



**Sagalla Ranchers Limited v Mbinga & 5 others; Haji & another (Interested Parties)  
(Civil Case 74 of 2019) [2024] KEHC 16982 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 16982 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 74 OF 2019  
F WANGARI, J  
JANUARY 19, 2024**

**BETWEEN**

**SAGALLA RANCHERS LIMITED ..... PLAINTIFF**

**AND**

**PATRICK MBINGA ..... 1<sup>ST</sup> DEFENDANT**

**WILMOT MWADILO ..... 2<sup>ND</sup> DEFENDANT**

**AMOS NYATTA ..... 3<sup>RD</sup> DEFENDANT**

**EDWIN MWAKAYA ..... 4<sup>TH</sup> DEFENDANT**

**HARUN MNJAU ..... 5<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**ABDI SATAR HAJI ..... INTERESTED PARTY**

**ALFRED KILONZO ..... INTERESTED PARTY**

**RULING**

1. This ruling relates to two applications commenced by way of notice of motion dated 26<sup>th</sup> January, 2022 and 14<sup>th</sup> March, 2022. For ease of reference, the motion dated 26<sup>th</sup> January, 2022 shall be referred to as the first application while the one dated 14<sup>th</sup> March, 2022 shall be referred to as the second application. The first application sought for the following orders: -
  - a. Spent;
  - b. Spent:



- c. That there be a stay of orders in the said ruling pending the hearing and determination of the Plaintiff's Appeal to the Court of Appeal against the Ruling of this Honourable Court delivered on 20<sup>th</sup> December, 2021;
  - d. That an order of temporary injunction issues restraining the Respondents therein from convening any board meeting or any other future meeting they may call of the Plaintiff/Applicant herein pending the hearing and determination of the instant application inter partes;
  - e. That an order of temporary injunction issues restraining the Respondents herein from convening any board meeting of the Plaintiff/Applicant herein pending the hearing and determination of the Applicant's Appeal against the Ruling of this Honourable Court delivered on 20<sup>th</sup> December, 2021 pending before the Court of Appeal;
  - f. That may this Honourable Court grant any other relief it deems fit and just in the matter;
  - g. Costs of the application be provided for.
2. The second application sought for the following orders: -
- a. Spent;
  - b. Spent;
  - c. That pending the outcome of the Plaintiff's application dated 26<sup>th</sup> January, 2022, the Plaintiff be restrained from carrying out any meeting purported to be done in accordance to the ruling delivered by Hon. Justice Dorah Chepkwony on 20<sup>th</sup> December, 2021;
  - d. That in light of the timelines set out in the ruling delivered on 20<sup>th</sup> December, 2021, the court herein do issue such further directions and orders that the court may deem fair and just to grant;
  - e. That the costs of this application be provided for.
3. Both applications were strenuously opposed. For the first application, the Defendants filed grounds of opposition dated 7<sup>th</sup> February, 2022 as well as a replying affidavit dated 23<sup>rd</sup> February, 2023 sworn by one Edwin Mwakaya. The Plaintiff filed a supplementary affidavit dated 22<sup>nd</sup> February, 2022 on 25<sup>th</sup> February, 2022 to which the Defendants filed a further replying affidavit dated 14<sup>th</sup> March, 2022 on even date. For the second application, the Plaintiff filed a replying affidavit dated 22<sup>nd</sup> March, 2022 sworn by one Raphael Lewela Mbinga.
4. Directions were taken that both applications be canvassed by way of written submissions wherein both parties duly complied by filing detailed submissions and cited various authorities in support of their respective rival positions. The Plaintiff filed two (2) sets of submissions both dated 29<sup>th</sup> March, 2022 and filed on 6<sup>th</sup> June, 2022. The Defendants' submissions are dated 31<sup>st</sup> May, 2022 and filed on 10<sup>th</sup> June, 2021. I am grateful to Counsel on their compliance as the submissions filed are an important aid the court in arriving at a just decision either way.

