



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 232 OF 2016**

**JOHN MITHAMO WASUSANA.....PLAINTIFF/APPLICANT**

**- V E R S U S -**

**NDIMA TEA FACTORY COMPANY LTD.....DEFENDANT**

**RULING**

1) The subject matter of this ruling is the motion dated 18.4.17 taken out by John Mithamo Wasusana, the plaintiff herein. In the aforesaid motion, the plaintiff sought for the following orders:

***i. THAT the instant application be certified as urgent and heard ex-parte in the first instance.***

***ii. THAT an injunction do issue staying the defendant/ respondent's resolution reached on 13<sup>th</sup> March 2017 and communicated to the plaintiff/applicant on or about 4<sup>th</sup> April 2017 vide a letter dated 28<sup>th</sup> March 2017 suspending the plaintiff/applicant as a director of the defendant company w.e.f 1<sup>st</sup> April 2017 "for the period between seven (7) quarter meetings ..." pending the hearing and final determination of the suit herein.***

***iii. THAT in the alternative to prayer (2) herein above, there be an injunctive order restraining the defendant/respondent by itself, its agents, servants and/or employees from barring, suspending, interfering, frustrating, denying, restricting and/or interfering in whatsoever manner with the plaintiff/applicant's exercise of his mandate, functions, responsibilities, privileges and/or rights as a director of the defendant/respondent company pending he hearing and final determination of the suit herein.***

***iv. THAT pending the inter-partes hearing of the instant applicant, there be an interim injunctive orders in terms of prayers 3 and/or prayer 4 hereinabove.***

***v. THAT the costs of this application be provided for.***

2) The motion is supported by the affidavit sworn by the plaintiff. When served, Ndima Tea Factory Company Limited, the defendant herein, filed the replying affidavit of John Kennedy Omanga to oppose the motion. When the application came up for interpartes hearing, learned counsels were directed to file and exchange written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival written submissions.

4) It is the submission of the plaintiff that on 23.8.2016 that the defendant suspended plaintiff for six months from being a director of the defendant i.e from 19<sup>th</sup> August 2016 until 31<sup>st</sup> March 2017 prompting the plaintiff to file this suit.

5) The plaintiff appears to have contemporaneously filed the application dated 2/9/2011 in which he sought for an order of injunction to restrain the plaintiff's suspension.

6) This court heard the aforesaid application and had it dismissed.

The plaintiff avers that his court dismissed the motion on a technicality and not on its merits.

7) The plaintiff avers that the defendant went ahead and without hearing the plaintiff suspended the plaintiff further.

- 8) The plaintiff argued that the defendant through its board of directors lacks the legal mandate to suspend the plaintiff and has arrived at a decision which is ultravires, irrational, capricious, high handed and malicious.
- 9) For the above reasons the plaintiff argued that unless the defendant is restrained by way of an injunction or stay of resolutions the defendant is hell bent to ensure that the plaintiff does not play his role as a director for the remaining part of his term.
- 10) It is also argued that unless the act of suspending the plaintiff is stayed or restrained, the tea farmers, the plaintiff represents as well as the plaintiff himself stand greatly disenfranchised hence he would suffer irreparable loss.
- 11) The defendant opposed the motion stating that the dispute between the plaintiff and the defendant is that between directors of a limited liability company which can only be resolved through the internal management process using the directors' code of conduct. Therefore the jurisdiction of the court to intervene in such internal management process is curtailed.
- 12) The defendant further pointed out that the plaintiff had filed the application dated 2/9/2016 which application is similar to the current motion. The aforesaid application was dismissed thus the plaintiff fully served the suspension slapped upon him.
- 13) It is stated that while serving suspension the plaintiff continued making negative statements and or publications against the defendant company and its associate companies.
- 14) The defendant was consequently prompted to invite the plaintiff to respond to the allegations. It is said the plaintiff ignored the summons and the defendant company proceeded to deliberate the plaintiff's conduct in his absence and ended up suspending the plaintiff for breaching the express and implied provisions of the code of conduct of directors. The defendant was of the submission that the decision of the board was not baseless nor driven by malice.
- 15) After a careful consideration of the material placed before this Court, I have come to the following conclusions in this saga: First, that there is no doubt that the plaintiff appended his signature to the Factory Directors' Code of Conduct, 2015.
- 16) Secondly, that the defendant board of directors invited the plaintiff to answer to allegations of making negative statements about the defendant company.
- 17) Third, that the plaintiff opted not to answer those allegations thus prompting the defendant's board of directors to proceed ex parte to deliberate on the complaints levelled against the plaintiff. In the circumstances it cannot be said that the plaintiff was not given an opportunity to be heard before he was suspended.
- 18) Fourth, that by virtue of the defendant's memorandum and Articles of Association and the Code of Conduct of Directors, the defendant board of directors had powers to suspend the plaintiff as a disciplinary action for a director's misconduct.
- 19) It is clear in my mind that the plaintiff/applicant has failed to show that he has a prima facie with any chance of success.
- 20) In the end, I find no merit in the plaintiff's motion dated 18.4.2017. The same is dismissed with costs to the defendant.

**Dated, Signed and Delivered in open court this 2<sup>nd</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants