



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL CASE NO.1 OF 2018

NAPHTALI MUNGAI MUREITHI.....APPLICANT

V E R S U S

AFRICAN AGRICULTURAL CAPITAL FUNDING LLC.....1STRESPONDENT

MIDLANDS LTD.....2NDRESPONDENT

R U L I N G

By the Notice of Motion dated 12/4/2018, the applicant **Naphtali Mungai Mureithi** (Suing on behalf of concerned shareholders of Midlands Ltd) seeks an order that pending the hearing of this suit, the court do issue a conservatory order of injunction to restrain the 1st respondent, African Agricultural Capital Funding LLC and 2nd respondent, Midlands Ltd, either by themselves, their agents or anybody acting on their behalf, from transferring guarantors' shares given as security, to Primestar Holding or any other 3rd party until this suit is heard and determined.

The application was premised on the affidavit sworn by the applicant dated 12/4/2018 and a further affidavit dated 23/5/2018, in which he deposed that he is a shareholder of the 2nd defendant, Midlands Ltd and is one of its promoters, when it was founded in 2004; that, with other farmers in Nyandarua, came up with the idea of building a factory in 2003 and were allocated 25 acres of public land by Director of Lands and Adjudication; that on 30/4/2004, the factory operation was launched in Njabini Trading Centre; that a company which was registered in 1987 whose name was Midlands Agro Industries Ltd was changed to Midlands Ltd the 2nd respondent; that 2800 shares were sold to members and 40 odd Self Help Groups which totaled to 8000 members. They agreed that no one share holder would own more than 3% of the shares (NMM1A). The applicant is aggrieved along with other members, by some individuals who have formed an Offshore Company from West Indies whose aim is to buy guarantors' shares which were given as security to the 1st respondent; that the 1st defendant will acquire 70% of the company's worth at Ksh.115,000,000/= whereas the company is worth Kshs. One Hundred Million including goodwill; that the 2nd respondent's Board has not held any Annual General Meeting for over 5 years and failed to service the loan owed to the 1st respondent.

By an agreement dated 4/12/2012, the 1st respondent, 2nd respondent and the major shareholders agreed with 1st respondent to loan Kshs.100 million to the 2nd respondent and shares of major shareholders, that is, Junghae, Wainaina, Juanco Group Ltd and Githima Ltd were used as security; that the 1st and 2nd respondents were to appoint representatives in the Board of Directors of the 1st respondent but they failed to convene the 2nd respondent's Annual General Meeting; that on 27/11/2017, the applicant with some shareholders requisitioned the 2nd respondent to hold an Extra Ordinary General Meeting. The notice was served on the Registrar of Companies and the 2nd respondent. Upon receipt of the notice, the 1st respondent started the process of disposing off the guarantor's shares and through a sale agreement dated 4/1/2018. The 1st respondent purported to sell some of its shares belonging to Junghae Wainaina, Juanco Group Ltd and the 2nd respondent; that shares were released to Githima Limited as security under a deed of Release on 27/1/2016 in consideration for injection of additional shareholders loan into the said company. The applicant suspects fraud since there had been no Annual General Meeting of the 2nd respondent since 2013 to January, 2018; that the applicant and concerned shareholders held an Extra Ordinary Annual General Meeting on 24/2/2018 and passed some resolutions which included creating a new Board and the new Board was to take up the offer to match the offer made to Primestar Holdings of Kshs.115,000,000/= to the 1st respondent; that an offer has been made to match that made by Primestar to the 1st respondent; that if guarantors' shares are sold, the 2nd respondent stands to lose the goodwill made since 2004 and only a few individuals stand to benefit and they are those behind Primestar Holdings; that they have tried to get directors of Primestar Holdings Ltd and it was found that those behind it are Kenyans. The applicant has found that the shares of the guarantors have not yet been transferred to Primestar and no money has so far been paid. The court is therefore invited to grant the orders prohibiting sale of any shareholders.

Mr. Waithaka counsel for the applicant, urged that the applicant is not opposed to the 1st respondents selling their private shares but they want the local farmers to be given preference but not outsiders and they are prepared to pay the Kshs.115 million quoted as the price of the

shares plus interest, that is, the package offered to the other company.

Counsel also submitted that the 2nd respondent has admitted that no Annual General Meetings have been held since 2013 and therefore the agreement between the 1st defendant and shareholders was illegal and the Board as presently constituted by the 4 Board Members instead of between 7 – 12 members is illegal and that the return filed by the 1st respondent to Registrar of Companies is a false return. Counsel also questioned why Githima Company Ltd though a shareholder of 2nd respondent, who guaranteed the loan of 2nd respondent, has not had its shares sold and wonders whether the said Githima Ltd is not the same as Primestar Ltd; that appointees of 1st respondent are directors in 2nd respondent while Githima Ltd has 2 directors but the farmers lack representation and hence the need for the court to grant the interim order as the applicants have satisfied the principles for grant of an order of injunction as held in *Giella v Cassman Brown(19743) EA 358*; that the farmers stand to suffer irreparably as they are the suppliers of raw materials to the company and there is no other factory of that nature in the Country; that the defendants will not suffer any prejudice because they will be paid their money.

The application was opposed and Wanjohi Ndagu, a representative of the 1st respondent swore an affidavit dated 12/5/2018. The 1st respondent was represented by Mr. Gachuhi who submitted that the applicant and ‘*concerned shareholders*’ of the 2nd respondent have not exhibited any certificates in terms of paragraph 17 of the Memorandum and Articles of Association of the 2nd respondent; that the list of names annexed to the further affidavit by the plaintiff is not evidence that they are members as the source of the list is unknown and hence they have not shown that they have any *locus standi*.

As to the applicant’s contention that he is a promoter of the 2nd respondent, it was submitted that the names of subscribers and promoters are listed in the Articles of Association in (MWKI) as of 25/1/1987; that in the Annual General Meeting held on 12/1/2013, the agreement of 4/12/2012 was approved and at clause 3 of the agreement, the promoters were identified as Junghae Wainaina, Githima Ltd and Juanco Group Ltd but not the plaintiff; that new Articles were adopted in the Annual General Meeting as seen at Clause 24 (NWNK4) which adopted the shareholders agreement of 4/12/2012.

It was urged that the 2nd respondent being a public company cannot be restricted by pre-emptive rights of existing shareholders and shares pledged by existing shareholders as security to 1st respondent are available for sale to anybody; that when the 2nd respondent defaulted in repayment of the loan to the 1st respondent, the 1st respondent advertised the sale of shares see (MWMK.8) HCC.93/2016 where an advertisement for sale of shares had been placed in the Daily Nation on 10/3/2016 for Sale, but the applicant never came up to buy them and that the applicant has recognized that fact that it is a lender’s right to exercise its right of sale to realize their security.

As regards the requisitioning of the Extra Ordinary General Meeting of 24/2/2018, it was the 1st respondent’s submission that the same is a nullity as the notice does not identify the shareholder, his shareholding, certificate number and what is annexed to the requisition was just a list of names ‘NMM.3’.

As to the prayer sought in the plaint that the shareholders be given pre-emptive rights, it is the 1st respondent’s contention that they are not available in a public company. Mr. Gachuhi further urged that even though the applicant is aware that the purchaser of the shares is Primestar, his address given, he failed to enjoin it to this suit yet the suit touches on the purchaser’s rights because they have already paid for the shares and exhibited documents from Kenya Revenue Authority and the Annual Returns from the Registrar of Companies ‘WM.2’. Mr. Gichuhi submitted that Juanco Ltd’s shares have not been transferred because they are the subject in HCC.13/2018 where the court ordered a *status quo*.

It’s the 1st respondent’s view that shares are quantifiable and the applicants can be compensated by way of damages and the court should not allow the application.

The 2nd respondent also opposed the application and Mary Wangui Kiarie, a director, swore two affidavits dated 11/5/218 and 30/5/2018 respectively. Mr. Githara counsel for the 2nd respondent associated himself with the submissions of Mr. Gachuhi, counsel of the 1st respondent. Counsel submitted that this matter only relates to sale of shares but that the other issues of the constitution of the Board of the 2nd respondent and its management are peripheral as no orders can be made in respect thereof.

Mr. Githara added his voice to the 1st respondent’s submissions that the applicant has not proved that he is a shareholder of the 2nd respondent as he did not provide an identity card number, membership number or copy of shareholders certificate and the list that was annexed to the further affidavit by the applicant could not be verified as a genuine list as it was served on the day before this application was heard. Counsel urged that the burden of proving the applicant’s standing in the 2nd respondent lies with him.

It is the 2nd respondent’s submission that the applicant cannot complain that he was denied a chance to buy the shares because the farmers in Nyandarua had been offered shares before but they never bought them. Mary Kiarie deponed at paragraph 12 of the affidavit that by the Board of Directors meeting of 17/4/2009 minute 5/10/AOB, the Board noted that some shares had not been taken up by members and extended the period of time for buying; that the Board also scraped the maximum limit of shareholding and because of the changes, there are shareholders who have well over 3% of the shares while the small shareholders only have a total of 15% of the total shareholding and hence minority shareholders; that this being a public company, there is no restriction on transfer of shares. Under Article 31, the Board has no power to refuse to register transfer of shares.

The applicant alleged that Mary Kiarie contradicted herself as to whether there has been Annual General Meetings held by the 2nd respondent but she has maintained that there has been no Annual General Meeting since 2013 and explained the reasons why the failure and clarified that there was no need for the company to approve transfer of shares since the 1st respondent demanded to exercise its rights and 2nd respondent had no say in the matter.

The applicant suspected fraud in the failure to have Githima Ltd's shares sold and it was explained at paragraph 24 of Mary's affidavit; it was deponed that the said company had loaned the 2nd defendant Kshs.50 million and helped the company remain in business and that it negotiated release of its shares on that basis.

It was the applicant's submission that Mary Kiarie is no longer a director of the 2nd respondent because the Board was removed by the new had Board set up after the meeting of 24/1/2018. She deponed that the requisition for an Extra Ordinary General Meeting held on 24/2/2018 was a nullity as the applicant had not proved their standing in the company and besides there was an order of status quo in HCC.13/2018 and the records at Registrar of Companies as at 20/4/2018 still show that the directors are the same as before 24/2/2018; that contrary to the allegation that the Board is improperly constituted, Article 101 provides the quorum of the Board to be at least four directors.

I have considered the rival arguments by counsel and affidavits on record. This being an application for an interlocutory order of injunction (conservatory order) the applicant must satisfy the conditions laid down in the case of ***Giella v Cassman Brown & Co Ltd (1973) E.A. 358***. The applicant must demonstrate that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage if the order of injunction is not granted. If the court is in doubt on the foregoing, it will decide the matter on a balance of convenience.

In the case of ***Mrao Ltd v First American Bank of Kenya Ltd 2003 KLR 125***, the Court of Appeal defined a prima facie case to mean:

".....a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial...."

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 from the latter..."

As properly observed by Mr. Githara, counsel for the 2nd respondent, the parties seemed to dwell at length on the issues of management and control of the 2nd defendant company. Though important to the issues at hand, they were more peripheral. I think that the issues that need to be addressed are:

- 1. Whether the applicant and other concerned shareholders are shareholders in the 2nd plaintiff's company and have a locus in this matter;***
- 2. Whether this matter is sub judice;***
- 3. Whether an extra ordinary General Meeting of the 2nd defendant took place;***
- 4. Whether the shares of the guarantors are still available for sale;***
- 5. Whether the applicants as shareholders have any pre-emptive rights.***

It was the respondent's submission that the applicant lacks the *locus standi* to bring this application because he has not demonstrated that he is a shareholder of the 2nd defendant company.

The applicant annexed to his affidavit a list of 62 persons whom he referred to as '**concerned shareholders**' on behalf of whom he brought this application/suit. The names however did not provide the identity cards of the said members, the membership numbers or copy of the share certificates.

The applicant filed a further affidavit and annexed another list of his purported shareholders but as submitted by the respondents, it was not filed in good time for the respondents to verify its source its source is not indicated on the document.

The onus squarely rests on the applicant to prove that he is a shareholder of the 2nd respondent. So far, the documents exhibited by the applicant do not prove membership of the 2nd respondent. Paragraph 17 of the Memorandum of Association of the company provides that every member will be issued with a certificate for his shares. Each of the concerned members and the applicant must have certificates showing their shareholding if indeed they are members. So far, the applicant has not demonstrated that they are shareholders of the 2nd respondent.

The applicant also claimed to be a promoter of the 2nd respondent. The court was referred to clause 3 of the Shareholder's agreement of 4/12/2012 which lists the promoters as Jungahae Wainaina, Juanco Group Ltd and Githima Ltd. The applicant is not one of them.

It is the respondent's submission that the applicant withheld material facts from the court by not disclosing that other suits seeking similar orders had been filed by shareholders whose shares are the subject of sale by the 1st respondent. These suits are ***Millimani HCC.93/2016 Jungahae Wainaina v Africa Agriculture Capital Fund & Midlands Ltd*** and ***HCC.13/2018 Juanco Group Ltd v Midland Ltd and African Agricultural Capital Fund and Primestar Holdings Ltd***. The copies of the pleadings were exhibited. The prayers sought in the above suits were generally injunctions to stop the sale of the 2nd respondent's shares by the 1st and 2nd respondents. They are the same prayers sought in the instant case. The prayers are basically the same and the parties are the same and the applicant has not given any explanation as to why he decided to file another suit when they could have joined the other pending suits. Filing a multiplicity of suits over the same issue is likely to cause embarrassment and conflicting findings.

It is the applicant's submission that due to the failure by the 2nd defendant to hold any Annual General Meetings from 2013, the shareholders issued a requisition calling for an Extra Ordinary General Meeting which was held on 24/2/2018 in which several resolutions were made including the election of a new Board which would take up the offer to match the offer made by Primestar Holdings to buy the 2nd respondent's shares.

The respondents have submitted that no valid Extra Ordinary Annual General Meeting was held. According to Mary Kiarie, a director of the 2nd respondent, the said meeting was a nullity in law because first, it was convened in contravention of orders of the court in HCC.13/2018 in which the court had ordered on 31/1/2018 that the status quo on the sale of shares be maintained till 6/3/2018. Further to the above, it was submitted that the requisition notice was invalid as it did not disclose who the shareholder issuing the requisition was, his shareholding and certificate number. The deponent also exhibited a search from the Registrar of Companies indicating that the old Board was still in office. Further to the above, I have earlier found that the applicants have not shown that they are shareholders of the 2nd respondent. I agree with the defendants that it seems the requisition notice was invalid and went against the court's orders. As a result, the applicant cannot purport to have resolved to appoint a new Board on 24/2/2018. Unless the contrary is shown, the old Board members who include Mary Kiarie are still in office.

As regards how many members form a quorum on the board; Article 101 provides for a quorum of not less than four directors.

According to the 1st respondent, the shares are not available for sale because they have already been sold and transferred to Primestar Holdings. However, the applicant contends that there has been no transfer. It is not in dispute that the 1st respondent advanced a loan of Kshs.100 million to the 2nd respondent and the 1st defendant took up shares in the 2nd respondent for consideration of the loan under a shareholder's agreement entered into with Junghae Wainaina, Juanco Ltd & Githima Ltd and the loan was secured by shares held by Juanco, Junghae and Githima Ltd. The 2nd respondent defaulted in its payment hence the need for 1st respondent to enforce against the guarantors. The 1st respondent has entered into a sale agreement with Primestar Holdings for sale of the shares that had been pledged. According to the 1st respondent, the purchase price was paid on 26/1/2018 and the advocate received the money on 1/2/2018 and the transfer duly effected except for the shares held by Juanco because of a court order in HCC.13/2018. The 1st respondent exhibited interim annual returns filed by the company secretary. Although the applicants deny that the shares have not been sold or transferred, they did not address themselves to the documents exhibited as evidence of the said sale and transfer. The prayer seeking to stop the sale may be time barred. That can only be determined at the full hearing.

It was the respondent's submissions that the applicant would not be entitled to the orders sought because there is no contractual relationship between the applicant and the 1st respondent and that the applicant was not privy to the investment agreement and the Shareholders Agreement; that the agreement did not provide for pre-emptive rights to the applicant and other shareholders except the anchor shareholders who were signatories to the agreement Junghae Wainaina, Juanco Ltd and Githima Ltd.

The applicant has not demonstrated that the minority shareholders were privy to the investment agreement MWMK.2. It is signed by African Agricultural Fund LLC, Midlands Ltd, Junghae Wainana, Juanco Group Ltd and Githima Ltd. The applicant and other concerned shareholders would need to prove that fact at a full hearing.

It was also submitted by the 2nd respondent that the small shareholders hold only 15% of the 2nd respondent's shareholding and hence are minority shareholders and that this being a public company, there is no restriction on the transfer of shares in terms of Article 13 of the Articles of the company. Article 30 also provides for free transfer of shares of shareholders except those not approved by the Board. It seems that the 2nd respondent would not bar the 1st respondent from the exercise of its right of sale because the pre-emptive rights were a preserve of the parties to the shareholders agreement (Clause 4.1).

The applicant stated that upon the registration of the 2nd respondent, it was agreed that no one shareholder would own more than 3% of the shares but now Primestar Holdings, upon purchasing the guarantors' shares will own 70% of the company's worth. In response, to the above allegation, Mary Kiarie deponed that in the 2nd respondent's meeting of 18/12/2012 under Minute 02/29/12/AOB, the Board approved the creation of 9, 523, 809 shares to be acquired by the 1st respondent as an equity investor and also approved the payment of any willing creditor through issuance of shares; that as a consequence, the company got several shareholders who hold more than 3% of the shares; that the shareholding is open to individuals and other entities who may purchase shares in the company or through allotment and there is no restriction in terms of the number of shares that may be held by anybody. If that is the case, then there would be no restriction on who may buy the shares.

For all the foregoing reasons, the court finds that an order of injunction is not deserved. If the shares have been sold, this court would be acting in vain if it were to grant an order of injunction. The applicant is unlikely to suffer irreparable damage because the value of shares is quantifiable and he can be compensated.

I hereby decline to allow the application. Costs to the respondents.

Dated, Signed and Delivered at NYAHURURU this 7th day of December, 2018.

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Njogu holding brief for Mr. Githara for 2nd respondents

Ms. Ndegwa holding brief for Mr. Waithaka Mwangi

Soi - Court Assistant