



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Civil Case 126 of 2007

1. AMOS TUM KIPTOO 1ST PLAINTIFF
2. LAWRENCE K. KAPTOGE 2ND PLAINTIFF
3. FRANCESCA CHEMUTAI 3RD PLAINTIFF

=VERSUS=

1. P.M. WANDABWA 1ST DEFENDANT
2. H.K. SITIENEI 2ND DEFENDANT
3. JUSTINA SITTI 3RD DEFENDANT
4. J. KINYUA 4TH DEFENDANT
5. R. KIOME 5TH DEFENDANT
6. L. GITHINJI 6TH DEFENDANT
7. W.K. KIRWA 7TH DEFENDANT
8. F.KOECH 8TH DEFENDANT
9. R. CAURI 9TH DEFENDANT
10. KENYA SEED CO. LTD 10TH DEFENDANT

RULING

The Plaintiffs filed this suit against the Defendants on 25th July, 2007 and in the Plaint of the same date sought the following orders from this Court:-

- (a) A declaration that the Plaintiffs are members and shareholders of the 10th Defendant and who are entitled, inter alia, to attend and participate in the General and Extra Ordinary Meetings of the 10th

Defendant with the right to vote and to receive approved Dividends.

(b) A declaration that the intended reduction of the Ordinary Share Capital of the 10th Defendant, by revoking the issuance of 3,370,000 Ordinary Shares Pursuant to the Prospectus of 30/5/2001 is illegal, null and void for violating the mandatory provisions of the Companies Act and the Articles of Association of the 10th Defendant.

(c) A declaration that the business of the intended Annual General Meeting Scheduled for 7/8/2007 would be illegal, oppressive and exploitative to the Plaintiffs for in effect intending to condemn the said Plaintiffs un-heard, and also denying them the right to vote.

(d) A declaration that the intended Annual General Meeting of 7/8/2007 would be illegal for excluding the Plaintiffs and who are lawful Shareholders from attendance and participation.

(e) An Order that the Plaintiffs be invited to the future General and Extra Ordinary Meetings of the 10th Defendant.

(f) A temporary and Permanent injunction

(g) Costs

(h) Interest

(i) Any other relief that this Honourable Court may deem fit to grant.

It is to be noted that due to withdrawal of suit against 6th Defendant, the 10th Defendant became 9th Defendant later. Later the 6th Defendant was added as the 10th Defendant.

On the same day, the Plaintiffs filed an application under Certificate of Urgency seeking the following Orders:-

1). That this application be certified as urgent and that service of the same in the first instance be dispensed with.

2). Alternatively, that a date for the Inter- partes hearing of the application be fixed on priority basis,

3). That this Honourable Court be pleased to issue a temporary injunction, to restrain the Defendants, their agents and/or servants from convening an Annual General Meeting or any other meeting of the 10th Defendant on the 7/8/2007 or any other date at Kitale Club or in any other venue, while pending the Inter Partes hearing and determination of the application herein, and while pending the hearing and determination of the suit herein.

4). That costs of the application be provided for.

This suit was filed at the High Court, Kitale but was placed before me on 1st August 2007 at Eldoret during the Court Vacation as the Honourable Judge in Kitale was not sitting on the said date. Due to the urgency and the fact that the Annual General Meeting of the 9th Defendant, the Kenya Seed Company Limited was scheduled to take place on 7th August, 2007, I had to hear the application.

On the 1st August, 2007, I heard various Preliminary issues on Service and joinder of parties and made various rulings/orders which are on record. I adjourned the further hearing of the application to 3rd August, 2007. On 3rd August, 2007, most of the time was taken up on questions of the legal representation of the Plaintiffs by the firms of M/S Kiarie & Co. Advocates. The said firm withdrew from acting for the Plaintiffs and its place taken up by that of M/S Ngigi Mbugua & Co. Advocates

The 1st, 2nd, 3rd, 9th and 10th Defendants were represented by Mr. Kimamo while the 4th and 5th Defendants were represented by Mrs. Muchiri and the 7th Defendant by Mr. Nyaencha. At the hearing of the application, the Court deemed that the 6th and 8th Defendants had been duly served but were not represented (now 10th and 7th Defendants).

