



REPUBLIC OF KENYA

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

Civil Case 449 of 2008

ISAAC NJENGA KAMUNGE.....1ST PLAINTIFF

JOSPHAT KINYANJUI MBUGUA.....2ND PLAINTIFF

JOSEPH NJATHI.....3RD PLAINTIFF

HENRY NYABUTO OMAE.....4TH PLAINTIFF

CATHERINE WAMAITHA MATHERI.....5TH PLAINTIFF

JULIUS IRUNGU MWANGI.....6TH PLAINTIFF

BERNARD GAITHO KARINGA.....7TH PLAINTIFF

SAMUEL K. KARIUKI.....8TH PLAINTIFF

FRED MUNGE.....9TH PLAINTIFF

MUKUYUINI FARMERS CO. LTD.....10TH PLAINTIFF

- VERSUS -

STEPHEN WAWERU NJENGA.....1ST DEFENDANT

PAUL GITAU MBUI.....2ND DEFENDANT

MICHAEL NDIRANGU WAHOTHI.....3RD DEFENDANT

STEPHEN KIARIE NJENGA.....4TH DEFENDANT

JANE WANJIRU KAMAU.....5TH DEFENDANT

PETERSON MWANGI GATHONJIA.....6TH DEFENDANT

JOSEPH RANJI NJENGA.....7TH DEFENDANT

MECHAEL GITAU MACHIBU.....8TH DEFENDANT

RULING

The 1st to 9th plaintiffs are directors of the 10th plaintiff, Mukuyuini Farmers Co. Limited (*hereinafter referred to as the company*). They were so elected as directors of the company in a meeting of the shareholders held on 3rd May 2008. The said directors were recognized as the duly elected directors of the company by the Registrar of Companies. This recognition took effect from 27th May 2008. The defendants, the former directors of the company were aggrieved by the decision of the shareholders in ousting them from office. They applied by way of judicial review to the court seeking a writ of certiorari to remove to the court and quash the decision of the Registrar of Companies recognizing the 1st to 9th plaintiffs as the duly elected directors of the company. In her considered ruling delivered on 11th July 2008 (in **Nairobi HC Misc. Appl. No.354 of 2008 Stephen Njenga Waweru & others vs. Registrar of Companies**), Wendoh J dismissed the defendants' application for judicial review on the grounds that the defendants had, firstly, failed to disclose material facts to the court (*including the fact that a meeting had indeed been held by the shareholders of the company in which the defendants were voted out of office*), and secondly, that the defendants had abused the due process of the court by being in contempt of the orders issued by the court in an earlier suit in which the defendants were required to deposit a sum of KShs.5,015,150/= in court. By the time the defendants presented their application for judicial review, they had not complied with the said order of the court.

In the present suit, the plaintiffs are, *inter alia*, seeking orders of permanent injunction to restrain the defendants by themselves or their agents from representing or holding themselves or exercising or purporting to exercise any powers vested in the directors of the company. They further prayed for an order of mandatory injunction to compel the defendants to forthwith release and hand over all the company's books, documents, title to land, assets and all other properties in their possession to the plaintiffs. Contemporaneous with filing suit, the plaintiff made an application pursuant to the provisions of **Section 3A** of the **Civil Procedure Act** seeking orders of mandatory injunction to compel the defendants to forthwith release and hand over to the plaintiffs all the company's books, documents of title to land, assets and all other properties in their possession or in default thereof, the plaintiffs were seeking authority of the court to forcefully take possession of the said property from the defendants. To give effect to the said order, the plaintiffs sought a further order for the Officer Commanding Kiambu Division to give due assistance. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Isaac Njenga Kamunge, the 1st plaintiff.

The application is opposed. Stephen Waweru Njenga, the 1st defendant swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the application, apart from being frivolous, vexatious and an abuse of the court process, was bad in law, incompetent and misconceived. He deponed that the consent order which was the subject of the allegation made by the plaintiffs that the defendants were in contempt of an order of the court, was fraudulently recorded without the authority of the defendant. The 1st defendant swore that the 1st to 9th plaintiffs were illegally in office since no meeting of the company actually took place on the day the said defendants alleged that they were elected into office. He deponed that it was incorrect to state that they were in contempt of the orders of the court, yet they had not, firstly, been cited for contempt of court, and secondly, been prosecuted for being in contempt of the court. He swore that the plaintiffs had no basis to fear for the safety of the company's documents held by the defendants since the defendants still hold that they are the duly elected directors of the company. He denied that the defendants had defrauded the company. He deponed that the defendants had accounted for all the amounts that they had received in account of the company. He urged the court to dismiss the application with costs.

