



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 172 of 2006**

**KATHANGARIRI TEA FACTORY CO. LTD.....  
.....PLAINTIFF**

**VERSUS**

**HARRISON MUGO MARIMBA.....1<sup>ST</sup>  
DEFENDANT**

**PATRICK KURIA MUGO.....2<sup>ND</sup>  
DEFENDANT**

**JOSEPH GICHOVI NYAGA.....3<sup>RD</sup>  
DEFENDANT**

**JOSHUA MAONI ARONI.....4<sup>TH</sup>  
DEFENDANT**

**R U L I N G**

The plaintiff case is that at all material time its directors were Wilfred Njue Njeru, Johnson C. Mwaniki, John Murithii Njeru, James Njagi Mkiea, Peter Waweru Manyara, David Mugo Subi Lerionka Samuel Tiampati and Nafutali Frank Njeri. The company secretary is John Kennedy Omanga.

That a meeting was convened on 4<sup>th</sup> January 2006 whereby the aforesaid directors were removed from office and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were appointed directors and the 4<sup>th</sup> defendant appointed the company secretary. The 4<sup>th</sup> defendant filed a notice notification of change of directors and secretaries thereafter. That by that notification the previous directors were removed and ceased to be the plaintiff's directors.

As a result of the aforesaid meeting and the decisions thereof reached the plaintiff filed the present action and a chamber summons. The chamber summons is the subject of the present ruling. The same is brought under section 3A of the Civil Procedure Act and Order XXXIX, Rules 2 and 3 of the Civil Procedure Rules. The plaintiff seeks the following prayers which although are five prayers have been collapsed into two as following:

· That a temporary injunction do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> defendants from undertaking or dealing in any way with the plaintiff company, from holding themselves as directors, from calling from, conducting and/or holding any purported general meeting or any other meeting or form dealing with the

management of the plaintiff.

· That a temporary injunction do issue against the 4<sup>th</sup> defendant from acting as the plaintiff's company secretary.

By a letter dated 30<sup>th</sup> November 2005 an individual by the name of Njeru Metha requisitioned for an Extra Ordinary General Meeting. That requisition stated that in the event of the directors failing to comply with the request, the letter was to serve as notice that the meeting will take place on Wednesday 4<sup>th</sup> January 2006. The letter then proceeded to set out the agenda. The agenda had amongst others the points, that:

- (i) Amendment of Articles of Association to reduce the number of directors.**
- (ii) "That the directors of .....co Ltd be reduced to two and Kussto to be represented by one ex-officio member"**
- (iii) Appointment of auditors through competitive bidding.**

It is at that meeting that the defendants were appointed.

Plaintiff learned counsel Mr Kipkorir argued that by the filing of Notification of change of directors and secretary the defendants removed the legitimate directors. That that change was fraudulent and void.

He submitted that Kenya Tea Development Authority (KTDA) is the holder of 160, 000 times 5/- shares while the farmers hold 40, 000 times 5/-. That accordingly KTDA is the largest shareholder of the plaintiff company.

Plaintiff submitted that the defendants failed to allow the dictates of section 185 Cap 486, which provides that in the case of removal of a director such a director ought to be given notice and the dictates of section 132 Cap 486, which requires that the requisition be by 10% of the voting block. Plaintiff stated that the person who requisitioned to have the meeting was unknown, it was not clear if he is a shareholder.

In regard to the 4<sup>th</sup> defendant plaintiff carried out investigation, which revealed that, the institute of Certified Public Secretaries deregistered him from its membership with effect from 29<sup>th</sup> April 1998. Plaintiff therefore argued that the fact he was deregistered, as foresaid, it nullified the Notification of Change of directors and secretary of the plaintiff to the registrar of companies.

That Kenya United Small Scale Tea Owners Association (KUSSTO Association) which is a registered Trade Union, is behind the acts of the defendants.

Plaintiff therefore stated that if injunction is not granted it would suffer injury and damage, which cannot be indemnified. That since the defendant's intention was to disrupt the plaintiff's business, which chiefly is tea export and yet tea export is the biggest export earner for Kenya, great loss would be suffered.

