



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 73 OF 2016

PAUL RUTO.....1ST PLAINTIFF

DANIEL KANDIE.....2ND PLAINTIFF

BENJAMIN RUTO3RD PLAINTIFF

KIROBON FARMERS CO LTD.....4TH PLAINTIFF

VERSUS

BENJAMIN KIBIWOT CHESULUT.....1ST DEFENDANT

WILSON KIPTOO LEITICH.....2ND DEFENDANT

PETER KIBET MUTAI.....3RD DEFENDANT

SAMUEL KIMUTAI BIRIR.....4TH DEFENDANT

HOSEA BARMAO CHEMWENO.....5TH DEFENDANT

CHERUIYOT SIGILAI.....6TH DEFENDANT

ROBERT SANG.....7TH DEFENDANT

PAULINE SANG.....8TH DEFENDANT

ESTHER RONO.....9TH DEFENDANT

RULING

1. By a plaint dated the 25th July 2016 and filed on the same day, the 1st, 2nd and 3rd plaintiffs who describe themselves as members and shareholders of the 4th plaintiff company sued the defendants as directors of the 4th plaintiff Kirobon Farmers company Limited that was incorporated in the year 1972.

The defendants and directors of the company were elected in an Annual General Meeting(AGM) held on the 20th June 2014, and since then no other AGM has been called by the Directors of the company.

2. In their statement of claim, the plaintiffs allege that the defendants have been running and managing

the affairs of the 4th plaintiff as a sole proprietorship and hence failed to call an Annual General Meeting to elect new directors and have failed to provide accounts for losses and profits, and also blocked audit of the financial affairs of the company. It is further alleged that the defendants have exposed the 4th plaintiffs assets to wastage, wrongful disposal hence the call for Directors Board Meetings to legitimise their actions which they describe as *ultra vires*.

For those reasons, the plaintiffs seek an order to compel the Defendants to convene an Annual General Meeting to elect new directors and provide accounts of the company assets.

3. By their application dated 25th July 2016 filed under a certificate of urgency, they sought the following orders:

(1) Spent

(2) Spent

(3) That pending the hearing and determination of this suit, the Honourable Court be pleased to grant an injunction restraining the defendants either by themselves, agents, servants or proxies or whosoever from operating, leasing out, selling, alienating, withdrawing money and in any way with the 4th plaintiffs/applicant Company's assets, leased properties more specifically business premises at Keringet Plot No.181, accumulated rent amounting to Ksh.2.7 Million held at Brookside Dairy Ltd and Kshs.600,000/= held by Pryrethrum Board of Kenya.

(4) That this Honourable Court be pleased to grant an order compelling the defendants to call for an urgent Annual General Meeting to elect New Directors.

4. The reasons for the application are stated on the face of the application and in the supporting affidavit of Daniel Kandie the 2nd plaintiff sworn on the 25th July 2016. They can be summarised as failure by the defendants to call for an Annual General Meeting since the 20th June 2014 and that the said directors are illegally in office, that the company's financial audit has not been done as the defendants have blocked the said audit and wanton wastage of the company's assets.

5. In opposing the application, the defendants filed a preliminary objection dated the 19th September 2016, stating that the 4th applicant being a company has no *locus standi* to sue on its own nor sue its own directors who are the defendants and Respondents. A replying affidavit was also filed.

Upon service, the applicants filed grounds of opposition to the preliminary objection stating that no pure points of law are raised. The defendants/Respondents also have filed a statement of defence on the 14th February 2017 but excluded the 1st Defendant. I have not seen the 1st Defendants Memorandum of Appearance or his defence.

6. The preliminary objection was urged together with the Notice of Motion application. Mr. Terer Advocate for the applicants told the court that the main interest was prayer No. 4 and urged the court to issue an order compelling the company directors to call for an Annual General Meeting to elect new directors as there are serious sharp divisions in the directorship and that the company's assets are being mismanaged and wasted by the the current directors.

7. Mr. Gai for the 2nd to 9th Respondents urged, by his preliminarily objection that there is no competent suit in court on grounds that the 1st and 2nd plaintiffs are not members of the company and that the 3rd plaintiff who is a member did not sign any documents. He stated that the Verifying Affidavit to the plaint was sworn by the plaintiff who being not a shareholder/member of the company has no *locus standi* to swear the verifying affidavit.

It is further argued for the respondents that the 4th plaintiff (the company) cannot sue its own directors

and can only sue through its directors and that the 1st Defendant director of the company is also colluding and acting with the applicants.

8. I have considered the grievances by the Applicants against the directors of the company: Other than stating that they are shareholders and members of the company, no documentary evidence was placed before the court to confirm their *locus standi* as either shareholders or members of the company, their status being in dispute.

The 4th plaintiff is the company itself. A Limited Liability Company acts through its directors elected by its members in an Annual General Meeting. The last Annual General Meeting according to the applicants was held on the 20th June 2014 and the respondents were duly elected.

9. There is no evidence tendered by the applicants that the respondents are acting beyond their authority or that they are mismanaging the company affairs. No evidence has been placed before me that the company assets are being disposed off or the company monies are being misused. All what the applicants have placed before me by way of affidavit is hearsay upon which they ask the court to issue orders to restrain the directors from carrying on their mandates as directors of the company. Without the issue of *locus standi* being resolved first, the plaintiffs prayers cannot be sufficiently addressed. I have stated above that the plaintiffs shareholding in the company is in dispute.

That being the case, it would be a travesty of justice if the court moves to issue orders without confirmation whether or not they are suited.

The preliminary objection raised by the respondents raise legal issues that ought to be determined before the orders sought can be granted.

10. A preliminary objection must consist of pure points of law that arise from the pleadings and that ought to be argued on the assumption that all facts as pleaded are correct, and should not be blurred with factual details to be proved by evidence where evidence or interrogation of a fact must be done. See **Nakuru HCCC No. 40 of 2014 Kirobon farmers co. Ltd -vs- Benjamin Chesulut & 3 Others**.

In the above case, the same company in the present case had sued the respondents more or less on similar issues and had sought to stop the 2014 Annual General Meeting which anyway proceeded and the current directors elected. Since then nothing much has been done upto the filing of the present suit.

What I see here is a multiplicity of suits by or against the same company by or against its shareholders. The court has not been told the fate of the case I have quoted above and why the plaintiffs could not have filed the current application within the said case.

11. The issue of *locus standi* of the plaintiffs to bring the suit has not been seriously urged by either the applicants or the respondents. Without any proper legal arguments and proof of the allegations being tabled before the court, I am unable to determine whether or not the applicants are seized with the proper *locus standi* to bring the suit against the defendants and even if they were members of the company they could only sue as minority shareholders through a derivative action as stated in the **Companies Act** and by leave of the court.

12. The procedure for filing a derivative action by minority shareholders, assuming that the applicants are such and for the perceived wrongs by the directors is for the benefit of the minority shareholders and not for their own benefit. It is well stated in civil case **No. 64 of 2014 Tash Goel Vedprakash -vs- Moses Wambua Mutua & Another (2014) e KLR**.

I agree with the respondents submissions that it is for the company, not the individual shareholders to enforce rights individual shareholders to enforce rights and actions rested in the company to sue for the wrongs done to it and in the absence of illegality a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company's internal affairs. This should be a matter to be resolved by a resolution at the company's meetings.

13. That is what the applicants are seeking, an order to compel the respondents to call and convene an Annual General Meeting to vote out the respondents.

But before such order can be granted, the applicants must satisfy the court that they are indeed shareholders of the company, and that the orders they seek are available to them.

14. For those reasons I find the application dated the 25th July 2016 devoid of merit and incompetent. I also find the respondents preliminary objections dated 19th September 2016 without merit too as not being based on pure points of law, but that requires proof by way of evidence. To that extent the preliminary objection is dismissed.

15. The upshot of the above is that the applicants cannot be granted the orders stated in their application which is also dismissed.

16. Costs of the application shall be costs in the cause.

Dated, Signed and Delivered this 11th Day of May 2017.

J.N. MULWA

JUDGE