



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC CASE NO. 30 OF 2017

SAMWEL KAMAU MWAURA.....1st PLAINTIFF/RESPONDENT

PETER KAMAU WAGAIYU.....2nd PLAINTIFF/RESPONDENT

MICHAEL WAWERU KIRUBI.....3rd PLAINTIFF/RESPONDENT

MALEWA RANCHING CO. LTD.....4th PLAINTIFF/RESPONDENT

-V E R S U S-

STANLEY NGANAGA KARIUKI.....1st DEFENDANT/APPLICANT

PETER NJUGUNA NJOROGE2nd DEFENDANT/APPLICANT

STEPHEN TIBI NJENGA3rd DEFENDANT/APPLICANT

JOSEPH NYUTU NGANGA.....4th DEFENDANT/APPLICANT

JOSEPH KAMAU KIMANI.....5th DEFENDANT/APPLICANT

SAMWEL KIMANI KARIUKI.....6th DEFENDANT/APPLICANT

RULING

1. The Plaintiffs herein filed their Complaint on the 28th September 2015. Subsequently, they filed their Notice of Motion dated the 29th January 2016 seeking interim orders against the Defendants herein pending inter-parte hearing of the same. On the 10th January 2017 the High Court sitting in Nakuru granted prayer 2 of the Application.

2. There were orders to the effect that the Defendants file responses to the said application within 7 days whereby the matter was then set for hearing inter-parties for the 24th January 2017.

3. On the said date, directions were taken for the Notice of Motion dated the 29th January 2016 to be disposed of by way of written submissions upon which the Plaintiffs filed their submissions on the 18th February 2017. However, instead of the Defendants filing their submissions, they filed an application dated the 23rd October 2017 under certificate of urgency.

4. The file was then transferred to the Nyahururu High Court wherein on the 6th November 2017 the same was placed before Hon Justice Wendoh who directed for its service to be effected and the matter proceeds for inter parties hearing on the 30th November 2017.

5. On the said date, parties were not ready to proceed and direction were taken for application to be disposed of by way of written submission and thereafter parties highlight on the same on the 20th February 2018.

6. Pursuant to the issuance of the said direction, and upon the Hon Judge realizing that the court had no jurisdiction to determine the matter as it was a land matter, transferred the same to the Environment and Land Court wherein parties appeared before me on the same date and a ruling was set for delivery on the application dated the 23rd October 2017.

7. On the 26th April 2018 the court delivered its ruling noting that there were two applications pending, hence an application dated 23rd

October 2017 on the one hand, and a Preliminary Objection dated the 29th November 2017 that sought to have the application dated 23rd October 2017 struck out, on the other hand.

8. In order to move forward, the court directed that the Preliminary Objection be disposed of in the first instance by way of written submissions. Parties were granted 21 days to comply.

9. Parties failed to comply with the said directions and after mentioning the matter on three consecutive dates wherein parties did not appear nor confirm compliance, the court dismissed the said application, dated the 29th November 2017, for want of prosecution and since parties had filed their submissions to the application dated the 23rd October 2017, gave a date for the ruling.

10. The Application dated the 23rd October 2017, seeks for interim orders against the Respondents herein from carrying out business on behalf of Malewa ranching Company limited and for eviction orders against the Respondents.

11. It was the Applicants' submission that they were the current directors of the 4th Respondent Company having been duly elected into office and the presence of illegal appointee in the office hindered them from executing their operations in the company.

12. That vide a sham election, the Respondents are yet to be registered as legitimate officials to the 4th Respondents. The Applicants vide the CR 12, herein annexed as JNN 7, subscribed themselves as the leaders and requested the Registrar of Companies vide a letter annexed as JNN6 not to issue a CR 12 to the Respondents.

13. That with the existence of the said letter, the Company's business is at stand still thus defeating its inception objective and main task of issuance of titles to its members which is injurious to its members.

14. That vide a member's list marked as JNN5 the same was clear that the Respondents were not members of the Company to which effect they could not hold office as proxies as this was contrary to the 4th Respondent's Constitution.

15. The Application was opposed by the Respondents who submitted that in accordance to the provisions of Order 40 Rule 1 of the Civil Procedure Rules, they had filed the present suit by way of a Complaint, wherein the Applicants in the present application did not file their response to the Complaint.