Defendant's learned counsel, Mr Ngala opposed the application. He argued that the plaintiff had not attacked the resolutions passed at the meeting of 4<sup>th</sup> January 2006. That KTDA who seemed to be the complainant was not a party in these proceedings. He denied that there is any connection between KUSSTO and the defendants. He contended meeting of 4<sup>th</sup> January 2006 was properly convened since it was held after notice had been issued.

The principles to guide the court as I consider the application is (i) whether the applicant has laid out a prima facie case with a probability of success; (ii) whether the applicant might suffer irreparable injury if the injunction is not granted and if there is doubt whether the balance of convenience favours the applicant.

Section 132 Cap 486 provides, on requisition of members, holding not less than 1/10 of the paid up capital, for a meeting, the company shall proceed to convene the meeting. If the company fails to convene such a meeting within 21 days the requisitionist can proceed to so convene such a meeting.

On prima facie basis I find that the defendant failed to proceed as provided by section 132. The defendants, or rather the individual called Njeru Metha, requisitioned for a meeting but before the expiry of 21 days and indeed in the very latter where the requisition was made a date for the meeting was set. Whether failure to wait for the 21 days to expire was fatal to the meeting convened on 4<sup>th</sup> January 2006 will have to wait the trial of this suit for determination.

The 4<sup>th</sup> defendant was deregistered as a member of The Institute of Certified Public Secretaries. Section 178A [1] Cap 486 provides.

**“Every secretary to the company shall hold a qualification prescribed by section 20 of Certified Public Secretaries Act, 1988.”**

And section 178 (1) provides:

**“Every Company shall have a Secretary.”**

If the 4<sup>th</sup> defendant was to continue to hold himself as a Secretary of the plaintiff the Plaintiff Company would be in breach of section 178 [1], may have to await trial of the suit. However, company, having the 4<sup>th</sup> defendant as its secretary, yet he is disqualified, technically and on a prima facie basis it could possible be said the plaintiff’s company is in breach of section 178 [1].

The defendants allegation that KTDA is the complainant in this action was not understood, for indeed the case is brought by the Plaintiff Company. The plaintiff company in argument stated that the largest shareholder was KTDA.

Getting back on the requisition for the meeting. Section 132 Cap 486 requires that such a requisition be made by members holding 1/10 of paid up capital. The requisition in this case was made by an individual with no clear indication of who he was in the Plaintiff Company.

At this interlocutory stage on the arguments presented before me I find that the plaintiff has shown a prima facie case with a probability of success and is deserving of the orders sought. Even on a balance of convenience I would have found for the plaintiff for it is important that the court will protect the plaintiff company from actions that may lead to its loss of business.

At the beginning of arguments by counsel in this matter the parties consented that the court do consider both the application dated 5.4.2006 and the other by the defendants dated 25.4.2006 in this matter.

The defendant’s application dated 25.4.2006 sought to restrain the plaintiffs from convening a meeting on 27<sup>th</sup> April 2006, now past. That meeting was held and at this juncture it would not serve any purpose to grant an injunction as prayed, indeed it would be in vain.

The parties further agreed that the arguments in this suit be adopted in another suit HCCC NO. 173 OF 2006 MUGANIA TEA FACTORY COMPANY LTD – V JOHN NAAMAN MUTAVI NYAGA AND OTHERS, where similar application was made and the parties are represented by same counsels. The court adopted that consent and indeed the final decision reached in this matter will abide in HCCC NO. 173 OF 2006.

The court grants the following orders: -

**(1) That the prayers Nos 2,3,4 and 5 in HCCC 172 OF 2006 and HCCC NO. 173 OF 2006 are granted until the determination of both suits or until further orders of this court.**

**(2) That the plaintiff is granted costs of the said chamber summons in HCCC 173 OF 2006 and 172 OF 2006.**

**MARY KASANGO**

**JUDGE**

Dated and delivered this 30<sup>th</sup> June 2006.

**MARY KASANGO**

**JUDGE**