At the outset of the hearing of the application, the 7th Defendant raised a Preliminary Objection on a point of Law, namely, that the 7th Defendant is wrongly enjoined as a party in the suit as he is merely an agent of a known Principal who should have been the party sued. The 7th Defendant is a Chairman of the Board of Directors of the 9th Defendant, Kenya Seed Company Ltd.

The 1st, 2nd, 3rd & 8th Defendants also joined in a similar Preliminary Objection on a point of Law, namely, that the said parties have been wrongly joined in the suit as directors and members of the Kenya Seed Company Limited.

The 4th and 5th Defendants raised their own Preliminary Objection on the ground that they as the Board of the Company are not amenable to the orders of injunction sought by the Plaintiffs.

Having briefly stated the Preliminary points of law raised, I will summaries the arguments of the respective Defendant's Counsel:-

For the 7th Defendant:

Mr. Kimamo holding brief for Mr. Nyaencha. He submitted that the 7th Defendant, Mr. W.K. Kirwa has wrongly been joined as a Defendant as he has been sued in his personal capacity. He said that W.K. Kirwa was the Managing Director of the Agricultural Development Corporation and his being on board of the 9th Defendant is in such capacity and as the representative of the Agricultural Development Corporation. He added that the person to have been sued in place of Mr. W.K. Kirwa is his Principal, the Agricultural Development Corporation. That Mr. W.K. Kirwa was not on the Board in an individual capacity. He also said that Mr. W.K. Kirwa as the M.D. of the Agricultural Development Corporation was appointed by the Minister exercising his Statutory Powers under section 6 (1) (a) of the State Corporations Act, Chapter 446, Laws of Kenya. He urged the Court to strike out the 7th Defendant's name as a party in the suit with costs.

For the 1st, 2nd, 3rd, 8th and 9th Defendants:

Mr. Kimamo submitted that these Directors are members of the Board of the Kenya Sugar Company and have no life of their own outside the said Company. All decisions of the Board are made collectively as a Company organ. All decisions are those of the Company and not the individual Directors. He added that the Board members are agents of the company. It was further submitted that the Notice calling for the meeting was that of the Board and not an individual member. As a result, there is a misjoinder of parties as the Company has been sued as the 9th Defendant. He also asked that their names be struck out from the pleadings.

For the 4th and 5th Defendants:

Mrs. Makena Muchiri for the two Defendants submitted that the 4th Defendant J.Kinyua and the 5th Defendant R. Kiome hold their respective positions as members of the Board of the 9th Defendant by virtue of being Public Servants. The 4th Defendant is the Permanent Secretary at Treasury and the 5th Defendant is the Permanent Secretary in the Ministry of Agriculture. As they hold public officers they cannot be sued in their personal names. She also argued that they cannot be liable in their personal capacities. She also brought in the operation of the Government Proceedings Act, Chapter 40 of the Law of Kenya and in particular section 13(A) that in order to sue the Attorney General one must serve a 30 days Notice. That this is a mandatory requirement. She also added that as the Government cannot be enjoined, no injunction orders can issue against the two Defendants.

Reply by the Plaintiffs:

Mr. Ngigi Mbugua responded to the aforesaid Preliminary Objections by the Defendants. He submitted that under the Provisions of Order 1, Rule 9, if there is any misjoinder of parties, it is not fatal to the suit and the same is curable.

He said that the 10th Defendant which became 9th Defendant later is a Limited Liability Company and is regulated by Provisions of the Companies Act, Chapter 486. He also agreed that the Defendants ought to have filed a substantive application to strike out the names of the said Defendants as parties. What were relied upon by the Defendants were factual and evidentiary matters, yet the objection was raised through submissions by Counsel.

He said that even if they sit on the Board by virtue of their offices, yet there is nothing wrong to sue them directly, using their names. Counsel added that what was being challenged is the Notice calling for the Annual General Meeting which was defective and not in Compliance with the law. He added that the Defendants are also therefore, personally liable for issuing the defective Notices. That their actions offend the Provisions of the Companies Act. Also that the Government Proceedings Act ought not to be used to shield persons sued in their Personal Capacities.

I have considered the Preliminary Objections on points of Law, Submissions of Counsel and authorities cited.

First and foremost, it is trite law that once a party raises a Preliminary Objection on a point of law that firstly he/she cannot adduce evidence and secondly, for the purposes of the objection, he/she takes to have admitted the pleadings and facts relied upon by the other party. The only fact I see that is disputed by the Defendants is that the 9th Defendant is a Limited Liability Company registered under the Provisions of the Companies Act. They claim that the Company is a Public Company. For the purposes of the Preliminary points of Law, I hold that the 9th Defendant shall be deemed to be a Company Incorporated under the Provisions of the Companies Act. Whether it is private or public is not in issue.

After a careful perusal of the pleadings, the application and supporting documents, for the purposes of the objection, I do find that from the Annual Reports and Accounts for the years 2005 and 2006 which were exhibited by the Plaintiffs that Board of Members or Directors of the Company are indeed the 9 Defendants named as members in this suit.

I also do hereby find that the said present Board members /Directors were appointed under the Provisions of the State Corporations Act, Section 6(1). The said Section provides as follows:

“ ‘6 (1) Unless the written Law by or under which a state Corporation is established or the articles of association of a State corporation otherwise require, a Board shall, subject to Subsection 4, consist of:-

(a) Chairman appointed by the President who shall be non-executive unless the President

otherwise directs;-

- (b) The Chief Executive;**
- (c) The Permanent Secretary of the parent Ministry;**
- (d) The Permanent Secretary to the Treasury;**
- (e) Not more than seven (7) other members not being employees of the state corporation of whom not more than three shall be public officers, appointed by the Minister.**

(2) Every appointment under subsection 1 (a) and (e) shall be by name and by notice in the Gazette and shall be for a renewable period of three years or for such shorter period as may be specified in the notice

This fact is not disputed and is supported by the Plaintiffs' own documents. I do not know why this is the position. I do not think that I should decide question whether the 9th Defendant Company is a state Corporation or not. The issue is not before me at this stage. However, due to the said appointment of the board members under the provisions of the said Act, it would appear that the Government is treating the Company as a State Corporation. As a matter of fact the members have been appointed by application and invocation of Section 6 (1) of the Act.

With regard to the 7th Defendant, he was appointed by virtue of being the Managing Director of the Agricultural Development Corporation. The Agricultural Development Corporation itself is a State Corporation and the appointment of any sitting Managing Directors to the Board of the 9th Company is by virtue of that position. Mr. W.K. Kirwa has no personal interest in the Company and is not representing any private interest. He is there on basis of his office. To be laden with a legal suit or litigation it must be shown that you have an interest or are a necessary party. Mr. Kirwa is not a necessary party. The Plaintiffs ought to have possibly sued the office of the Managing Director or Agricultural Development Corporation itself. If his term expires and he is not re-appointed, what will happen? Mr. Kirwa in such a circumstances will continue having the responsibility of defending the suit as it could have possible personal implications in terms of compliance with Court orders and costs. I see no basis to retain his name as a party.

With regard to 1st, 2nd, 3rd and 8th Defendants, and the same will apply to all other Board Members in that; the Annual General Meeting was being convened by the Board of the 9th Defendant Company. The Board is an organ of the Company. The meeting could not be called by an individual Board Member. It is a collective act and decision and it is not personal. It was an act of the company. I see no personal liability that can arise from this. Any consequences will be faced by the Company. The Board members are agents of the Company and the principal is known. To sue the Board Members in their personal capacities is totally unnecessary and will only vex them and expose them to waste of precious time and legal costs.

With regard to the 4th, 5th and 10th Defendants, they are Permanent Secretaries from Treasury, Ministry of Agriculture and Office of the President. They were appointed by virtue of their offices. In fact it is

their offices which were appointed and they are merely the human face and person sitting there. They have no personal interest.

Secondly, they are members of various Government Ministries. To sue them, the Plaintiff has in effect sued the Ministries which are Government. The Law is clear under the Provisions of the Government Proceedings Act that that no injunction can issue against the Government. The Government is not amenable to the orders being sought and it follows that this Court cannot injunct the three Permanent Secretaries or any other public servant.

The net result is that the Preliminary Objections are hereby sustained and upheld. I hereby do strike out the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Defendants i.e. the entire Board Members as Defendants and parties in this suit with costs. The 9th Defendant, the Kenya Seed Company Ltd shall remain the Sole Defendant. Costs between the Plaintiffs and the said Defendant shall abide by the outcome of the substantive application for injunction. Orders accordingly.

DATED AT ELDORET THIS 24TH DAY OF OCTOBER 2007.

M.K.IBRAHIM,

JUDGE.