### **Analysis and Determination**

5. I have considered the two (2) applications, the responses thereto, submissions filed together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination: -
  - a. Whether the orders sought in both applications are the most efficacious;



- b. If the answer to (a) above is in the affirmative, what orders ought to issue for the ends of justice to be met?
- c. Who bears the costs of the applications?
6. Both the Plaintiff and the Defendants are not strangers to each other. However, from the pleadings, affidavits and documents on record, these two (2) parties have been having several run ins within the corridors of justice and it appears to be a battle of wits on who upends the other next. But having gone through the record, it appears that the bone of contention is the directorship and/or shareholding of the Plaintiff. This court opines that once this issue is resolved, sanity in running the affairs of the Plaintiff shall be restored.
7. I have had the benefit of reading the ruling delivered by my sister Judge, Hon. Lady Justice Dorah Chepkwony and without pre-empting my decision in the present applications, I consider that the orders issued on 20<sup>th</sup> December, 2021 were progressive in nature and it only required good faith from these two (2) warring parties to achieve sanity. Having expressed myself as here above, I now proceed to interrogate the two applications.
8. The first application principally seeks to stay execution of the ruling delivered on 20<sup>th</sup> December, 2021 and specifically order (d) of the said ruling. It further sought for temporary injunction orders to restrain the Defendants from convening any board meeting or any other future meetings. Order (d) of the ruling delivered on 20<sup>th</sup> December, 2021 was couched in the following terms: - “That in the meantime, it is hereby ordered that the status quo existing before the filing of the suit as far as the Directorship of the Plaintiff Company is concerned be maintained.”
9. This order did not augur well with the Plaintiff and it thus preferred an appeal to the Court of Appeal. The Plaintiff’s contention as can be discerned from the affidavit sworn by Raphael Lewela Mbinga is that the meeting that took place on 26<sup>th</sup> January, 2022 brought strangers to the Plaintiff’s board who were not lawful members of the Plaintiff. It was equally contended that some board members were deceased and others had not taken out letters of administration to entitle them to be Personal Representatives of the deceased members of the Plaintiff. A case in point was the 1<sup>st</sup> Defendant, Wilmot Mwadilo.
10. Before delving on whether stay ought to be granted or not, this court having noted that an appeal had been preferred against the ruling of 20<sup>th</sup> December, 2021 had requested parties to address it on the status of the appeal. Mr. Kurgat, Learned Counsel for the Plaintiff indicated to the court that the appeal was pending and that no hearing date had been given. It is now two (2) years since the appeal was preferred. To date, it has not been heard. There is no indication that case management as required by the Court of Appeal Practice Directions has taken place.
11. With this state of affairs, this court has a duty under section 1A and B of the *Civil Procedure Act* to ensure timely disposal of the proceedings and all other proceedings in the court. It is unfortunate that applications filed under certificate of urgency have remained un-determined for more than one (1) year with interim orders being extended from one time to the other. Indeed, the Plaintiff’s affairs must have seriously grounded. Now having observed as above, is an order of stay of execution an efficacious order in the circumstances?
12. To answer the above question, it is imperative to consider whether order (d) of the ruling delivered on 20<sup>th</sup> December, 2021 was a positive order capable of being stayed. Did the court order any party to do anything or refrain from doing anything? This court returns a negative answer to the question. The



order simply meant that both parties stayed in the situation they were in before coming to court and thus the issue of substantial loss which is the cornerstone of grant of stay orders does not arise.

13. The Plaintiff's position is that the 1<sup>st</sup> to 5<sup>th</sup> Defendants are not its directors since it elected new directors during an Annual General Meeting held on 29<sup>th</sup> July, 2017. The court found for a fact that this meeting was held in contempt of the order issued on 28<sup>th</sup> July, 2017 and thus any decision agreed during the said meeting including election of directors was a nullity. Thus the Plaintiff's CR12 as of 14<sup>th</sup> December, 2014 was still unaffected. The suit was filed on 5<sup>th</sup> September, 2019. As of the date of filing suit, the Plaintiff's directors were and still remain those appearing on the CR12 dated 14<sup>th</sup> December, 2014. Therefore, the court order for status quo before filing of the suit materially changed nothing.
14. On the efficacy of stay order, the Plaintiff has been enjoying this order for the last almost two (2) years. As a prudent litigant, it was incumbent upon it to prosecute its appeal within a reasonable time. Having not done so, confirming the stay orders would be counter-productive as it would keep the wrangles bedevilling the Plaintiff to simmer on ad infinitum. I think I have said enough to show that the stay order sought cannot issue in the circumstances.
15. On the injunction sought, both applications seek an order of injunction albeit for different reasons to bar either from calling for and/or conducting an Annual General Meeting (AGM) of the Plaintiff. It is now over two (2) years since the ruling directing the Plaintiff to issue a proper notification to all its members for an AGM. This means that for the last more than two (2) years, there have been no AGM thus no elections. This is clearly prejudicial to the Plaintiff as it is incapable of making any substantial progress without looking over its shoulders.
16. The principles guiding the court whether to grant injunctive orders or not are settled. Those principles were set out in *East African Industries v Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows:

