



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL CASE NO.1 OF 2018

NAPHTALI MUNGAI MUREITHI (Suing

On his behalf & on behalf of concerned

shareholders of Midlands Ltd).....PLAINTIFF

- V E R S U S -

AFRICAN AGRICULTURAL CAPITAL

FUND LLC MIDLANDS LTD.....DEFENDANTS

R U L I N G

The application dated 12/4/2018 was coming up for hearing today. The applicant's counsel, Mr. Waithaka sought an adjournment and extension of the interim order because he was served with the 1st respondent's Replying Affidavit yesterday while the 2nd respondent had filed theirs on Friday. The applicant's counsel wishes to file a further affidavit.

Both counsel for the 1st respondent, Mr. Gachuhi and Mr. Githara for 2nd respondent, have objected to extension of the interim order in the event an adjournment is allowed.

Mr. Gachuhi contended that the delay in filing their affidavit was occasioned by the manner in which the order sought in the Notice of Motion was framed as to suggest that the application had been heard to its finality; that when a party comes to court for *ex parte* interim orders, it is expected that all facts are disclosed to enable him proceed to argue the case as presented. Counsel also argued that the applicant is aware of other matters pending before the High Court in Nairobi Commercial Division, namely HCC.13/2018 and 93/2016 touching on the same subject matter of sale of shares by the 1st respondent. It is his view that it will be a gross abuse of the court process if the orders are to remain in force as it may lead to embarrassment of the courts if they were to issue defferent orders on the same subject matter.

Mr. Githara for 2nd defendant who filed his Replying Affidavit within the allowed time was ready to proceed but objected to extension of the interim order on the same grounds.

It was Mr. Waithaka's view that the applicant and others who filed this suit are not party to the existing suits and that the appellant has a right to come to this court to exercise his rights. He argued that a further delay of 14 days will not cause any prejudice to the respondents if the interim order were extended.

I have considered the objection raised to the extension of the interim order. I have seen the order extracted dated 16/4/2018 by the applicant and it is clear that it is final in nature as it is issued pending the hearing of the suit which was very misleading. It was supposed to issue pending hearing of the application *inter partes*. It is no wonder counsel for 1st respondent did not understand it.

I have seen the annexures to the Replying Affidavits filed by the respondents and it is a fact that there exist two other suits filed by two different plaintiffs at the Commercial Division, Milimani in Nairobi in HCC.93/2016 and 13/2018, touching on the issue of sale of shares by the 1st respondent. The applicant is aware of the said suits and although some documents in relation thereof were annexed by the applicant, counsel had a duty to disclose to this court of the existence of the said suits and what had transpired therein and the orders issued, if any. Disclosure was necessary to enable the court determine whether or not to grant the interim order, so that the court does not put itself in an embarrassing situation in view of the other matters pending before the Commercial Division in Nairobi.

I do agree that the legal position is that when an applicant files an application seeking an interim order, it is expected that he has brought all

the facts before the court to enable him to proceed to justify the grant of interim orders and maybe their extension and it may not be necessary to file further affidavits. This court has a discretion to discharge or extend interim orders given exparte. In view of the facts disclosed by the respondents of similar pending cases, I think it is fair that the orders be discharged. I also bear in mind that no interim orders had been sought in the original application in the first place. The interim order issued on 16/4/2018 is hereby discharged.

The court will allow the applicant an adjournment and allow him 7 days to file and serve a further Affidavit. The application will then be heard inter-partes.

Dated, Signed and Delivered at NYAHURURU this 17th day of May, 2018.

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R.P.V. WENDOH

JUDGE

PRESENT:

Soi - Court Assistant

Mr. Waithaka Mwangi - Counsel for Applicant

Mr. Gachuhi - Counsel for 1st Respondent

Mr. Githora - Counsel for 2nd Respondent