



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL CASE NO. NO. 13 OF 2014

GEORGE MAINA KABUI.....1ST PLAINTIFF

KANGARA MUTNGI KAMAU.....2ND PLAINTIFF

PERMINUS MWANGI NJUKU.....3RD PLAINTIFF

LAZARUS MUGO MUNYI.....4TH PLAINTIFF

IMMANUEL GACHIRA NJAMUMO.....5TH PLAINTIFF

DEDAN GITUKE.....6TH PLAINTIFF

RAPHAEL NYAMU KARIUKI.....7TH PLAINTIFF

CHARITY WAMBUI NJAMBURI.....8TH PLAINTIFF

MARGARET NJOKI KINUTHIA.....9TH PLAINTIFF

-VERSUS-

DAVID CHRISPO CHIGITI.....1ST DEFENDANT

DAVID MURIUKI MIGWI.....2ND DEFENDANT

WINNIE WAMBUI GACHOKI.....3RD DEFENDANT

STEPHEN KABUI NYAGA.....4TH DEFENDANT

JUDGMENT

1. The plaintiff **George Maina Kabui** who testified that he is the administrator of the Estate of **Stanley Kabue Ngethe** together with other plaintiffs who are shareholders of **Kerugoya Service Station** namely **Kangara Mutugi Kamau, Perminus Mwangi Njuki, Lazarus Mugo Munyi, Emmanuel Gichira Njamumo** and **Charity Wambui Njamburi** filed a plaint dated 20th August, 2014 claiming:-

a) Permanent injunction to be issued against the defendants from accessing the company account No. 0100299916568 Equity Bank Kerugoya and/or operating the company account without authority.

b) To account for all transactions conducted in the company and refund all money withdrawn and used without authority.

c) Provide the plaintiffs with audited report and valuation report of all assets and liabilities of the company.

2. The claim is against, **David Crispo Chigiti, David Muriuki Migwi, Winnie Wambui Gachoki** and **Stephene Kabui Nyaga** who are board members of the **Kerugoya Service Station Company Limited**.

3. The claim is based on the grounds that the 1st plaintiff together with the four defendants herein were elected by the members as directors on 12th May, 2012. However, the Registrar of Companies did not legitimize the elected directors due to lack of:-

Ø Registration letters of the outgoing directors.

Ø Affidavit sworn by the outgoing directors.

Ø Minutes of meeting whose agenda was the resignation of the outgoing directors, appointment of incoming directors, a certified public secretary and confirmed meetings by the then chairman.

4. The plaintiffs aver that the defendants have been taking advantage of the vacuum to withdraw money from the company's account, leasing out company's property to 3rd parties, receiving money from the company's business without the approval of the board members. It is also averred that the defendants have refused to provide audited accounts of the last five years and also do not file tax returns and have failed to call a general meeting of the company. That the company stands to be sued for tax evasion.

5. The defendants filed a defence and counter claim.

6. Defendant's case and counter-claim

They responded by stating that the 3rd, 5th and 8th plaintiffs deliberately refused to render their resignation letters so as to frustrate the smooth operations of the company. They stated that the directors mostly lease its properties to bonafide shareholders. They claim that they are still the bonafide directors of the company and stopping them from accessing the bank accounts will polarize the operations of the company. That the 1st plaintiff has been in unlawful occupation of the company premises and has deliberately refused to pay rent. That the 2nd plaintiff has been operating the company matatu and has failed to make daily payments as agreed and owes the company approximately Kshs.310,335/=. That there was a previous suit involving the same parties therefore the plaintiffs should be liable for contempt of court. That the 2nd plaintiff intended to defraud the company of Kshs.110,000/= for **plots 137 and 139** which he purported to transfer to the company name but the transfer has never materialized. That the 5th plaintiff never audited any accounts and planned a fake handover of the company's documents. They claim that the issue is a power struggle which should be resolved through alternative dispute resolution.

7. They raised a counter claim seeking the following orders:

a) The 1st and 2nd plaintiffs to pay the sum of Kshs.214,500/= and Kshs.310,335/= respectfully owed to the company plus interest.

b) The 3rd, 5th and 8th plaintiffs to render their resignation letters plus affidavits.

c) Declaration that the defendants are the lawful directors of Kerugoya Service Station.

d) The 4th and 8th defendants to refund the sum of Kshs.110,000/= paid to them to settle the land rates for Plots 131 and 139 in Sagana.

8. This matter was scheduled for hearing on 21st June, 2017 but the defendants never showed up although they had been invited vide a letter dated 9th March, 2017 to come to the registry on 23rd March, 2017 with a view to fixing a hearing date which they never did. A date was fixed and they were duly served on 13th April, 2017 as per the affidavit of service sworn on 18th April, 2017. The Court having been satisfied that the defendants were served and there was no explanation for their non-attendance the matter proceeded *ex parte*. The plaintiff adduced evidence and closed their case.

