



**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**

**Civil Application 118 of 2010**

**BETWEEN**

**STEPHEN KIPKATAM KENDUIYWA  
JOEL KIMUTAI SANG  
JOSEPH KIPKURUI NGETICH  
RODERICK MITEI KENDUIYWA  
JONAH KIPKEMOI KETER  
G MUGO MUNGAI  
ASSOCIATED REGISTRARS LIMITED .....APPLICANTS**

**AND**

**ISMAIL GULAMALI  
DAVID BETT LANGAT  
KAPCHEBET TEA FACTORY LIMIT  
REGISTRAR OF COMPANIES .....RESPONDENTS**  
**(An application for an order of stay of execution pending hearing and determination of  
the appeal from a ruling and orders of the High Court of Kenya at Mombasa, (Ojwang, J)  
dated 26<sup>th</sup> February, 2010  
in**

**H.C.C.C. NO. 31 OF 2009)**

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**RULING**

On 3<sup>rd</sup> June, 2010, I declined to certify the notice of motion dated 19<sup>th</sup> May, 2010, as urgent as I found no reason to stop all other scheduled activities of this Court to deal with the matter, which in my view is the essence of urgency.

The applicant now returns before me under *rule 47 (5) of the Rules of this Court*, seeking to persuade me in the presence of the other party, that the matter is indeed urgent. Both parties appeared before me on 14<sup>th</sup> July, 2010 and made submissions on the matter.

The dispute between the parties in the superior court relates to the shareholding and therefore, control of a company known as **Kapchebet Tea Factory Limited**. The allegation is that some of the defendants stole or otherwise unlawfully took the shares of one of the plaintiffs thereby wresting from those plaintiffs the right to appoint the secretary of the company. The Registrar of Companies appears to have conceded that there were some unlawful dealings in the company hence the suit in the superior court. The plaintiffs sought a temporary injunction, amongst other prayers, to restrain the new secretary appointed for the company by those who were alleged to have “*stolen*” the shares, and to nullify a certificate issued by the Registrar of

Companies on 16<sup>th</sup> January, 2009. The superior court, Ojwang, J. granted those temporary orders which are mandatory in nature, pending the hearing of the suit. The defendants, who are now the applicants before me, were dissatisfied and are intending to overturn those orders on appeal. In the meantime, they seek an order under **rule 5 (2) (b) of the rules of this Court** to forestall the execution of the two orders.

The urgency as explained in the affidavit in support and in submissions of Mr Wasuna, learned counsel for the applicants, is that the orders of the superior court determined the main suit by issuing mandatory orders which will disrupt the organization and running of **Kapchebet Tea Factory Limited**. The situation, in Mr Wasuna's view, is alarming particularly because the respondents have no experience in tea farming and processing since their preoccupation is to market the final product to international markets. Furthermore, the removal of the secretary would leave the company without a Chief Executive. In his view, unless orders for stay are granted, there would be a multiplicity of applications in the superior court.

On the other hand, learned counsel for the respondents Mr Kinyua Kamundi, saw no urgency in the matter since there is already an order in the superior court restraining the respondents until a matter before the superior court is determined. The matter is still pending. There is also an undertaking given in the matter by the plaintiffs and therefore, nothing imminent is expected to happen to the detriment of the company. At all events the company has a secretary who has always been there and it can still operate until the motion is heard and determined.

It seems to me that the urgency is sought on the basis that the company has no secretary and will, therefore, suffer in its operations. There are conflicting submissions about who the lawful secretary is but the company is not without a secretary. There must be a *prima facie* position in the Company Registry which will subsist until the contrary is shown the orders of the superior court notwithstanding. Other matters relating to the company and execution of the orders of the superior court appear to have been put on hold to await other decisions. Some undertakings, which are not disputed, are also said to be in place. In all the circumstances, therefore, I am not persuaded that this Court ought to put aside other matters, many of them urgent too, in order to deal with this notice of motion. It will hopefully be heard without undue delay but in the normal course of events.

For those reasons, I decline to certify the matter urgent.

Dated and delivered at Mombasa this 30th day of July, 2010.

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of this original.

DEPUTY REGISTRAR