



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO 62 OF 2004

NDATHI MUGUNDA & CO. LTD.....PLAINTIFF

Versus

PATRICK MATU GITHINJI & 4 OTHERS..... DEFENDANTS

RULING

1. By Chamber Summons under section 3A order 40 of the Civil Procedure Rules and Section 132 of the Companies Act the Defendant Applicants moved court under certificate of urgency for orders that:

1. ***The application be certified urgent.***
2. ***The honourable court be pleased to grant interim orders of injunction restraining the plaintiff/respondent whether by Itself or its agents from holding the meeting scheduled for 2nd November 2013 pending hearing and determination of this application.***
3. ***The honourable court be pleased to grant interim orders of injunction restraining the plaintiff company/Respondent whether by itself or its agents from holding the meeting scheduled for 2nd November 2013 pending hearing and determination of this suit.***

4)The order be served upon the office of the Assistant County Commissioner Nyeri North District, The Officer Commanding Station , Kiganjo Police Station alongside the Officer Commanding Police sub-county Nyeri North for enforcement of the order.

5. ***Cost be provided for.***

1. The application dated 31st October 2012 and filed on the same date was based on the ground that the applicants are members of the Plaintiff Company and that self imposed chairman of the Respondent had invited members to a meeting scheduled to take place on 2nd November 2013 while this suit is pending judgment.
2. It was supported by the affidavit of one PATRICK MATU GITHINJI and annexures thereto in which he deponed that on 28th October 2013 the plaintiff/Respondent posted a general notice informed members of a purported annual General Meeting to be held at Chaka Market ground on 2nd November 2013 and that it was the applicants position that the meeting is brought in bad faith and with sinister intention to defeat the pending decision of this court.
3. That in the plaint the plaintiff/Respondent had sought judgment for

a) A declaration that the defendants are inter meddlers as relates to the affairs of the plaintiff company.

b) Meeting scheduled and held on 216th June 2004 was an illegality as it had been called by persons with no locus standi and that any resolutions that may have proceeded therefrom be nullified.

c. Permanent injunction restraining the defendant their agents or person claiming under them from interfering with the running of the plaintiff company.

1. It was further deponed that if the plaintiff/respondent is allowed to proceed with the said meeting there is a risk of the applicants being locked out of the meeting despite being bona fide members of the company. It was further deponed that the Registrar is on record in various correspondences confirming that he is aware of the dispute and that there is danger of chaos erupting at the scene and that the plaintiff will suffer no prejudice.
2. When the matter came up for hearing before me exparte and upon submissions by Mr. Ombongi in which he submitted that the meeting had an agenda of the chairman report while there existed no chairman and that the company had been ordered not to make any substantive resolution until the determination of the suit and that Justice Sergon had stated that neither party should hold meetings until the dispute is determined, I certified the application urgent granted interlocutory injunction and fixed the same for interparte hearing on 11th November 2013.
3. On 11th November 2013 Mr. Gitimbi applied for adjournment to enable the plaintiff respondent file its reply to the application which was done on 16th December 2013 through an affidavit by CHARLES KINYUA KARURI wherein he deponed that he is the current chairman of the plaintiff company and that subsequent to the filing of the suit in the ruling of court delivered on 16th October 2008 the Defendants applicants were barred from conducting themselves as members of the plaintiff company until the hearing and determination of the suit and that the application dated 31st October 2013 was another attempt by the applicant to entrench themselves through a back door by forestalling the plaintiff company's meeting which was scheduled for 2nd November 2013.
4. It was further deponed that there is no arbitration pending before the Registrar of Companies and that the company Registrar ruling dated 31st July 2012 and 3rd June 2011 all instigated by the Defendants herein have since been quashed by the honourable court in NYERI HIGH COURT JR NO. 32B of 2011 and 20 of 2013 and that in planning for the Annual General Meeting scheduled for 2nd November 2013 the directors of the plaintiffs company were aware of the need to comply with the provisions of the company Act which requires that annual general meetings be held within 15 months of every subsequent meeting the previous meeting having been held on 3rd August 2012.
5. It was deponed that the company had made preparation for the same and that the defendants filed this application late and further served the exparte orders on the date of meeting at 10.00 am. when a total of 652 members had arrived at the venue of the meeting and that the plaintiff will seek reimbursement of the mount of Ksh. 34,487/- if the application is dismissed.

