



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Suit 49 of 200

YASANGWAN HOLDINGS CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

ISAIAH CHELUGET.....1ST DEFENDANT/RESPONDENT

DR. DAVY KOECH.....2ND DEFENDANT/RESPONDENT

MUSA KIPTOO KOECH.....3RD DEFENDANT/RESPONDENT

JOEL CHUMO.....4TH DEFENDANT/RESPONDENT

AMBROSE MAINA.....5TH DEFENDANT/RESPONDENT

TEA HOTEL LTD.....6TH DEFENDANT/RESPONDENT

RULING

This is an application by the Plaintiff made under Order 39, rule 2 of the Civil Procedure Rules and Section 63(c) and (e) and 3A of the Civil Procedure Act seeking an order of injunction to restrain the 1st to 5th Defendants acting in their capacity as directors of the 6th Defendant from effecting the special resolution made on 20th of April, 2007 in respect of the 6th Defendant pending the hearing and determination of the suit. The application is based on the grounds on the face of the application and supported by the annexed affidavit of William Kimutai Sang. The grounds in support of the application are that the special resolution made on 20th April, 2007 by the 1st to 5th Defendants was *ultra vires* their authority. The Plaintiff further contended that the said special resolution was contrary to the 6th Defendant's Memorandum and Articles of Association and the provisions of the Companies Act. The Plaintiff stated that it would suffer irreparable damages if the order of injunction sought is not granted.

The application is opposed. The Defendants swore three replying affidavits in opposition of the application. The 4th Defendant Joel Chuma, the 5th Defendant Ambrose Maina and the 3rd Defendant Musa Kiptoo Koech all swore replying affidavits in opposition to the application. The first two affidavits were filed in court on 18th May, 2007. The affidavit of Musa Kiptoo Koech was filed in court on 4th June, 2007. The defence was filed on 18th May, 2007. The firm of Migiro & Co. Advocates, acting for the Defendants entered appearance on 29th May, 2007. The two affidavits filed on 18th May, 2007 by the said firm of Migiro & Co. Advocates on behalf of the Defendants were therefore filed without authority.

The defence was also filed without authority. I will at this stage strike them out because they were filed before the said firm of Advocates were properly on record. The only replying affidavit properly on record is the affidavit of Musa Kiptoo Koech. He deponed that the said special resolution was a draft which was intended to be approved first by the 6th Defendant's advocates first before the debenture was registered.

At the hearing of the application, I heard the submissions made by Mr. Rono on behalf of the Plaintiff and by Mr. Migiro on behalf of the Defendants. Mr. Rono submitted that the resolution passed by the 1st to 5th Defendants in their capacity as the directors of the 6th Defendant was *ultra vires* the powers of directors of the 6th Defendant as provided for by the Memorandum and Articles of Association of the 6th Defendant. He submitted that the said resolution sought to alter the shareholding of the 6th Defendant under the guise of some shareholders of the 6th Defendant would lend the 6th Defendant a loan and which if the 6th Defendant defaulted in repaying the the said shareholders would have the shares of the 6th Defendant equivalent to the said loan plus interest transferred to them.

The Plaintiff was aggrieved that should the said special resolution be given effect to it would amount to the share capital of the company being increased without the approval of the shareholders in a special general meeting. He further submitted that the said special resolution would result in substantially changing the shareholding of the 6th Defendant without the approval of the shareholders of the company. He submitted that it was clear from the said resolution that the 6th Defendant was not in a financially stable position to repay the said loan proposed to be advanced to it by some of its shareholders. He submitted that it was obvious that the 6th Defendant would default in repaying the said loan advanced to it with the obvious consequences that some shares of the company would be transferred to the said debenture holders. He submitted that William Sang, the director of the Plaintiff had capacity to bring the suit on behalf of the Plaintiff company. He also submitted that this court had jurisdiction to grant the order of injunction sought to prevent the Defendants from acting in excess of their powers as directors. He urged this court to allow the application with costs.

Mr. Migiro for the Defendants opposed the application. He submitted that William Sang, the person who brought the suit on behalf of the Plaintiff company had no authority to bring the suit on behalf of the Plaintiff. He submitted that there was no special resolution made by the Plaintiff which would have enabled the Plaintiff file the suit before court. He submitted that William Sang had no authority to swear any affidavit on behalf of the Plaintiff. Mr. Migiro argued that William Sang was impersonating the Plaintiff company. He further submitted that the 1st to 5th Defendants did not act in excess of their jurisdiction as directors of the 6th Defendant. He submitted that the directors of the 6th Defendant acted in good faith and for the benefit of the 6th Defendant to enable the 6th Defendant settle a debt which is owned to the Kericho Municipal Council.

Mr. Migiro denied the suggestion made by the Plaintiff that the 6th Defendant would not be in a financial position to pay the loan advanced to it by some of the shareholders. He further submitted that the special resolution passed by the 1st to 5th Defendants would not come into effect until the same is approved by the shareholders of the 6th Defendant in a general meeting. He submitted that William Sang was a person who was bent on disrupting the affairs of the Plaintiff and the 6th Defendant and his application in this suit was in furtherance of his penchant for not acting collectively with the other shareholders, both of the Plaintiff company and of the 6th Defendant. Mr. Migiro referred this court to several decided cases in support of his submissions. This court shall refer to the said decided cases where necessary in its ruling.

