



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL SUIT NO. 13 OF 2018**

**IBACHO TRADING COMPANY.....PLAINTIFF**

**VERSUS**

**SAMUEL MONDA NYONGOKI ONDORA.....1<sup>ST</sup> DEFENDANT**

**WILLIAM ONSONGO MAYAKA.....2<sup>ND</sup> DEFENDANT**

**WILLIAM OMBONGO MATUNDURA.....3<sup>RD</sup> DEFENDANT**

**DONALD BARONGO MOCHAMA.....4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. On the 24<sup>th</sup> December 2018 the plaintiff **Ibacho Trading Company** (**‘the Applicant**’) hereinafter referred to as the applicant filed a Notice of Motion (**‘the Motion**’) dated the 24<sup>th</sup> December 2018. The motion is brought against the 1<sup>st</sup> to 4<sup>th</sup> defendants, **Samuel Monda Nyongoki Ondora** (1<sup>st</sup> defendant), **William Onsongo Mayaka** (2<sup>nd</sup> defendant), **William Ombongo Matundura** (3<sup>rd</sup> defendant) and **Donald Barongo Mochama** (4<sup>th</sup> defendant) (**‘the Respondents**’). The motion is brought under Order 40 Rule 1,2 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act. The applicant seeks the following orders;

*i. That pending the hearing and determination of the suit there be an order of temporary injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents restraining by themselves, servants, agents or any person acting under their instructions from acting, holding themselves, representing, managing, selling, transferring, collecting rent, spending, transacting or in any manner interfering with the management of the plaintiff’s affairs.*

*ii. That costs of the application be granted.*

2. The motion is supported on the affidavit of **John Kenyaga Mochama** and the grounds on the face of the application. The application was opposed by the Respondents. **William Onsongo Mayaka** the 2<sup>nd</sup> respondent filed an affidavit with the authority from the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

3. The applicant through **John Mochama** a director of the applicant depones as follows that; **Kevah Nyakundi Gadinar, Zablon Omobongi, John Arumba, Rodha Ondieki, Truphena Moraa, Ogata Siriako** and **Nelson Moruri** and himself are duly elected directors of the Ibacho Trading Company. Their mandate is drawn from the Memorandum and Article of Association. That the 1<sup>st</sup> to 4<sup>th</sup> respondents have without the knowledge of the applicant secretly, fraudulently and unlawfully made documents and forged signatures of the executive officials purporting them to be documents made for and or behalf of the applicant and presented to the 5<sup>th</sup> respondent to effect changes to the directors of the applicant. The 5<sup>th</sup> respondent effected the changes and removed the names of the elected directors from the list of directors of the applicant replacing them with those of the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> respondents. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents thereafter started to take control and management of the applicant affairs and wrote letters to tenants. The respondents are now collecting rent from the premises belonging to the applicant. The 5<sup>th</sup> defendant confirmed to them that the changes had been made. Thereafter they convened a meeting with other directors and resolved to report the matter at Ramasha Police station. The investigation culminated into the arrest and charging of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents at Keroka Principal Magistrate’s court criminal case no. 920 of 2018 which is still pending hearing and determination. The 4<sup>th</sup> respondent was later on co-opted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to act as their treasurer. According to the applicant the actions of the 1<sup>st</sup> to 4<sup>th</sup> respondents purporting to act as the directors of the applicant is illegal and without colour of right. That the applicant and her shareholders are likely to suffer irreparably if the respondents are to continue to run its affairs in line with her memorandum and Article of Association and the provisions of the Companies Act. That the respondents may use illegal acquired status to

transfer, sell, charge, misuse, misappropriate or in any manner interfere with the properties of the applicant, hence the orders sought of injunction should be issued.

4. During submission in court Mr. Ombachi for the applicant relied on the affidavit in support of the application and added the following that; there was no election of the 1<sup>st</sup> to 4<sup>th</sup> respondents nor was there a notice to call for an AGM. That the law requires that there be an AGM and the results of the elections be announced. At the AGM the directors and shareholder participate and there has to be resolution of the replacement of directors which can only be done at the said meeting. The law does not allow the management to take over without following the due process. The applicant has demonstrated a prima facie case against the defendants that they have no authority to ran the affairs of the company. The loss the company will suffer is irreparably is that the interests of the shareholders are in jeopardy as the affairs of the company are being run by persons not known by the company. The rent being collected is not being accounted for. That there is also the danger that the property of the company could be unlawfully sold without the authority of the company. The balance of convenience tilts in favour of the applicants. That it is in the interest of justice that the orders sought be granted that the registered directors be allowed to continue to serve pending the hearing and determination of the matter.

5. The respondents' response was as follows through William Onsongo Mayaka that; he is the elected chairman of the plaintiff board of director and the 1<sup>st</sup> respondent is the company secretary, the 3<sup>rd</sup> respondent is the treasurer duly elected during the general meeting at Ibacho farmers' co-operative grounds on the 27/7/2017. On the 7/11/2017 a general meeting was held where it was agreed that there be a change of bank signatories and also **John Kenyaga Mochama** was elected as the vice chairman of the managing directors. On the 21<sup>st</sup> May 2018 upon discovery some directors were involved with withdrawal of monies from the bank without authority from the management another meeting was held and the affected directors were stripped off their post. The application is devoid of merit and has been made in bad faith and without the authority of the plaintiff. It's an individual who wants to disrupt the smooth running of the company. That John Mochama has no mandate from the plaintiff to institute suit as no such resolution was passed by other directors. The criminal case is yet to be heard and determined and they cannot be condemned before conclusion of the matter. That the prayer sought are similar to the ones which were sought in High Court Civil case no. 25 of 2014 which was not successful. The applicant has not demonstrated good faith and how the affairs of the plaintiff company are being interfered with since the 1<sup>st</sup> to the 4<sup>th</sup> respondents are diligently running the affairs of the company without any complaint from the shareholders who are over 1500 and above. The applicant will not suffer any loss if the orders sought are not granted since the plaintiff is under able leadership. The application should be dismissed as it has no merit and is calculated to frustrate the respondents.

6. Mr. Matoke for the respondents in his oral submissions reiterated the facts as deponed in the respondent's replying affidavit adding that the respondents are the managing directors of the plaintiff company and the same plaintiff is seeking orders to stop them from running the functions of the plaintiff company. The suit is misconceived and an abuse of the court process as management is being sought through back door.

7. In response Mr. Ombachi for the respondent stated that on the 2/10/2018 there was a meeting where a minute indicates that the applicant was given authority to file suit. The documents of 27/7/2017 are some of the forgeries alleged. That it has not been established that the respondents are elected leaders. That this court has power to deal with issues of fraud under the Companies Act in respect of a fraud in a company. That the criminal jurisdiction does not oust the jurisdiction of this court. The application has merit and should be granted.

#### **DETERMINATION**

8. I have considered the affidavits in support of the application, the oral submissions and the law. The undisputed facts are that the plaintiff company is a limited company whose functions are guided by the Companies Act. It's also not in dispute that the there are wrangles over the directorship/ management of the affairs of the plaintiff.

9. The principles of granting an injunction are well laid down (*see Geilla vs. Cassman Brown Ltd E. A 1973 at page 358*). The applicant has to establish that it has a prima facie case with a probability of success. It is the applicant's contention that the 1<sup>st</sup> to 4<sup>th</sup> respondents are illegally in office. It is alleged that there was forgery/fraud in the manner the respondents became directors of the plaintiff company. The conduct of the 1<sup>st</sup> to 4<sup>th</sup> respondents is the subject of a criminal case which is yet to be determined. This court cannot make a decision at this interlocutory on the said allegations. My considered view is that the allegations/ complaints made in the criminal case ought to be heard and determined before the issues raised in this matter are dealt. For if fraud or forgery is established then the said findings will definitely affect the decision to be made in this matter. Further the issues raised on how the elections were done can only be dealt with at a full hearing. The applicant has to demonstrate that it will suffer irreparable loss. The allegations made by the applicant is that there could be possible cases of mismanagement. It appears that the applicant's main concern is the rent being collected. This court expects the 1<sup>st</sup> to 4<sup>th</sup> Respondents to be collecting rent and accounting for it to the shareholders. The allegation of mismanagement has not been established. The deponent of the applicant's affidavit is a serving director. I believe that as a serving director he has a say in the management of the affairs of the plaintiff. This limp in my view has not been established. Lastly on the issue of balance of convenience in my view issuing an injunction at this interlocutory stage will disrupt the management of the plaintiff company. It is the interest of the Company that the current management continues to conduct the affairs of the plaintiff, having in mind that they are answerable to the shareholders and must conduct the affairs of the company as provided in the Memorandum and Article of Association and law governing companies. For these reasons I decline to grant the orders sought. Let the parties pursue the criminal case at Keroka Court. Meanwhile the parties should comply with the provisions of order 11 of the Civil Procedure Rules. This matter will be mentioned on the 30<sup>th</sup> of September 2019 to find out the progress and or outcome of the criminal case at Keroka and to give directions on the hearing of this case. No orders as to costs.

Dated signed and delivered at **Kisii** this **11<sup>th</sup>** day of **July 2019**

**R.E.OUGO**

**JUDGE**

**In the present**

**Miss. Oeira h/b Mr.Ombachi For the Applicant**

**Mr. Mr. Matoke For the 1<sup>st</sup> to 4<sup>th</sup> Respondent**

**5<sup>th</sup> Respondent Absent**

**Ms. Rael Court clerk**