



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 113 of 2000

NJERU KAMWEA.....PLAINTIFF

*Versus*

EMBU TENE TRADERS CO. LTD.....DEFENDANT

JUDGMENT

The Plaintiff filed this suit against the Defendant praying for

- (a) *A declaration that minute 5 of 1993 was unlawful and ultra vires the Defendant's powers.*
- (b) *A declaration that the Plaintiff is still a share-holder in the Defendant Company.*
- (c) *The Defendant Company's account be taken so as to determine the Plaintiff's unpaid dividend."*

The Plaintiff also wants costs and interest at court rates.

The Defendant does not agree and therefore denies that the said minute was *ultra vires* its power and claims the same was lawful.

This case was heard by my brother Judge, Hon. Mr. Justice J. V. O. Juma up to conclusion and written submissions were subsequently filed by Counsel on both sides. But no judgment was written and I was recently called upon to write that judgment. I have read the pleadings, the recorded evidence and the written submissions. In my view, no issue of forfeiture arises in this matter. It is neither in the pleadings nor in the recorded evidence, and I do not understand why Counsel for the Plaintiff made it a big issue in his written submissions.

This case, as I understand it, is that the Plaintiff was a member of the Defendant Company. Whether or not a founder member, it matters not. What matters is that the Defendant is a limited liability company registered under the Companies Act, Cap. 486 Laws of Kenya, with its registered office at Embu. It was started by Africans before the Mau Mau Emergency in Kenya and managed to survive until to-day, though not without some temporary set-backs.

Up to the year 1985, the Defendant Company which by 1947 had a capital of Ksh.20,000/= divided into 1000 shares of Ksh.20/= each, suggesting that the initial capital may even have been less than Ksh.20,000/=, by 1985 the capital had risen to Ksh.100,000/= divided into 1000 shares of Ksh.100/= each.

If the Plaintiff was a founder member as he claims to have been, and the Defendant claims that the Plaintiff joined the Company two years later, it means the action of increasing the capital value of the Defendant Company is not a new thing to the Plaintiff – who had no dispute against those previous increase. I think that explains why at the Annual General Meeting of the Defendant Company held on 19<sup>th</sup> April 1985, attended by the Plaintiff, he had no problem with Minute No. 4/85 which approved the raising of the Defendant’s capital price from Ksh.100,000/= to Ksh.500,000/=. The Minute stated:

*“Members discussed about increasing the price of shares and agreed that a share will cost Kshs.400/= more to total Ksh. 500/= per share from Kshs100/= per share. The reason was that the cost of living is to-day high.”*

That is the minute and the meeting which increased the value of shares as well as the capital/price of the Defendant Company to the level from which this litigation has arisen.

In his evidence the Plaintiff said that he opposed that increase. The minute I have quoted above does not show the stand taken by each member present. Where, there was opposition, however, that minute reflects majority vote and unless it is the Plaintiff’s case that majority vote could not count in this case, that is the decision the Plaintiff has to abide by. He did not adduce evidence to show that majority vote could not carry the day.

In any case, and this is worthy noting, the Plaintiff is raising no finger against that minute. I must therefore take it that he is accepting that that minute is lawful. It is not *ultra vires* the Defendant’s power. Section 63 of the Companies Act gives the Defendant power. It provides *inter alia*:

***“(1) a company limited by shares or a company limited by guarantee and having a share capital, if so authorized by its Articles may alter the conditions of its Memorandum as follows, that is to say it may***

***(a) increase its share capital by new shares of such amounts as it thinks expedient.***

***(b) -----***

***(2) The powers conferred by this Section shall be exercised by the company in general meeting.”***

Rule 44 of the regulations In Part I of Table “A” in the First Schedule of the Companies Act states:

*“A Company may from time to time by ordinary resolution increase the share capital by such sum to be divided into shares of such amount, as the resolution shall prescribe.”*

Section 65(1) of the Act states:

***“Where a company having a share capital, whether its shares have or have not been converted into stocks, has increased its share capital beyond the registered capital, it shall within 30 days after the passing of the resolution of authorizing the increase, give to the Registrar notice of the increase, and the Registrar shall record the increase.”***

Furthermore, Section 24 of the Act allows the alteration in Memorandum or Articles of Association by increasing the ability to contribute to share capital. Clause 5 of the Defendant’s Memorandum of Association which sets out the capital of the Company goes on to give the Defendant Company power to increase and reduce its capital. It states:

*“The company shall have the power from time to time to increase or reduce its capital and to divide the shares in the original or increased capital into several classes and to attach thereto respectively any preferential or deferred, qualified or special rights, privileges and conditions.”*

Finally, clause number 1 of the Defendant’s Articles of Association declares that the regulations

contained in Part 1 of Table "A" in the First Schedule of the Companies Act shall apply to the Defendant Company save in so far as they are excluded or varied by the Defendant's Article of Association.

There is evidence on record that all the above provisions were observed by the Defendant. That being so, how are the Plaintiff's claims in his prayers in the Plaint justified?

I have said that the Plaintiff was present at the Annual General Meeting of 19<sup>th</sup> April, 1985 which contains Minute No. 4/85 approving the increase of capital so that a share increased from Ksh.100/= to Ksh.500/= and that he is not complaining against that resolution. Yet that is when the rain started beating him.

