

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

WINDING UP CAUSE 2 OF 2004

IN THE MATTER OF NG'ENDA LOCATION RANCHING COMPANY LTD

AND

IN THE MATTER OF THE COMPANIES ACT PETITION BY MINORITY SHARE HOLDERS

RULING

John Ndung'u Gitaka and Samuel Kibebe Waitindi filed a petition under **Section 211 of the Companies Act** seeking to have Ng'enda Location Ranching Company Limited (*hereinafter referred to as the company*) wound up on allegation that the directors of the said company, had, *inter alia*, failed to manage the company in accordance with the memorandum and articles of association of the company. They petitioned this court for a declaration that the affairs of the company were being run in a manner detrimental to the shareholders. They averred that the assets of the company were being wasted or alternatively being disposed off without the consent of the shareholders. As minority shareholders, they were aggrieved that the company's directors had not performed their duties as required by the law. The petitioners therefore sought the intervention of this court to have the said company run and managed in accordance with the law and especially to the satisfaction of its shareholders. Contemporaneous with filing the petition, the petitioners filed an application under **Sections 3A & 63(a), (b) and (e) of the Civil Procedure Act, Section 135 of the Companies Act and Order XXXIX rules 1, 2, 5 and 9 of the Civil Procedure Rules** seeking the orders of temporary injunction to restrain the company by itself or its agents from interfering with the property of the company or otherwise disposing, wasting or alienating the property of the said company. The petitioners further prayed for restraining orders against the company to injunct it from barring or interfering with the petitioners occupation, use or access to the land which they are currently occupying by virtue of being shareholders of the company. The application is supported by the annexed affidavit of John Ndungu Gitaka and based on the grounds stated on the face of the application. The said John Ndungu Gitaka swore a further affidavit on the 21st of April 2005 in further support of the said application. One Anne Wanjiku has also sworn a further affidavit in support of the application.

The application is opposed. Gabriel Njoroge Wamatu, a director of the company has sworn two replying affidavits in opposition to the application. James Odongo Odhiambo, a Manager of Menengai Estate owned by the company has also sworn an affidavit in opposition to the application filed by the petitioners. In essence, the directors of the company have denied that the company is being mismanaged or run against the wishes of the shareholders. They deny that the properties and assets of the company were being disposed off or wasted. They avers that none of the farms owned by the company had been allocated to the shareholders. They deponed that the only persons who were given licence to cultivate part of the parcel of land owned by the company were employees of the company, some of whom happened to be shareholders. They insisted that the application filed by the petitioners did not disclose sufficient grounds which would enable this court grant the petitioners the orders of injunction sought.

At the hearing of the application, Mr Oduor, Learned Counsel for the petitioners submitted that the application for injunction ought to be allowed as prayed. He submitted that the petitioners were aggrieved that they had been prevented from utilizing the land pending its distribution to the shareholders as provided by the memorandum and articles of association. It was submitted that the petitioners had been harassed and prevented from accessing the land yet non-members were being allowed to cultivate the land in question. He further submitted that some of the shareholders were being allowed to cultivate the land yet the petitioners had been prevented from accessing the land. The petitioner urged the court to

restrain the company from preventing them to access and cultivate the same pending the hearing and determination of the suit. The petitioners argued that the company had initially acquiesced the petitioners to cultivate a portion of the land and therefore the company should not be allowed to turn around and prevent them from accessing the land.

Mr Orege, Learned Counsel for the company opposed the application. He submitted that the company was not a land buying company neither did it intend to distribute the said parcel of land to the shareholders. He argued that persons who had been allowed to cultivate the land were given licence on the basis of being workers of the company and not shareholders. He submitted that the petitioner only held two shares in the company and did not have a right of access to the land. It was argued on behalf of the company that the petitioners had refused to present whatever grievances that they have to the annual general meeting so that the same could be discussed and a decision made by the general membership of the company. The company denied that it had harassed the petitioners. The company was of the view that the petitioner were not sincere in the orders they are seeking from court; The information that the petitioners deposed in the affidavits in support of the application were mere hearsay. If the application was allowed, the company argues, its operations would be interfered with. He urged the court to dismiss the application.

I have read the application filed by the petitioners together with all the affidavits filed thereto. I have also read the replying affidavits filed by the company. I have carefully considered the submissions made before me by the counsel for the parties to this application. The petitioners are seeking to be granted interlocutory orders of injunction. The application has been coached in a manner which if the application is granted it would amount to this court granting mandatory injunction against the company to compel it to allow the petitioners to have access to the suit land and cultivate the same for an indeterminate period pending the hearing and final disposal of the petition filed herein. The principles for granting an interlocutory mandatory injunction are well settled. The applicants, in this case the petitioners, must establish a prima facie case with a high likelihood of success. The applicants must also establish special circumstances that would persuade this court that it would be desirable to grant the mandatory injunction at the interlocutory stage. Further, the applicants must establish such a strong case that would make this court be certain that orders it would be issued would likely be confirmed when the main suit is finally heard and disposed off. (See **The Despina Pontikos [1975]EA 38**).

In the present case, the petitioners case is that, as shareholders, they have been prevented from accessing with a view to cultivating one of the parcels of land owned by the company. They state that the action by the company amounts to oppression of the minority shareholders by the company. They therefore want the company to be compelled by an order to this court to allow them to cultivate part of the parcel of land owned by the company. The company has countered this argument by the petitioners by stating that none of the members or shareholders of the company had been granted access to cultivate the land. The only people granted such access were the workers of the company who resided within those farms.

Having considered the petitioners case, including carefully reading the memorandum and articles of association of the company, and the minutes of the annual general meeting held by the shareholders of the company, it is evident that the company was incorporated for the purposes of conducting agri-business for the benefit of its members or shareholders. The company did not have an intention of sub-dividing and settling on the parcels of land which they currently own to its shareholders. Neither has any shareholder been allowed to access to any of the parcels of land owned by the company for the purposes of cultivating it. The legal basis upon which the petitioners want this court to issue the orders of mandatory injunction has not been established.

The petitioners have not established that their rights as shareholders have been infringed by the company. From the affidavit evidence on record, it is clear that the petitioners have refused to present what they perceive to be their grievances to the general membership of the company in an annual general meeting. Instead the petitioners, who only own two shares, have resorted to court action to try and achieve their objective in forcing the company to allow them to access its land for the purposes of cultivating the same. This court's assessment of the facts of this case is that the petitioners actual intention is to put a foothold on part of the company's parcel of land, so that in future, they can lay claim to it as

shareholders. This court will not allow the petitioners to interfere with the operations of the company based on a misguided notion that the company would sooner rather than later make a decision sub-dividing its farms to its shareholders.

I do find that the petitioners have not established any basis, acceptable in law, to persuade this court to grant them the orders of mandatory injunction sought. The petitioners' application therefore lacks merit. They have miserably failed to establish that they have a prima facie case that will have a high likelihood of success when the main suit is heard.

For the reasons stated, the application for mandatory injunction filed by the petitioners is hereby disallowed. The company shall have the costs of the application.

DATED at NAKURU this 21st day of September 2005.

L. KIMARU

JUDGE