SUBMISSIONS

6. When the matter came for interpartes hearing Mr. Ombongi submitted that the meeting intended for 2nd November 2013 though did not take place the same would have had effect since from the agenda the resolutions would have had effect to give power to the incoming committee members to the detriment of the applicants and that the main suit seeks to bar the applicants from participating in the affairs of the company.
7. He further submitted that judge Sergon had ordered that the applicants should not hold any parallel meeting pending the determination of the suit and that if the plaintiff is allowed to proceed with the meetings there is a likelihood of the applicants being barred from participating since they are members and that Justice Sergon had ordered the applicants not to intermeddle with the company and that it would be better if the plaintiff is barred from holding any general meetings pending judgment on 21st February 2014.
8. Mr. Mugambi for the plaintiff/Respondent submitted that by the time when the order was served the meeting had already began and that the balance of convenience would have been in their favour. It was submitted that the plaintiff called the meeting in compliance with section 131 of

- the Companies Act and that the previous courts rulings had barred the applicants from interfering with the running of the plaintiff company and that the applicants have not provided evidence that in the previous general meetings resolution were passed detrimental to them.
9. From the submissions herein the issue for the courts determination is whether the applicants have made up a case from confirmation of the interlocutory injunctions granted herein or whether the same ought to be set aside.
 10. To answer this issue I must state for record purpose that at the time of granting the interlocutory injunction herein the court did not have the benefit of the original court file which is pending judgment and depended solely on the affidavit of the applicants and the submission by Mr. Ombongi
 11. This application depends on the order issued by Justice Serгон. Both Mr. Ombongi and Mr. Mugambi confirmed that Justice Sergon had barred the applicant from interfering with the running of the plaintiff company with Mr. Mugambi submitting that the previous ruling of the court had barred these applicants from interfering with the running of the company and from calling their own meeting and therefore had this information been available to the court the interlocutory injunction granted herein would not have been granted as to do so amounted to reviewing the rulings stated herein.
 12. It is very clear that the interlocutory injunction was obtained through non disclosure of material facts. In the case of *MOBILE KITALE STATION v MOBIL OIL KENYA LTD AND ANOTHER* (2004)1KLR the court held that:

“An interlocutory injunction is given on the courts understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction being an equitable remedy would be taken away (discharged) where it is shown that the person's conduct with respect to matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The order of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose to shield the party against violation of his rights or threatened violation of the legal rights of the persons seeking it”

13. I would therefore agree with the submissions by Mr. Mugambi that any injunction granted herein would amount to allowing the applicants to interfere with the running of the plaintiff company and contrary to the previous orders granted herein.
14. The principles upon which injunction can be granted were stated in the case of *GIELA V CASSMAN BROWN LTD* [1973]EA 358 A party needs to show that they have a prima facie case with a probability of success, that they stand to suffer irreparable damage that cannot be compensated by an award in damages and that in the event of any doubt in regard to the issue above two conditions that the balance of convenience having regard to the circumstances of the matter tilt in favour of the applicant.
15. From the submission and affidavit evidence herein the balance of success of this case depends on the outcome of the judgment of Justice Sergon but any injury which the applicants can suffer in respect of the annual general meetings of the plaintiff company can adequately be compensated by way of damages.
16. It is therefore clear that the applicants have not made up a case for grant of the orders sought and the application herein dated 31st October 2013 lacks merit and is dismissed with cost to the plaintiff/respondent.
17. I further order that this skeleton file be placed together with the main file on 22nd February 2014 before Justice Sergon.

Dated and delivered at Nyeri this 14th day of February 2014.

J. WAKIAGA

JUDGE

Gatibi for Mr. Mugambi for Respondent.

No appearance by Mr. Ombongi for the applicant
the Applicant in person

J. WAKIAGA

JUDGE