At the hearing of the application, I heard the submissions made by Mr. Macharia for the plaintiffs and by Mr. Kibe for the defendants. Other than citing several decided cases, counsel relied on the facts contained in the application and the affidavits sworn by their respective clients in support of their respective opposing positions. The issue for determination by this court is whether the plaintiffs established a case to entitle this court grant them the mandatory injunction sought. The principles to be

considered by this court in determining when to grant a mandatory injunction are well settled. In **Kenya Breweries Limited & Anor. vs. Washington O. Okeyo CA Civil Appeal No. 322 of 2000** (Nairobi), the Court of Appeal held at page 3 as follows:

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edn. Para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffa mandatory injunction will be granted on an interlocutory application”.

Also in **Locabail International Finance Ltd. vs. Agroexport and others [1986] 1 All ER 901** at page 901 it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

*The principles of law enunciated by these decisions have received full approval by the courts within our jurisdiction. See the cases of **Belle Maison Limited vs. Yaya Towers Limited HCCC 2225 of 1992**, per Bosire, J (as he then was) and the **Ripples Limited vs. Kamau Mucuha HCCC No.4522 of 1992** per Mwera, J.”*

In the present application, certain facts are not in dispute. It is not disputed that the 1st to 9th plaintiffs are the duly registered directors of the company. They have been so recognized since 27th May 2008. The record kept by the Registrar of Companies confirms this position. It is apparent that the defendants, the former directors of the company, still insist that they are properly in office despite the fact that a court of competent jurisdiction dismissed their application for judicial review seeking the nullification of the election of the 1st to 9th plaintiffs. In the said application, the defendants sought to quash the decision of the Registrar of Companies recognizing the 1st to 9th plaintiffs as the directors of the company. As stated earlier in this ruling, the court noted that the defendants were no longer the directors of the company. It now emerges that the defendants are still holding the documents and the assets of the company under the guise that they are still the directors of the company. For instance, in paragraph 13 of his replying affidavit, Stephen Waweru Njenga deponed that:

“...In reply to paragraphs 14 and 15 I believe the plaintiffs apprehension about the safety of the assets and documents of the 10th plaintiff are misplaced as the same are safe with us given that we were duly elected by members in the last meeting of the company whereas the applicants have actually not been elected by members as directors.”

It is evident from the foregoing that the defendants have not accepted the verdict of the court that they are no longer the directors of the company. Since the court has already declared the 1st to 9th plaintiffs as the duly elected directors of the company, there is no basis in law why the defendants are still holding on to the properties of the company. As far as this court is concerned, the defendants, being no longer the directors of the company, have no business holding to the properties of the company. The defendants previously held the said assets of the company in their capacity as directors of the company. They have been ousted and removed from office. They lack legal capacity to retain possession of the company’s properties.

It is clear from the foregoing that the plaintiffs' application is for granting. Special circumstances exist to enable this court grant the mandatory injunction at an interlocutory stage. The assets of the company are liable to be wasted if they remain in the hands of persons who are no longer recognized as directors of the 10th plaintiff. The plaintiffs' application seeking to compel the defendants, by mandatory injunction to hand over to the plaintiffs all the books, documents, titles to land, the assets and all other properties belonging to the company is hereby allowed. The defendants are hereby ordered to hand over possession to the plaintiffs, of all the assets of the company that are in their possession in their capacity as the former directors of the company. They are required to do the said handing over within fourteen (14) days of today's date. In default thereof, the plaintiffs shall be at liberty to commence contempt of court proceedings against the defendants. The order of this court shall personally be served upon each defendant together with a notice of penal consequences. The plaintiffs shall have the costs of this application.

DATED at NAIROBI this 22nd day of OCTOBER 2008.

L. KIMARU

JUDGE