9. The plaintiff urged the Court to rely on his statement dated 20th August, 2014 and the list of documents filed on 19th August, 2014 and 9th October, 2014 and 16th June, 2017. He stated that he is claiming some money the defendants used without consent of the shareholders and the defendants to account for the money.

10. The plaintiff further testified that they obtained statements from Equity Bank and Kenya Commercial Bank after the Court order of 19th June, 2015. They looked for an auditor and he did an audit on the accounts. It showed that from the year 2009 to 2015 Ksh.15,852,683.36 was received. He testified that they are asking for orders that the defendants be ordered to refund all the money they used without consent from shareholders. The defendants never paid dividends.

11. The defendants never adduced evidence. The last time when the matter was in Court before it came for hearing the plaintiff had sought for leave to amend the plaint as they were seized with documents which they did not have. The plaintiffs were given 21 days to put in their application for amendment and take a date for the application. That was on 8th October, 2015. The plaintiffs never filed the application to amend but proceeded with plaint without amendment. Be thus as it may, the issue for determination is whether the plaintiffs have proved their claim on a balance of probabilities.

12. The 1st prayer is for a permanent injunction restraining the defendants from accessing the company account No. 0100299916568 Equity Bank Kerugoya and/or operating the company account without authority. The principles for granting an injunction are well settled. The plaintiffs are seeking a permanent injunction against the defendants. The Court of Appeal has restated the principles for granting of an injunction. In the case of **Ngurumani Limited -V- Ian Bonde Nielsen & 2 Others (2014) eKLR** the Court stated 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) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent”.

13. The plaintiff has stated that as per the general meeting held on 12th May, 2012 the 1st plaintiff and the defendants were appointed as directors of the company. However, the Registrar has not legitimized the elected directors since the company is yet to forward resignation letters and affidavits of outgoing directors together with minutes of meeting whose agenda was resignation of outgoing directors and appointment of incoming directors. The 3rd, 5th and 8th plaintiffs are said to have deliberately refused to render their resignation letters. It should be noted that the plaintiffs had filed an application dated 20th August, 2014 and in prayer 2 and 3 of the application they were seeking orders to restrain the defendants from accessing the said account at Equity Bank Kerugoya Branch pending the hearing and determination of the suit. My brother Justice Limo declined to issue orders of injunction for the following reasons: “*The applicants have alluded in their response to the applicants’ application that the internal affairs of the company cannot be subjected to this Court’s supervision or jurisdiction. I am unable to look at the Articles of Association of the company in this case as none was availed to me by either the applicants or the respondents. I was also not given a copy of the Memorandum of Association. It is difficult therefor at this stage for this Court to establish the exact position. What is clear however, is that Section 22 (1) of the Companies Act (Cap 486) provides that Memorandum and Articles of Association are binding to members once it is registered. The Articles of Association ordinarily provide for avenues in regard to conflict resolution. Some provide for arbitration some provide for Courts as avenues for conflict resolution. This Court will therefore not take a position at stage on the issue of whether the Court is mandated to check into the conduct of affairs on the management of Kerugoya Service Station Limited.*”

14. The Court has not been supplied with the Articles and Memorandum of Association and the plaintiff has not shown that this Court has jurisdiction to check into the affairs of the company. The judge declined to grant prayer 1 and 2 in the application which are the same prayers in the plaint and stated that they do not meet the threshold in the case of **Giella -V- Cassman Brown** as they have not demonstrated the harm they are likely to suffer owing to the defendants’ action is irreparable. That if they lose money as a result of the actions of the defendants whether legal or not the same can be compensated if they prove they indeed deserve to be compensated by way of unpaid dividends. The case of **Giella -V- Cassman Brown & Co. Ltd. (1973) E.A. 358** on the principle of granting injunction states as follows:

“First an applicant must show a prima facie case with a probability of success. Secondly interlocutory injunction will not normally be granted unless the applicant 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.”

15. What Justice Limo was saying is that the plaintiffs did not prove that they are likely to suffer irreparable loss which cannot be compensated by an award of damages. The plaintiffs did not adduce any evidence at the trial to prove that they are likely to suffer irreparable loss. The plaintiff relied on the same pleadings and on the documents which were before Justice Limo. It is surprising to expect the Court to reach at a different finding based on the same facts and evidence. The same principles for granting an injunction at the interlocutory stage are the same ones which apply for the granting of a permanent injunction. In the case of **Ngurumani Limited (supra)**. The Court of Appeal stated that the settled principles for granting of injunction in the case of **Giella -V- Cassman Brown** stated that these are the three pillars on which vests 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 Company 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 applicant 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 other.

