

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

Civil Suit 355 of 2007

JAMES MUTUA MWANZIA.....1ST PLAINTIFF/APPLICANT

TIMOTHY NZOMO.....2ND PLAINTIFF/APPLICANT

NGWILI KYALO MAUNDU.....3RD PLAINTIFF/APPLICANT

VERSUS

KYANZA FARMERS CO. LTD.....DEFENDANT/RESPONDENT

RULING

The Plaintiff's instituted this suit by filing a plaint dated 11th July 2007 simultaneously with a chamber summons application. The application is the one under consideration in this ruling but from the onset let me make it quite clear that the court ordered the Applicants to serve the application after certifying it urgent. After the application was served on the Respondents, the application was fully argued before me on 13th July 2007 and dismissed. The following then are the reasons for its dismissal. A little background to the application is necessary to enable one understand the application. The Plaintiffs at paragraph 3 of the plaint averred that they were shareholders of the Defendant Company which has a membership of 1890 shareholders. The Plaintiffs complaint in the plaint was that the Defendant Company purported to publish a notice of an extraordinary General Meeting in the Sunday Nation newspaper of 24th June 2007. They contend that the said notice was fundamentally defective, illegal and void for contravening the Companies Act Cap 486 and the Defendant Company's Memorandum and Articles of Association. The Plaintiffs contend further that themselves and the majority of the shareholders would suffer irreparable loss and damages if the meeting were allowed to proceed. In the prayers, the Plaintiffs seek a declaration that the notice of convening the Extraordinary General Meeting was totally defective, and thereby null and void.

The application is expressed to be brought under Order XXXIX rule 1,2,2A,3 and 4 of Civil Procedure Rules and Section 3A of Civil Procedure Act. It seeks injunctive relief's to restrain the Defendant from convening an Extraordinary General Meeting of the Defendant on 14th day of July, 2007 pending the hearing and determination of the application and subsequently pending the hearing and determination of the suit. The Respondent filed a long replying affidavit of 24 paragraphs with 11 annexures. The gist of the affidavit is that since 2001 various court orders have been issued injuncting the Defendant Company from convening similar meetings and that as a result the Company creditors who are owed a total of 50 million shillings are yet to be paid and the company is slowly grounding to a halt. It also draws court's attention to the fact that the 2nd Plaintiff was not a shareholder or member of the Company and annexes the list of its members including the name of member No. 547 which was said to be his. The affidavit also draws court's attention to costs incurred by the Respondent through the issue of various notices, issued and posted to members including those made through electronic and print media, posting at various conspicuous places including posting in administrative offices and centers where members come from. The deponent avers further that all items required for the meeting had been bought and security arrangements made through Regular and Administration Police. It also raises issue with the delay in bringing the application and avers that the intention is mischievous.

Having considered all the submissions made by Mr. Mogire for the Applicants and Mr. Nzavi for the Respondent I disallowed the application for the following broad reasons. One that only two shareholders

have complained concerning the meeting out of 1888 other members. Two, the application was not brought timeously. Three, the Applicants were unable to show the prejudice they could suffer if the meeting was convened nor did they demonstrate the loss or damages they may suffer if the meeting continued. The Applicants did not demonstrate or disclose what mischief they sought to prevent. The Applicants did not offer any undertaking for loss in case the suit was eventually dismissed.

Four, the court was of the view that greater harm would be caused by restraining the Defendants from convening the meeting than in allowing the meeting to proceed. On a balance of convenience the balance shifts in favour of the Respondent. Five, on a technical point the application for an injunction could not succeed as the Plaintiff had no prayer for any injunctive relief to support it. The Plaintiffs did not establish a prima facie case with a probability of success. For these reasons the Application was dismissed with costs to the Respondent.

Dated this 21st day of September, 2007 at Nairobi.

LESIIT, J.

JUDGE

Dated, signed and delivered in presence of

Ojiambo holding brief Nzavi for Respondent

LESIIT, J.

JUDGE