



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 74 of 2013**

**DAVID MAHUGU .....1<sup>ST</sup> PLAINTIFF**

**JOHN KIHU .....2<sup>ND</sup> PLAINTIFF**

**LYDIA GACHOYA .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**STEPHEN MBUGUA.....1<sup>ST</sup> DEFENDANT**

**LUCY WANJA .....2<sup>ND</sup> DEFENDANT**

**THE KENYA NATIONAL CHAMBER OF**

**COMMERCE & INDUSTRY .....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is yet another round of the circus that the 3<sup>rd</sup> Defendant and its directors are now too well used to. The sheer number of cases in the courts involving the 3<sup>rd</sup> Defendant is enough evidence that the 3<sup>rd</sup> Defendant is an entity which its continued survival is by sheer luck. All those cases involve the leadership of the 3<sup>rd</sup> Defendant. This is one of them.

2. On 21<sup>st</sup> February, 2013, a Board meeting called by the 1<sup>st</sup> Defendant aborted. On the following day, 22<sup>nd</sup> February, 2013, seven (7) directors of the 3<sup>rd</sup> Defendant held a meeting wherein they, inter alia, resolved to replace the 1<sup>st</sup> Defendant as the National Chairman of the 3<sup>rd</sup> Defendant and appointed a new Chief Executive Officer (“CEO”) to replace the 2<sup>nd</sup> Defendant as the CEO of the 3<sup>rd</sup> Defendant. It would seem that another meeting convened by the 1<sup>st</sup> Defendant on 27<sup>th</sup> February, 2013 resolved to re-instate him to the position of the National Chairman of the 3<sup>rd</sup> Defendant as well as the 2<sup>nd</sup> Defendant as the C.E.O of the 3<sup>rd</sup> Defendant. That meeting also suspended the Plaintiffs as directors of the 3<sup>rd</sup> Defendant.

3. On 7<sup>th</sup> March, 2013, the Plaintiffs took out a motion on notice seeking temporary orders to restrain the Defendants from rescinding the appointment of the 1<sup>st</sup> Plaintiff as acting Chairman of the 3<sup>rd</sup> Defendant

and from suspending the Plaintiffs from being directors of the 3<sup>rd</sup> Defendant. Those prayers were granted at an ex parte stage and the Plaintiffs have sought that they be confirmed until the trial. The grounds upon which the application was grounded were set out in the body of the motion and in the Supporting and two Supplementary Affidavits of David Mahugu sworn on 1<sup>st</sup> March, 2013 and 15<sup>th</sup> March, 2013, respectively.

4. The Plaintiffs contention was that it had been agreed by consensus that the meeting of 21<sup>st</sup> February, 2013 be adjourned to the 22<sup>nd</sup> February, 2013 under Article 82 of the Memorandum and Articles of Association that at that meeting of 22/2/13, the 1<sup>st</sup> Defendant was suspended as National Chairman and the 1<sup>st</sup> Plaintiff appointed to act on his behalf, that Dr. Benson N. Momanyi was appointed the C.E.O of the 3<sup>rd</sup> Defendant to replace the 2<sup>nd</sup> Defendant, that the Defendants purported to have held a meeting on 27/2/2013 and to rescind the resolutions of 22/2/2013 and suspend the Plaintiffs from the Board of Directors of the 3<sup>rd</sup> Defendant. That the Defendants had also resulted to the use of police officers to effectuate the Defendants purported decision of 27<sup>th</sup> February, 2013. That there were other cases pending in court regarding the leadership wrangles in the 3<sup>rd</sup> Defendant.

5. Ms Ratemo teaming up with Mr. Ogeto appeared for the Plaintiffs. They submitted that the meeting of 22/2/2013 was not a continuation of the one of 21/2/13 but was independently called, that that meeting of 22<sup>nd</sup> February, 2013 was properly called and was quorate in view of Article 71 of the 3<sup>rd</sup> Defendant's memorandum and Articles of Association, that the meeting of the 21/2/13 was the 5<sup>th</sup> time the 1<sup>st</sup> Defendant was cancelling a board meeting meant to discuss the operations of the 3<sup>rd</sup> Defendant, that it has been difficult to call for an election as the 1<sup>st</sup> and 2<sup>nd</sup> Defendant do not want any elections held. Counsels asked the Court of allow the application.

6. The Defendants opposed the application vide the Replying Affidavits of Stephen Mbugua sworn on 12<sup>th</sup> March, 2012 and Lucy Wanja sworn on 13<sup>th</sup> March, 2012 respectively. They also filed written submissions on 20/3/13. The Defendants contended that the meeting of 21/2/2013 was not quorate and had been adjourned to a date after the National General Elections of 4<sup>th</sup> March, 2013. That on discovering about the "unlawful" meeting of 22/2/2013, an emergency Board of Directors meeting was called for 27/2/2013 vide a notice dated 25/2/13. That the Plaintiffs broke into the Chairman's and CEO's offices on 23<sup>rd</sup> February, 2013 and changed the locks therefor, that they wrongfully re-instated the sacked employees of the 3<sup>rd</sup> Defendant. That they wrongfully purported to remove the 2<sup>nd</sup> Defendant as the CEO of the 3<sup>rd</sup> Defendant whilst she was away in Ethiopia on official duties. That the meeting of 27/2/2013 sought to undo what had been done by the meeting of 22/2/2013. That the Plaintiffs had concealed the fact that there were other cases pending before this court whose orders were meant to sustain the incumbency of the 1<sup>st</sup> Defendant as the Chairman of the 3<sup>rd</sup> Defendant. That as a result of the actions of the Plaintiffs the operations of the 3<sup>rd</sup> Defendant had been greatly affected and its image dented in the eyes of the National and International Business Community. That the calling of the police was because the offices of the 2<sup>nd</sup> Defendant had been unlawfully broken into. That the purported removal of the 2<sup>nd</sup> Defendant as CEO of the 3<sup>rd</sup> Defendant was irregular. That the actions of the Plaintiffs of the 22/2/13 had been overturned by the meeting of the 27/2/13.

7. Mr. Isindu, learned counsel for the 2<sup>nd</sup> Defendant submitted that the 2<sup>nd</sup> Defendant was only employed on 8<sup>th</sup> October, 2012 and could not have stood on the way of the elections for the 3<sup>rd</sup> Defendant, that Hon. Waweru J had given directions on 20<sup>th</sup> April, 2012 staying all suits pending the elections of the 3<sup>rd</sup> Defendant, that this suit was therefore an abuse of the court process, that the Plaintiffs participated in the proceedings of 27/2/13 and cannot feign ignorance of its resolutions. Counsel therefore urged that the application be dismissed.

8. Mr. Itonga, learned Counsel for the 3<sup>rd</sup> Defendant submitted that the meeting of 22<sup>nd</sup> February, 2013 was irregular as Article 85 of the Articles of the 3<sup>rd</sup> Defendant required that an adjourned meeting does take place within seven (7) business days. That the meeting of 22/2/13 was a different meeting called by

some of the directors and was not a continuation of the one of 21/2/13. That it was unfair to charge, convict and execute judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the meeting of 22/2/13 contrary to rules of natural Justice. That the meeting of 22/2/13 was supposed to be of two thirds (2/3) of 22 members of the board of the 3<sup>rd</sup> Defendant, that there was no quorum, that there was no notice calling for that meeting, that removal of the Chairman under Article 80 requires 28 days notice for such a resolution. That directors can only be suspended at an annual general meeting which the one of 22/2/13 was not. That the Plaintiff had concealed the existence of the other cases including No. JR Misc No.251 of 2012. That no elections had been held pursuant to the order of 19/7/2011, that the actions of the Plaintiffs were contrary to the interest of the 3<sup>rd</sup> Defendant. Counsel therefore urged that the application be dismissed.

9. The first and 2<sup>nd</sup> Interested Parties also submitted. Their arguments were either in favour or against the application. I have considered the Affidavits on record, both the written and oral submissions of learned Counsel. I have also considered the representations and authorities of the Interested Parties. This is an injunction application and the principles to be considered were set out in the **Giella –vs- Cassman Brown Case**, that is, the Plaintiff must establish a prima facie case with a probability of success, that he must show that he might suffer loss that cannot be compensated by an award of damages unless the injunction is granted and that if the court is in doubt, it will decide the matter on a balance of convenience.

10. The parties spent a lot of time in addressing issues which this court considers irrelevant. The issues such as the employment of the 2<sup>nd</sup> Defendant, the rehiring of the fired employees, in my view, can be litigated in a competent jurisdiction that is the Industrial Court and not here. To my mind, the only issues for determination are two. Firstly, whether there was a valid meeting held on 22<sup>nd</sup> February, 2013 and if so, whether the resolutions passed thereon can hold. Secondly, whether there was a valid meeting on 27<sup>th</sup> February, 2013 and if so, whether its resolutions can stand.

11. On the first issue, it is not disputed that there was a meeting of seven (7) directors that was held on 22<sup>nd</sup> February, 2013. From the Memorandum and Articles of Association of the 3<sup>rd</sup> Defendant that was produced by the Plaintiffs and not challenged by the Defendants, it would seem that there is no particular mode of convening a board meeting that has been provided for. No notice or any period is stipulated as a requirement for convening such a meeting. What Article 82 provides is:-

***“82. The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings and they thin fit. Questions arising at any meeting shall be decided by a majority of votes. In the case of an equality of votes the chairperson shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summons a meeting of directors.”***

From the said Article, it would seem that directors of the 3<sup>rd</sup> Defendant may meet anyhowly and transact business. What in my view is required is that such a meeting should be quorate in terms of Article 84 of the Articles. That article provides: -

***“84. The quorum necessary for the transaction of the business of the directors shall be two thirds of the directors present and entitled to vote.”***

The Article does not clarify what “two thirds of the director’s present” means. Does it refer to two thirds of the directors that are presently registered as the 3<sup>rd</sup> Defendant’s directors or just two thirds of directors present in such a meeting? My view is that, the literal meaning that should be given to that phrase which will not render the Article meaningless should be the first interpretation i.e. two thirds (2/3) of the present registered directors of the 3<sup>rd</sup> Defendant. According to the Plaintiffs, the 3<sup>rd</sup> Defendant currently has eleven (11) directors whilst according to the Defendants there were twenty two (22) directors as at 6<sup>th</sup> March, 2012, See exhibit “SM II” which is CR 12 from the Registrar of Companies. If that be the case, then two thirds (2/3) quorum should be fifteen (15) directors. Indeed, it would seem that in that meeting of 22<sup>nd</sup> February, 2013, in minute No. SBM/6/22/02/2013, the seven (7) directors present resolved to

strike out a total number of nine (9) directors who had been inactive since 24<sup>th</sup> March, 2011. This means that the 3<sup>rd</sup> Defendant must have had more than eleven (11) directors which is the minimum number. Therefore, on the basis of the evidence before me, the number of directors' of the 3<sup>rd</sup> Defendant is twenty two (22) and for a meeting to be quorate, there should be at least fifteen (15) directors.

**12.** Whilst the meeting of 22<sup>nd</sup> February, 2013 was properly held without any notice as aforesaid, there was no quorum as the directors present was only seven (7). This was far below what is stipulated under Article 84 of the Articles. That being the case, the resolutions passed therein, in my view, cannot stand.

**13.** Even if I am wrong on the issue of quorum, whilst all the other resolutions passed thereon can stand, the resolution suspending the 1<sup>st</sup> Defendant from the Chairmanship and appointing the 1<sup>st</sup> Plaintiff the Acting National Chairman of the 3<sup>rd</sup> Defendant cannot stand. I have looked at Articles 97 to 100 of the Memorandum and Articles, nowhere does it permit the replacement of the Chairman as the Plaintiffs purported to. If the National Chairman is removed for any reason, he has to be replaced by the Vice Chairman failing of which he is to be elected by the County Governing Council. Those who nominated the 1<sup>st</sup> Plaintiff as the Acting Chairman on 22/2/2013 have not been shown to have constituted the County Governing Council. Accordingly, that nomination cannot stand.

**14.** As regards the second issue, having come to the conclusion that the quorum for the Board of Directors meeting of the 3<sup>rd</sup> Defendant is fifteen (15) directors, what is purported to have happened on 27<sup>th</sup> February, 2013 is but a sham. There were only Seven (7) directors. Indeed I am convinced that there was no meeting that took place on 27<sup>th</sup> February, 2013. For the following reasons:-

**a)** Those present are shown to be seven (7) directors but at the place of signing of the minutes that was produced as "Exhibit SM 8" a Mr. Edward Juma has signed yet he was not present.

**b)** Ms Lucy Wanja has signed the minutes as a director yet she is neither a director nor secretary of the 3<sup>rd</sup> Defendant – she is but only a Chief Executive Officer, not a secretary appointed under Article 104 of the Memorandum and Articles.

**c)** Ms. Lucy Wanja is said to have been attending a meeting in Ethiopia and returned on 27<sup>th</sup> February, 2013 (See Exhibit DM 5). However she is alleged to have issued and signed the Notice of 25<sup>th</sup> February, 2013 convening the purported meeting of 27<sup>th</sup> February, 2013.

**15.** That meeting did not take place and if it took place, its resolutions were superfluous irregular, unlawful and illegal. There was no quorum and even if there was such a quorum, under Article 80 of the Memorandum and Articles the meeting could not purport to remove or suspend the Plaintiffs from their directorship as it did. To that extent the Plaintiffs have established a prima facie case with a probability of success. Being of that persuasion, I do not need to consider the other principles.

**16.** Before concluding this ruling, I would like to make one observation. The actions of the Plaintiffs may be explained by what seems to be a well orchestrated scheme by some of the directors of the 3<sup>rd</sup> Defendant, one of their own at the helm of the 3<sup>rd</sup> Defendant. It is clear that these directors may have made it difficult for the calling of the elections of the 3<sup>rd</sup> Defendant. They seem not to mind the status quo continuing to be maintained so long as one of their own continues to be in office. I am told that the order of the Hon. Mwera J (as he then was) in HCCC No. 253 of 2009 for holding of elections of the 3<sup>rd</sup> Defendant was effected but whilst those elections were so held, the 1<sup>st</sup> Defendant blocked them vide an order he obtained on 18<sup>th</sup> June, 2012 through JR. Miscellaneous 251 of 2012. I have seen that order, which was produced as "LW 1". But that order was to last until 9<sup>th</sup> July, 2012. The court was not told what happened to that order or what steps have been taken in the said JR Miscellaneous 251 of 2012. To my mind, let the parties pursue their remedies in those proceedings and not to vex the courts with other proceedings, this one included.

17. The upshot is that the motion dated 1<sup>st</sup> March, 2013 is allowed in terms of prayer No. 5 only. The rest of the prayers are dismissed. Due to the nature of this dispute each party is to bear his/her own costs. It is so ordered.

**DATED** and **DELIVERED** at Nairobi this 3<sup>rd</sup> day of April, 2013.

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**A. MABEYA**

**JUDGE**