16. The plaintiff has failed to show that he has a *prima facie* case or that he will suffer irreparable loss. The ruling by Justice Limo still stands as no appeal was filed. The plaintiffs cannot urge the Court to grant an injunction under the same pleadings. Though the plaintiff swore an affidavit sworn by Emmanuel Gichira Njamumo showing that a sum of Ksh.6,805,153/= was withdrawn from the account of the company at Equity Bank Kerugoya, this further goes to show that the plaintiffs are not likely to suffer irreparable loss. This amount is quantified and can be recoverable from the defendants by an order to refund and an order that it be paid to the plaintiffs as dividends. The plaintiffs are not likely to suffer irreparable loss. Any loss may be compensated by an award of damages or order of re-imburement or refund. I find that the plaintiffs have not proved on a balance of probabilities that the Court should grant an injunction as prayed in prayer (a) of the plaint. Prayer (a) in the plaint is a replica of prayer (1) in the application dated 20th August, 2014 where a detailed ruling was given by Justice Limo. There was an intention to amend the pleadings which never was. Instead the plaintiffs decided to proceed with the hearing. It is an abuse of the Court process to expect the Court to have a ruling declining the prayer and a judgment allowing the prayers without any amendment. The prayer would affect the operations of the company with regard to payments due to the company. I decline to grant prayer (a) in the plaint.

17. The plaintiffs pray that the defendants be ordered to account for all transactions conducted in the company and refund all money withdrawn and used without authority. They also seek an order that the defendants be ordered to provide the plaintiffs with audited report and valuation report of all assets and liabilities of the company. The defendants are not recognized as directors of the company owing to the fact that they have not been registered as the directors of the company. It should be noted that the plaintiffs have not produced the Articles and Memorandum of Association. The Court is still in the dark as to whether the internal affairs of the company are subject to this Court’s supervision. It is trite law that the Articles of Association ordinarily provide for the manner in which disputes should be resolved. The Memorandum and Articles of Association binds all members as provided under **Section 22 (1) of the Companies Act (Cap 486) Laws of Kenya**. However, in the defence and counterclaim the jurisdiction of this Court is admitted. As such the issue of jurisdiction does not arise.

18. The defendants should be called to account for all the transactions which have been done for the period they have been in the office without the authority of the Registrar of Companies. It is alleged that the defendants have not been paying taxes as required and have not been filing tax returns. This puts the company at risk of being blacklisted by the tax man. The plaintiffs and other members have a right to know the financial standing of the company.

19. The issue as to whether the plaintiff could maintain this claim was addressed by this Court while considering whether the directors can be sued by members as the company is a distinct entity from its members and it is the company itself which has locus to bring an action for remedy. Justice Limo in his ruling dated 18th February, 2015 held that the suit as filed discloses some derivative claims from the plaintiffs. The judge considered the Rule in **Foss -V- Harbottle (1843) 2 HARE 461** on the exceptions to the rule that it is the company which should file the suit. The exceptions to the rule are to the effect that may bring an action against the directors.

20. Justice Limo relied on the persuasive decision y Justice Mwera (as he then was) in **Dadani -V- Manji & 3 Others (2004) 1 KLR 95** where he stated:

“It is a cardinal principle in Company Law that it is for the company and not an individual shareholder to enforce rights of action vested in the company and to sue for wrongs done to it. It is also cardinal that in absence of illegality a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal circumstances where the majority are entitled to prevent the bringing of an action in relation to such matter (See FOSS -V- HARBOTTLE (1843) 2 HARE 461). All this is in deference to the self regulation the law allows corporations and thus limits the interference by court in the running of such bodies on their own. However, if due to an illegality a shareholder perceives that the company is put to loss and damage.....such a shareholder can bring action by way of derivative suit.”

Justice Mwera described a derivative claim as follows:

“Where the shareholder seeks to enforce a right not vested in himself by the company of which he is a member for example a claim of misappropriation of company’s property by a director, he can do (if at all) by means of a derivative claim.....”

21. My view is that the defendants have been in office though not registered by the Registrar of Companies. I hasten to say though that is not through any fault of their own in view of the reasons given by the Registrar as pointed out above. In all fairness they should be able to account for the transactions they have conducted and file an audit report and a valuation report of all assets and liabilities of the company.

22. The plaintiffs have averred that the defendants have failed to provide audited accounts for the last three years, failed to file tax returns and to call for a general meeting. It is also averred that the defendants have failed to account despite being summoned by the plaintiffs. I find that the plaintiffs have made a case for this Court to grant prayer (b) and (c). I therefore enter judgment as follows:

- a) Prayer (a) is declined.
- b) Is allowed to the extent that the defendants accounts for their transactions in the company. The second limb is declined as it is speculative since the amount of money withdrawn and used without authority was not specifically pleaded and proved. The claim for refund cannot be sustained as drawn.
- c) The prayer is allowed as prayed.
- d) Costs to the plaintiffs.

Dated and delivered at Kerugoya this 7th day of March, 2018.

L. W. GITARI

JUDGE

Judgment read out in the presence of M/s Kibe holding brief for Mr. Gori for Plaintiff. Mr. Macharia holding brief for Mr. Okubasu for Defendant. Court assistant Naomi Murage this 7th day of March, 2018.

L. W. GITARI

JUDGE

7.3.2018