are adverse to the other party and the court needs to know all facts before giving any orders. In this case, the Applicant failed to disclose a material fact that the DO had disclosed that the meeting of 3<sup>rd</sup> May 2008 actually took place and elections were conducted. A person who tells court lies is not entitled to the discretion of this court to grant the orders sought and that alone would disentitle him to the orders sought. The Applicants were not entitled to the orders of this court having withheld a material fact from the court.

The Interested Parties raised an interesting point. That after the applicants filed this application on 13<sup>th</sup> June 2008 and on 16<sup>th</sup> June 2008 the court directed that they serve the other parties for hearing inter partes, that the Applicants moved to Kiambu Senior Principal Magistrate’s Court seeking orders of injunction. The proceedings in Kiambu court were exhibited as MK 16, - SPMCC 124/08, filed in Kiambu Court on 15<sup>th</sup> June 2008 under certificate of urgency. In that case, the Applicants who are also Applicants herein sought an order of injunction restraining the Defendants (Interested Parties) from requisitioning, convening and/or holding the meeting scheduled for 21<sup>st</sup> June 2008 pending hearing of HCC 354/08 and a declaration that the said meeting of 21<sup>st</sup> June 2008 is unlawful. The court heard the Chamber Summons seeking interim orders of injunction and declined to grant the orders for reasons that the court was of the view that the said application was meant to derail the meeting of 21<sup>st</sup> June 2008. Having come to this court for Judicial Review seeking orders of stay of the decision recognizing the Interested Parties as directors of Mukuyu-ini Farmers Co. had the orders of stay were granted, then they would have the effect of stopping the meeting of 21<sup>st</sup> June 2008. The suit filed in Kiambu and the

Judicial Review application would have had the same effect and I do agree with the Interested Parties that the Applicant was abusing the court process and the Applicants are not entitled to the order sought. What is abuse of court process; Justice Makhandia in **MISC APPLICATION 898/03** in **REP V HON. AG & PMS COURT** Justice Nyamu adopted Lord Bingham CJ in his decision in **AG V BAKER, THE TIMES March 7 2000** on what abuse of court process is. The C.J. said:

**Although the term abuse of the court process is not defined in the rules or practice directions it has been explained in another context as,**

**“using that process for a purpose or in a way significantly different from its ordinary and proper use.”**

**It is an abuse to bring vexatious proceedings i.e. two or more sets of proceedings in respect of the same matter which amounts to harassment of the defendant in order to make him fight the same battle more than once with the attendant multiplication of costs, time and stress. In this context it is**

**immaterial whether the proceedings are brought concurrently or severally.”**

I adopt the above definition of what an abuse of the court process is. That is exactly what the Applicants have done here. When they did not get interim orders before this court they moved the lower court for the injunctive orders which would have the same effect as stay orders. Their hands are soiled and they would not be entitled to the exercise of this court’s discretion to hear them and grant the orders sought.

There was an issue raised of whether or not the Applicants are members of Mukuyu-ini Farmers Co. Ltd. The Applicants have been holding themselves as such for a long time and have held offices in the company. That is not an issue that can be resolved at this stage but at a substantive hearing.

It was admitted by the Applicants that Justice Rawal made orders in HCC 620/07 on 5<sup>th</sup> October 2007 in which some of the Applicants were defendants and the court ordered the Respondents to deposit Kshs.5,015,150/= with the court within 24 hours. The Applicants admit they have not complied with the said order. That was a consent order

and the Applicants never moved the court for setting aside the said order or for its review until the Respondents moved that court on 2<sup>nd</sup>

May 2008 under certificate of urgency seeking to commit the Applicants to civil jail for contempt.

If the Applicants were genuine in settling that said matter which is also related to the present, that is, the issue of leadership of the company, they would have moved the court for variation of that order if they could not for some reason, comply. Instead, they sat back and did nothing and yet they still want this court to exercise its discretion in their favour. They are in flagrant disobedience of the court’s orders and do not deserve the audience of this court. The order of 5<sup>th</sup> October 2007 is in still in force and has to be obeyed whether it is illegal or otherwise until it is discharged See **HADKINSON V HADKINSON**.

I do not think I need to go any further in this matter. From all that I have considered above, the Applicants have abused the court process and do not deserve the exercise of this court’s discretion to hear them and grant them any orders. It will be unnecessary to consider all

the issues touching on the merits of this Chamber Summons dated 13<sup>th</sup> June 2008 and it is hereby dismissed with costs.

Dated and delivered this 11<sup>th</sup> day of July 2008.

R.P.V. WENDOH

JUDGE

Read in the Presence of :

Mr. Macharia for Interested Parties

Mr. Kamwendwa for Applicants

Daniel Court Clerk