“...In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt



as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted...” (Emphasis added)

17. While considering the above principles, I take caution that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. (See the decision of Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002). However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. Being an equitable relief, a party seeking this remedy ought to act equitably.
18. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the Applicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Applicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.
19. The Court is also, by virtue of section 1A (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A (1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.<sup>1</sup>
20. At paragraph 30 of the ruling delivered on 20<sup>th</sup> December, 2021, the court expressed itself succinctly as to why an order of injunction was not the most appropriate. The court’s reasoning was that it was in the parties’ best interest if the Plaintiff remains a going concern. An order restraining holding of AGM was counter-productive. This court cannot sit on appeal of its own decision and neither can it review it when no reasons have been proffered to warrant such an exercise. To this end, this court shall not delve on whether the requirements for grant of an order for injunction had been met by either party.
21. Considering the intricate relationship between the two warring parties, there is a need to strike a balance that achieves a greater good for a great number of people. In *East African Cables Limited v Public Procurement Complaints, Review and Appeals Board & Another* [2007] eKLR, the Court of Appeal held as follows: -

“...in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods...”

22. This principle aptly applies to the prevailing circumstances. The Plaintiff needs to continue being a going concern and the shareholders need to receive their dividends as and when they are due. This will not be possible if the current impasse is not resolved. Since parties appear not willing to sit down on

<sup>1</sup> See *JM v SMK & 4 Others* [2022] eKLR



their own, this court as a neutral arbiter shall not shy away from exercising its duty bestowed upon it by the People of Kenya. On the first and second issues, this court returns a negative finding on both. Before embarking on making appropriate orders and/or directions, the issue of costs has to be considered.

23. On costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. Having considered the fact that these were interlocutory applications, it would be onerous to award costs to or against any party at this stage. Therefore, I direct that costs shall await the outcome of the suit.
24. I note that some of the issues raised by the Plaintiff included the standing of some of the directors but I note that those issues were responded to by the Defendants and in any event, those are issues that can be canvassed during the hearing.
25. For the above reasons and in order to strike a balance between the two parties, the court makes the following orders: -
  - a. The applications dated 26<sup>th</sup> January, 2022 and 14<sup>th</sup> March, 2022 are allowed only to the extent that an order of injunction is hereby issued barring either the Plaintiff or the Defendants from calling for, advertising, carrying out or in any other manner conducting an Annual General Meeting (AGM) or any other meeting concerning the operations, management and day to day running of the Plaintiff;
  - b. Any transactions involving withdrawal of funds from the Plaintiff's account can only be effected upon satisfaction of due execution of necessary funds withdrawal documents between Raphael Lewela Mbinga representing the Plaintiff and Edwin Mwakaya representing the Defendants;
  - c. To give effect to (b) above, this order be extracted and served upon all banks and/or financial institutions where the Plaintiff's account (s) are domiciled;
  - d. In order to ensure that the parties named in (b) above do not frustrate each other, if any reasonable withdrawal request is made and either party unreasonably withholds his signature, either the Plaintiff or the Defendant shall be at liberty to move the court;
  - e. The warring parties, that is, Raphael Lewela Mbinga representing the Plaintiff and Edwin Mwakaya representing the Defendants together with their Counsel, Mr. Kurgat for the Plaintiff and Mr. Gikandi for the Defendants are hereby directed to organize for a joint meeting either at the Plaintiff's registered offices or at a venue agreed by the parties within thirty (30) days from the date hereof;
  - f. The purpose of the meeting would be to identify the contested issues and propose the way forward on resolving the contested issues once and for all;
  - g. Parties to report back to court on the progress within sixty (60) days from the date hereof;
  - h. In the meantime, the orders made on 20<sup>th</sup> December, 2021 are hereby held in abeyance save for order (d) pending presentation of the report of the joint meeting;
  - i. Costs to abide the outcome of the suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF JANUARY, 2024.**



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**F. WANGARI**

**JUDGE**

In the presence of;

Ms. Chepchumba Advocate h/b for Kurgat Advocate for the Plaintiff/ Applicant

Ms. Murage Advocate for the Defendants

N/A by the Interested Parties

Mr. Barille, Court Assistant