On 3<sup>rd</sup> October, 1987 the Plaintiff participated in a Special General Meeting where Minute No. 7/1987 was prominently discussed. It was about the new shares and members who had not paid. The Minute referred to a General Meeting which had been held on 23<sup>rd</sup> May, 1987 and the same issue was discussed and it had been decided to give time to those who were unable and who had not paid for their shares. In Minute No. 7/1987 it was stated that the Defendant Company had told each member to pay for 17 shares. Names of six members, including the Plaintiff, who had not paid were read. It was concluded:

***"After long deliberations, all members in the meeting unanimously agreed that those who had not paid for their shares to a total of 36 shares as shown above, be given up to 15.10.87 and that, any member who will not have had paid by 01/11/87 will have his paid shares value refunded.***

*Proposed by Njeru Kamwea*

***Seconded by Ezara Njiru***

***All members passed the resolution unanimously."***

Here, again like in respect of Minute No. 4 in the Minutes of the meeting held on 19<sup>th</sup> April, 1985, the Plaintiff is not saying Minute No. 7/1987 was unlawful and was *ultra vires* the Defendant's power.

By 3<sup>rd</sup> October, 1987, the time of Minute No. 7/1987, two years had passed without the Plaintiff having made the required full payment for his shares. As can be seen from the quotation immediately above, the resolution which was passed was proposed by the Plaintiff. Then came the Annual General Meeting held on 27<sup>th</sup> January, 1993 where the questioned Minute No. 5/93 is found. Again the Plaintiff was present participating. It was recorded:

***"The list of members together with their fully and unfully paid shares was read to the members. After lengthy deliberations the company decided that all members should add the value of their shares and this was to be done in two years time. Any member who will not have paid their shares fully by 31<sup>st</sup> December, 1994 will forfeit their shares and will be refunded the money contributed so far. This is in accordance with the Company's resolutions."***

The Plaintiff was one of the members who had not completed payment eight years down the line.

Lastly was the Annual General Meeting held on 25<sup>th</sup> February, 1995. It was attended by the Plaintiff and the first Minute confirmed Minutes of the meeting held on 27<sup>th</sup> January, 1993. Minute No. 2/95 on matters arising from Minute No. 5/93 increase of share value. It was stated in Minute No. 2/95:

***"After the minutes of the meeting held on 27<sup>th</sup> January, 1993 were read to members, all those who were in attendance unanimously agreed that those members who had not fully paid up their shares in two years time i.e. from 27<sup>th</sup> January, 1993 to 31<sup>st</sup> January, 1994 should have their amounts paid so far refunded to them. This was following the company's resolution. Those who had not paid up their shares fully were as follows:-"***

Five people were listed including the Plaintiff who was by then trying to make payment when it was too late as the 31<sup>st</sup> December, 1994, being almost 10 years from the date 19<sup>th</sup> April, 1985, had already passed. The Plaintiff in his evidence mentions the date 27<sup>th</sup> January, 1983 when a meeting of the company increased the shares from Ksh.100/= to Ksh.500/=. That increases the period in which he had failed to pay the increase, while the Defendant was waiting for him, to 11 years.

Reading through his evidence, and that of his witness, on record, nothing comes out to show how Minute No. 5/93 is singled out to be unlawful and *ultra vires* the Defendant's power when the other Minutes I have referred to dealing with the increase of share value, including the relevant minute in the meeting he refers to as having taken place on 27<sup>th</sup> January, 1993 were not unlawful and *ultra vires*.

Although in his evidence the Plaintiff claims that an auditor's report ought to have been there to make what took place lawful and his Counsel in his written submission helps the Plaintiff to emphasize that point referring to clause 10 of the Defendant's Articles of Association, I think that is a misconception as in this matter there was no need for a valuation or an auditor's report and clause 10 aforesaid is only relevant where a member is selling a share or shares and that is not the position in this case. I have said elsewhere that this case has nothing to do with forfeiture which counsel for the Plaintiff discusses at some length in his written submission even though the Plaintiff's pleadings and evidence on record has completely nothing about forfeiture, and neither did the Defendant introduce it in the Defendant's case. The only thing I notice is that a word "forfeit" was used when it should not have been used in Minute No. 5/93 in question in this case. In fact the words

***"will forfeit their shares and"***

ought not be in that minute as there was actually no forfeiture. All that there was, and that is what the Defendant tried to do without success as the Plaintiff stubbornly refused to accept his money back, were the next words in that minute stating:

*"will be refunded the money contributed so far."*

The Plaintiff was a member who had decided not to comply with these resolutions to increase share value. Resolutions passed with his full and active participation, some from his own proposals. For nine or more years the Defendant was patiently waiting for him to comply without success. Out of the five members who failed to meet the deadline which members of the Defendant Company, including the Plaintiff, were forced to fix, it was only the Plaintiff who refused to accept refund of his money from the Defendant and instead instituted these legal proceedings against the Defendant. By his own conduct the Plaintiff ceased, after 31<sup>st</sup> December 1994, to be a member of the Defendant's share holders and his entitlement to dividends ended.

As I hold the view that the Plaintiff's case in this matter is based on misconceptions, bringing into the case valuation reports, audit

reports and forfeiture, being issues irrelevant in the matter, and further holding that the Defendant did nothing unlawful and nothing *ultra vires* its powers, the Plaintiff's case is hereby dismissed with costs to the Defendant.

***Dated at Nyeri this 7<sup>th</sup> day of October, 2005.***

**J. M. KHAMONI**

**JUDGE**