

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1279 OF 2003

CEPHAS KIMANI KIHARA & 2 OTHERS..... PLAINTIFFS

VERSUS

PITHON MWANGI NJOROGE & 7 OTHERS..... DEFENDANTS

RULING

The applicants herein being three shareholders of the 9th Defendant/Respondent, Githambo Tea Factory Company Limited, have brought this application under Order XXXIX Rules 2 2A and 3 of the Civil Procedure Rules, Order L Rule 1, Section 135 of the Companies Act Cap 486 and Section 3A of the Civil Procedure Act. The orders sought are:

- 1. That an injunction do issue against the 1st to 8th Defendant/Respondents restraining them, inter alia, from holding out as the bona fide directors of the 9th Defendant/Respondents and from receiving fees, allowances or any other payments or enjoying rights and privileges attaching to directors' positions.**
- 2. That alternatively the Registrar of Companies be ordered to convene a meeting of shareholders for the purpose of electing directors of the Company.**
- 3. That the Defendants be restrained from utilizing the funds of the Company in defending this suit.**

The applicants contend that the 1st to 8th Respondents are disqualified from holding office as directors of the 9th Defendant Respondent having been removed from office on 23rd August 2003; that they have been incompetent, negligent and/or reckless in the management of the Company's affairs resulting in consistent and continuous decline in the Plaintiff's and other shareholders earnings from the operations of the Company. The applicants further claim that the refusal by the said Respondents to relinquish their positions infringes on their rights as shareholders of the Company and is oppressive to the shareholders.

In submitting for the applicants, Mr. Kahonge argued that no Annual General Meeting was held at which the Respondents were elected as required under the Articles of Association and other statutory requirements; that the 1st to 5th Respondents were not, at the time of taking office, members of a tea buying committee as required by the Articles and that the 6th Respondent does not hold an 'O' level Certificate of Education. The applicants contend that not being bona fide directors, the 1st to 6th Respondents could not validly appoint the 8th and 7th Respondents to office and that as a result the latter two hold office illegally. Mr. Kahonge submitted that the above contentions are adequate to found a prima facie case, contrary to the Respondents belief. The latter have opposed this application primarily on the grounds that the principles of granting an injunction have not been met in that no prima facie case has been established against the Respondents, whose appointments were validly noted in the register through the filing of copies of notification of change of Directors annexed to the Replying Affidavit of Python Mwangi Njoroge as "PMN-1" and "PMN-2". Counsel for the Respondents also submitted that matters complained of against the Respondents are mere allegations without proof. I find this argument sustainable since the affidavit in support contains no annexures. Although it is deponed in paragraph 16 of the Supporting Affidavit of Jackson Kahiga Zaphron that the depositions are supported by a bundle of

documents marked “JKZ” no such bundle is annexed to the affidavit and no submissions were put forth in relation thereto. The Respondents incapacity to hold office is therefore not shown by evidence. Moreover, the three applicants have not shown that they have an equitable right or interest for which an injunction could issue. Neither have they demonstrated the loss they are likely to suffer if an injunction does not issue save to make general allegations of mismanagement of the Company’s affairs without tendering proof, on the balance of probabilities. It is also not clear to me under what authority the applicants herein claim to represent other shareholders whose rights they claim to have been equally infringed.

I have no doubt in my mind that the Applicants have failed to show a prima facie case with a probability of success and also that they have not demonstrated any irreparable loss. I therefore do not find it necessary to consider the balance of convenience. I refuse to grant the order for injunction.

As regards the prayer that the Registrar of Companies be ordered to convene a meeting of shareholders for election purposes, I find that the same cannot issue when the Registrar is not party to these proceedings and in the absence of adequate evidence that the Respondents hold office illegally. The Registrar having entered the names of the Respondents in the register would be required to firstly remove their names from the register, which he can only do upon conclusive evidence being tendered that such entry was wrongfully made. No submissions were made regarding the prayer that the Respondents be restrained from utilizing the Company’s funds in the defence of this suit.

I shall therefore not make any finding as regards the same.

For all the above reasons I disallow this application and hereby dismiss the same with costs to the Respondents.

Dated, Signed and Delivered at Nairobi this 29th day of April 2005

M.G. Mugo

Judge

In the presence of:

N/A for Applicant

N/A for Respondent