16. That in effect thereof the Applicants herein had not complied with the provisions of Order 40 Rule 1 of the Civil Procedure Rules which stipulates that for an application for orders of injunction to lie, there ought to have been commenced a suit in which it is pleaded that the property in dispute is in danger of being wasted or damaged. The Applicants having failed to comply with the said provisions of the law, the present application ought to be dismissed.

17. That whereas the Applicants sought for interim orders against the Respondents to stop them managing the affairs of the 4th Respondent, yet the Respondents were Plaintiffs in the suit that was filed as a derivative suit. That what the Applicants therefore seek are orders of injunction for a party who is already an adversary in the same dispute.

18. That Order 4 Rules 2, 3, and 4 of the Civil Procedure Rules are specific. The application herein was accompanied by a sworn affidavit by a party claiming to be the treasurer of the 4th Plaintiff and who did not deponee that he had had authority from the 4th plaintiff to swear the supporting affidavit on behalf of the 4th Plaintiff. The present application was therefore incompetent for want of locus.

19. The Respondent relied on the cases of;

i. Kenya Commercial Bank Limited vs Stage Coach Management Ltd [2014] eKLR.

ii. Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another [2001] eKLR.

iii. East African Portland Cement Ltd vs Capital Markest Authority & 4 Others [2014] eKLR

20. The issue for determination by this court is whether the Applicant has established a prima facie case to enable this court grant her the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420)."

21. Has the Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

22. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicant, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.

23. The first issue that I need to consider for determination is whether the Applicant has established a prima facie case as is required in the **Giella vs. Cassman Brown** herein supra.

24. I have considered all the material facts placed before me and find that the parties herein are shareholders and Directors of the 4th Respondent Company where the Applicants herein have sought for orders injuncting the Respondents from carrying out business on behalf of Malewa Ranching Company Limited as well as for eviction orders against the Respondents.

25. The Respondents have submitted that there are no Proceedings within which interlocutory orders could be granted as the Applicants herein have not filed their response to the Plaint filed on the 13th October 2015. I agree.

26. In the case of **Nyamira F.C.S vs The Chief Land Registrar & Another [2005] eKLR** the court observed as follows:-

“The word interlocutory refers to something that is intermediate- between the beginning and the end. In a civil suit, it denotes any application between the filing of the suit and the final judgment or decree. The main suit has to be alive for there to be an interlocutory order...”

27. The Provisions under which applications for temporary injunction may be granted are found in Order 40, rule 1 of the Civil Procedure rules which provide as follows:

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders

28. The Plaint in the present case was filed by the Respondents on the 13th October 2015 wherein the Applicants in the present application did not file their response by way of a replying affidavit, defence or counter claim. In effect thereof they have not complied with the provisions of Order 40 Rule 1 of the Civil Procedure Rules which stipulates that for an application for orders of injunction to lie, there ought to have been commenced a suit in which it is pleaded that the property in dispute is in danger of being wasted

29. Secondly, I have considered the Affidavit in support of the Application sworn by Joseph Nyutu Nganga the treasurer of the 4th Respondent herein who deponed that he was competent to swear the affidavit but who attached no resolution by the 4th Respondent authorizing him to swear the same

30. Hewett, J. in **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd [2000] eKLR** held as follows:

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

31. Accordingly, having considered the application herein as well as the written submissions by the respective parties and the case law that they each relied upon, this court has come to a firm conclusion the incompetence of the application herein was not one that could be cured by the provisions of Article 159 (2) (d) of the Constitution of Kenya for the reason that the flaw was substantive and was not a procedural technicality that this court could overlook. I find that the applicant has not established a prima facie case in the circumstance.

32. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Muluya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

33. Consequently, I dismiss the application dated 23rd October 2017 with costs to the Respondents.

34. Further orders are to the effect that the Applicant/Respondents having failed to comply with the orders issued on the 24th January 2017 to file and serve their written submissions to the Application dated the 29th January 2016 within the stipulated time thereby choosing instead to file a myriad of applications, are hereby directed to file and serve their response to the said application, by way of written submissions within 7 days upon delivery of this ruling.

Dated and delivered at Nyahururu this 9th day of April 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE