



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 213 OF 2018

KIROBON FARMERS CO. LTD.....PLAINTIFF

VERSUS

BENJAMIN KIBIWOT CHESULUT.....1ST DEFENDANT

NAKURU LAND REGISTRAR..... 2ND DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 15th June 2018, an application through which the plaintiff seeks an injunction to restrain the defendants by themselves, their servants, employees and or authorised agents from issuing title deeds and searches based on old map LR No. Molo South/Keringet Block 2 (Kirobon) sheet I part of 118/3/14 and 19 pending hearing and determination of this suit.

2. The application is supported by an affidavit sworn by Hosea B. Chemweno, one of the directors of the plaintiff company and is opposed by the 1st defendant through a replying affidavit sworn by himself. Parties also filed and exchanged written submissions. The 2nd defendant opted not to participate in the hearing of the application.

3. There is no dispute that the 1st defendant is a director and a shareholder of the plaintiff company, a land buying company. The plaintiff's case is that the 1st defendant who is a past chairman of the plaintiff has been frustrating its efforts by among others refusing to attend meetings, refusing to work with other directors and generally going against other directors and members. In particular, it is alleged that the 1st defendant procured a map being Molo South/Keringet Block 2 (Kirobon) sheet I part 118/3/14 and 19 without the input, consent, participation, mandate and approval of the board of directors and general membership of the plaintiff. That the 1st defendant has used the map to issue irregular title deeds to about 54 members. That the 1st defendant has also been using an erroneous register of members which he procured while in office. As a result, disputed title deeds have been issued and there have been suits filed in court such as **Nakuru HCC No. 353 of 2008, Nakuru ELC No. 429 of 2016, Nakuru ELC No. 460 of 2017 and Nakuru HCC No. 11 of 2018.**

4. The 1st defendant in response contends that no board meeting of the plaintiff company was held or resolution passed to authorize filing of this suit, swearing of an affidavit on behalf of the company by Hosea B. Chemweno or even to appoint M/s Ochieng' Gai & Co. Advocates to act for the plaintiff. Further that the alleged map for Molo South/Keringet Block 2 (Kirobon) sheet I part 118/3/14 and 19 has not been exhibited and the issues raised in this case are also pending in the earlier cases listed above.

5. I have considered the application, the affidavits filed and the submissions. The applicant seeks an interlocutory injunction. It must therefore satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. This entails establishing a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to the answers to the above two tests then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR.**

6. The plaintiff/applicant is a limited liability company or a corporation. **Order 4 rule 1 (2) of the Civil Procedure Rules** requires that every plaint be accompanied by a verifying affidavit. In the case of a corporation, **rule 1 (4)** thereof provides:

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

7. I have read the verifying affidavit that was filed alongside the plaint in this matter. The deponent, Hosea B. Chemweno, does not state that

he has any authority from the plaintiff company to swear the affidavit. No authority under seal is annexed. The suit does not therefore comply with the rules. It is up to the plaintiff to take corrective measures. While the non-compliance is a rectifiable defect, until it is corrected the plaintiff cannot be said to have a valid suit capable of revealing a prima facie case.

8. Even assuming the issue of authority under seal did not arise, I note that a lot of the issues raised by the plaintiff concern its own corporate governance which is already part of the subject in **Nakuru HCC No. 11 of 2018**. Parties need to address that issue squarely, be it in **Nakuru HCC No. 11 of 2018** or any other validly filed matter. As matters stand, I do not see any prima facie case in the allegations that the 1st defendant, who is admittedly a director of the plaintiff, is interfering or is responsible for the map referred to as Molo South/Keringet Block 2 (Kirobon) sheet I part 118/3/14 and 19.

9. In view of the foregoing discourse, I am not persuaded that the applicant has a prima facie case. That being so, Notice of Motion dated 15th June 2018 is dismissed with costs to the 1st defendant.

Dated, signed and delivered in open court at Nakuru this 17th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

Mr Terer holding brief for Mr Ruto for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistants: Beatrice & Lotkomoi