I have carefully read the pleadings filed by the parties to this suit. I have also carefully considered the submissions made before me by Mr. Rono on behalf of the Plaintiff and by Mr. Migiro on behalf of the Defendants. The issue for determination by this court is whether the Plaintiff has established such a case as to entitle this court to grant it the order of injunction sought. The principles to be considered by this court in deciding whether or not to grant the said injunction sought are well settled. In **Giella -vs- Cassman Brown [1973] EA 358**, it was held that an injunction would not normally issue unless the

applicant establishes a prima facie case with a likelihood of success. The applicant has to prove that he is likely to suffer irreparable damage that would not be compensated by an award of damages. Finally, in the event that the court would be in doubt, it shall decide the case on a balance of convenience.

What are the issues in dispute in the present case? The 6th Defendant is owned by two shareholders namely Yasangwan Holdings Co. Ltd (the Plaintiff) and Sololo Investments Ltd. The Plaintiff owns 8,000 shares whilst the Sololo Investments Ltd owns 12,000 shares. The directors of the Plaintiff and the directors of the Sololo Investments Ltd. are represented in the board of the 6th Defendant. The 4th and 5th Defendants represent the Plaintiff in the board of the 6th Defendant. It is apparent from the pleadings filed, especially the affidavit of William Sang, that the 6th Defendant has been experiencing financial difficulties. In fact the 6th Defendant recently posted a loss of KShs. 1.2 million.

The 6th Defendant has been unable to pay the rates due to the Kericho Municipal Council. The rates have accumulated to the sum of KShs.23 million. The 6th Defendant negotiated with Kericho Municipal Council which agreed to waive the accrued interest in respect of the said rates owed by the 6th Defendant. The Kericho Municipal Council agreed to waive the interests charged. The 6th Defendant was required to pay a sum of KShs. 8 million in settlement of the said outstanding rates. Its clear from the minutes of the meeting held by the directors of the 6th Defendant that the 6th Defendant is not in a financial position to pay the said amount of KShs. 8 million. It is also clear that the 6th Defendant cannot borrow the said amount from a financial institution due to the fact that there is a problem with the title to its properties.

It was then that the directors of the 6th Defendant came up with the idea of the shareholders issuing a debenture to the company so that it could be able to settle the outstanding rates in respect of its property to the Kericho Municipal Council. A special resolution was passed which provided, *inter alia*, that shareholders who would be able and interested would issue a debenture of the sum of KShs. 10 million to the 6th Defendant and which sum would be paid with an annual interest of 6%. In the event that the 6th Defendant would default in repaying the said amount loaned in the debenture, then the said loan amount would be converted into equity in form of shares to the shareholders who loaned the amount to the 6th Defendant. It is apparent that the 1st to 5th Defendants as directors of the 6th Defendant have sought to give effect to the said special resolution without seeking the authority of the entire shareholders of the 6th Defendant.

Having carefully evaluated the facts of this case, it is evident that the shareholders of the Plaintiff, including William Sang, are justified in being apprehensive that the 1st to 5th Defendants had a sinister motive when they passed the said special resolution. Although Mr. Migiro has submitted that the said special resolution would have been presented to the shareholders in a special general meeting to be called at a later date, it is clear from the events that took place from 20th April, 2007 that the 1st to 5th Defendants are intent on by-passing the shareholders of both the Plaintiff and the 6th Defendant in their quest to have the debenture registered. It is therefore clear to this court that the 1st to 5th Defendants, acting in their capacity as directors of the 6th Defendant, passed the said special resolution of the 20th April, 2007 *ultra vires* the Memorandum and Articles of Association of the 6th Defendant. The 1st to 5th Defendants could not purport to pass a resolution whose ultimate effect would be the dilution of the shareholding of the 6th Defendant without the authority of the entire shareholders of the 6th Defendant in a general meeting.

I do therefore hold that the Plaintiff has established a prima facie case that the 1st to 5th Defendants acted *ultra vires* their powers as the directors of the 6th Defendant when they passed the resolution of 20th April, 2007. For the avoidance of doubt, I would state that the decision made by the 1st to 5th Defendants in the said special resolution can only be given effect to if the same is approved by the shareholders of the 6th Defendant in a duly convened general meeting. As regard the submission by Mr. Migiro that William Sang did not have *locus standi* to bring this suit on behalf of the plaintiff company, I would state that the

position of the law is that a resolution of a company must be passed before a suit is brought to court. However, such a company may pass such a resolution ratifying its decision to bring a suit before court after the suit has been filed. I therefore do not agree with the submissions by Mr. Migiro that the Plaintiff lacked the requisite capacity to bring this suit before court.

Mr. Migiro quoted the decision of **Foss –vs- Harbottle (1843) 2 Hare 461** where it was held that it is only a company which can file a suit in a court of law to redress a wrong committed against it. In the present case the suit has been brought by the Plaintiff company which is justifiably aggrieved that its shareholding in the 6th Defendant is in danger of being adversely affected by the said special resolution. William Sang, as a director of the Plaintiff has *locus standi* to bring the suit to safeguard the property of the Plaintiff. In any event, even if the said William Sang had filed the said suit in his capacity as a shareholder of the Plaintiff, this court would still have given him audience if he alleged, as the Plaintiff has done, that the 1st to 5th Defendants have acted illegally and *ultra vires* their powers as directors of the 6th Defendant.

The upshot of the above reasons is that the application for injunction by the Plaintiff is hereby allowed with costs. The Defendants jointly and severally are hereby restrained by means of a temporary injunction from giving effect to the special resolution of the 20th April, 2007 in respect of the 6th Defendant pending the hearing and determination of the suit filed by the Plaintiff. It is so ordered.

Dated at Nakuru this 20th day of June, 2007.

L. KIMARU

JUDGE