REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 593 OF 2002
JOSEPH MUKUNDI NGAARI……..1ST PLAINTIFF
DANIEL KARANJA MWAURA……....2ND PLAINTIFF

V E R S U S

THETA TEA FACTORY COMPANY LTD……..1ST DEFENDANT

KENYA TEA DEVELOPMENT AGENCY LTD…....2ND DEFENDANT

CALEB MACHARIA GITHIGE……....3RD DEFENDANT

R U L I N G

The two Plaintiffs in this suit are shareholders of Theta Tea Factory Company Limited (hereinafter referred to as "The Company") which is a public limited liability company comprising, I am told, thousands of members.

They came to Court on 5th April, 2002 accusing the company and the two other Defendants who are described as its secretaries, of various transgressions against Court Orders, the Companies Act, and the Memorandum and Articles of Association of the Company. They sought a permanent prohibitory injunction and declarations stopping various intended activities of all the Defendants and annulling other activities which have already taken place.

Together with the filing of the suit they took out a Chamber Summons seeking a temporary injunction under Order 39 rule 1, 2, 2A and 3 of the Civil Procedure Act for an order that:-

> ***"That the 1 st, 2nd and 3 rd defendants their servants and agents or any person purporting to act on their behalf or under their instructions be restrained from holding elections of the 1 st defendant's Buying center committees and Directors on 17 th and 19 th April, 2002 respectively or on any other date pending the hearing and final determination of the suit herein."***

That is the matter argued before me and the subject matter of this Ruling .

A temporary injunction under those provisions of the law will issue if the court is persuaded that the Applicant has established a prima facie case with a probability of success, and even if he has done so, that loss that is incapable of recompense in damages will ensue, and if the Court is in doubt, where the balance of convenience lies. Those are the time-tested principles in **GIELLA VS CASSMAN BROWN & CO. LTD [1973] E.A. 358**. In applying those principles, I must remember that I cannot make conclusive findings of fact as those will be made at the trial when they are tested in crossexamination.

The cause of action pleaded by the Plaintiffs is essentially pleadings, proceedings and Rulings made in another suit filed against the Company by 7 other shareholders of the Company. That is HCCC 1744 of

2000 in which my Brother Judges are said to have considered similar issues and made Rulings relating to the elections of the Company that are complained of in this suit. Indeed Rulings made by Mulwa, J. on 5th April, 2001, and 20th June, 2001 and Rimita, J. on 15th March, 2002 together with the ensuing orders are exhibited on both sides and were relied on as the basis for seeking the order for injunction.

I have a problem with that kind of pleading. Firstly because HCCC 1744 of 2000 is still pending before this Court and no final orders have issued. Secondly, the case is not before me and there is no order for consolidation. I cannot, therefore, verify the pleadings made in this suit in respect of that earlier suit. As far as I can make out, the major complaint in the earlier suit was about the holding of elections of the Company, either for Buying Centre committees or for the Board of Directors then scheduled for 3rd and 4th November, 2000. The complaint was that the elections were being held in contravention of the Companies Act and the Memorandum & Articles of Association of the Company. It is the self-same elections that are intended to be held on 17th and 19th April, 2002 and are now being challenged by different shareholders in this suit on similar grounds. That smacks of the scenario envisaged under Section 6 of the Civil Procedure Act where the Court is prohibited from proceeding with a suit where the matter in issue is also directly or substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom or any of them claim, litigating under the same title. The only difference is that the Plaintiffs are different and state that they are suing on their own behalf and not in a representative capacity. It is not lost to me however, that they, and the Plaintiffs in the earlier suit, are all members or shareholders of the Company and are all suing in that capacity pursuing substantially the same issues. I see no reason why the two shareholders could not apply to be joined in the earlier suit to urge their case against the renewed attempt by the Company to hold elections. They could also apply for consolidation of both matters. Proceeding as they have, opens up the danger of a multiplicity of suits, by any one or groups of the numerous members of the Company pursuing substantially the same issues, with the concomitant danger of conflicting decisions.

That in my view would be an abuse of Court process.

Be that as it may, it would appear that Mulwa, J. in HCCC 1744 of 2000 was of the view that the present problems within the Company can only be resolved through elections and he invoked Section 135(1) of the Companied Act to make some orders in relation thereto. There is conflicting information from Counsel for both parties on whether such orders were or were not complied with and that issue cannot be resolved in the current suit. Whoever contends that the orders in the earlier suit were not complied with ought to pursue his remedy under that suit. References have been made to the Memorandum and Articles of Association of the Company, which were also discussed in the earlier suit, but I have not had the benefit of seeing those documents as they have not been introduced in this suit.

All in all I express my doubts on the propriety of this suit in so far as it pleads HCCC 1744 of 2000 as its cause of action. The other issues pleaded are the sufficiency of Notices issued for the two elections and the legal capacity of Defendants 2 and 3 to perform the duties of secretary of the Company.

Learned Counsel for the Applicants Mr. Cerere referred to Notices dated the 26th March, 2002 in respect of both elections of 17th and 19th of April, 2002 and submitted that they were in contravention of Section 133 of the Companies Act and the Memorandum & Articles of Association of the Company. That is because the two Plaintiffs received the Notices on 3rd April, 2002 and they did not, therefore, receive the requisite Notice of 21 days. On the other hand, Learned Counsel for the Defendants Mr. Sichangi submitted that the first election of Buying Centre Committees was an internal management arrangement of the Company regulated by its Articles of Association and had nothing to do with the officers of the Company as envisaged in the Companies Act; that is to say the Board of Directors. At all events, he submitted, the Notices given out complied with the Companies Act and the Articles of Association as they gave more that 21 days notice of the two elections. Even if they were not, the period of Notice was curable under the Act.

Once again I am unable to express any view on the provisions of the Memorandum and Articles of Association of the Company since the Applicants did not introduce it in these proceedings.

Whether or not the first elections have any relevance to the elections of the Company's officers therefore remains at large. As for the elections of the officers of the Company scheduled for 19th April, 2002, the mathematics of it shows that over 21 days were given. It is contended however, that the tabulation of the dates commences with the date of receipt of the Notice and Section 133 of the Companies Act is cited in aid:-

Section 133(1) and (2) states:-

> ***"133. (1) (a) Any provision of a company's articles shall be void in so far as it provides for the calling of a meeting of the company (other than an adjourned meeting) by a shorter notice than twenty -one days (b) Every such notice shall be in writing.***
>
> ***(2) Save in so far as the articles of a company make other provisions in that behalf (not being a provision avoided by subsection (1)) a meeting of the company (other than as adjourned meeting) may be called by twenty -one days notice in writing.***
>
> ***(3) A meeting of the company shall, notwith - standing that it is called by shorter notice than that specified in subsection (2) or in the company's articles, as the case may be, be deemed to have duly called if it is so agreed: -***
>
> ***(a) in the case of a meeting called as the annual general meeting, by all the members entitled to attend and vote th ereat: and***
>
> ***(b) in the case of any other meeting, by a majority in number of members having a right to attend and vote at the meeting, being a majority together holding not less than ninety -five per cent in nominal value of the shares giving a right to attend and vote at the meeting, or, in the case of a company not having a share capital together representing not less than ninety -five per cent of the total voting rights at that meeting of all the members."***

The Section says nothing about the tabulation of the period of notice and no authority was cited to me for the proposition that the tabulation commences from the date of receipt of the Notice. It is however stated in **"The Principles of Modern Company Law"** by L.C.B. Gower, 4th Edition, at Page 531 that:-

> ***"…….although Section 133 lays down minimum lengths of notice and states that notice shall be in writing, it does not say to whom the notice is to be given or how it is to be transmitted……And even though the mem ber may have a right to attend, it does not follow that he will ever actually receive the notice, for the method of service is left entirely to the articles which, in theory might presumably provide that notice should be given by affixing it to a notice board at the registered office. "***

Again I have not had sight of the Articles to find out what provision there is relating to Notices or whether they differ from the Provisions of Table A of the Companies Act. I am satisfied however, that there are curative provisions under Section 133(3), even where there is a complaint that the notice was shorter than that provided for under the Act or the Articles. The Act also provides a remedy for omissions relating to proxies.

As for the qualifications of the secretaries, reliance is made on Section 14, 16 and 18 of the Certified Public Secretaries of Kenya Act Cap 534. They provide for Practicing Certificates and Registration of Certified Public Secretaries. It is contended however, that some of those provisions have since been repealed by Act No. 9/2000. Suffice it to say that the matter is one of evidence and I cannot make conclusive findings on it at this stage.

It goes without saying that the right to vote and to choose leaders of ones choice is a fundamental one and cannot be taken lightly. It must, however be taken within the context of similar rights of others. It is submitted by the Company's Advocate that it is desirable to subject the Company's leadership to periodic elections inorder to avoid corporate disputes. Indeed that was the view taken by Mulwa, J. in dealing with

a similar issue of the Company's elections. The Company's Act itself forces the issue by providing for mandatory Annual General Meetings when the Directors must renew the mandate of the members and the members exercise their right of choice of their leaders. It also provides for Extra Ordinary General Meetings where the same objective may be achieved. In all cases the law and the procedure set up in the Memorandum & Articles of Association of the Company shall be complied with and remedies are provided for breach. The Applicants in this case have not made out a case that would tilt the balance against upholding the intendment of the law that Companies should hold regular elections. The fear expressed is that there will be violence if the elections are held. But the Applicants do not say they express that fear on behalf of anyone else and it must be assumed that they speak for themselves and are the only ones complaining. If they persuade the majority to reject the elections in accordance with the law, so be it. One hopes however, that they will not be the authors or instigators of any violence. Unless the elections are otherwise validly challenged, I hold that view that the balance of convenience tilts in favour of rejecting the application for injunction which I now do.

The application is dismissed with costs.

DATED at NAIROBI this 15th day of April, 2002.

P.N. WAKI

JUDGE.