**Ndeffo Co. Ltd v Ndegwa & 4 others (Civil Suit E024 of 2023)**
**[2024] KEHC 4436 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4436 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL SUIT E024 OF 2023**

**HM NYAGA, J**

**APRIL 30, 2024**

**BETWEEN**

**NDEFFO CO. LTD ..... PLAINTIFF**

**AND**

**ONESMUS MATHERI NDEGWA ..... 1ST DEFENDANT**

**SOSPETER KABUBA KARIUKI ..... 2ND DEFENDANT**

**DANIEL MUCHOKI KARIUKI ..... 3RD DEFENDANT**

**PAUL DOUGLAS MACHARIA ..... 4TH DEFENDANT**

**MICHAEL NJOROGE KINYANJUI ..... 5TH DEFENDANT**

**RULING**

1. The Application before court is the one dated 18th December,2023 by the Plaintiff/Applicant. It is brought pursuant to Order 40 Rules 1,2, and 4 of the *Civil Procedure Rules* and Sections 1A and 3A of the *Civil Procedure Act*.

2. The Application seeks to restrain the Defendants/Respondents from acting on behalf of the of the Applicant, holding any meeting on 4th January,2024, and submitting any resolutions to the Registrar of Companies.

3. The Application also seeks for costs to be provided for.

4. The application is grounded on the grounds listed on its face and supported by an affidavit of Peter Mwangi Maina who is the Director of the Applicant.

5. He deposes that on 22nd November,2023 the Respondents wrote to the Registrar of Companies seeking to convene a meeting on 4th January,2024 and also advertised the said meeting in the Newspaper.

6. That on 11th December,2023, the Applicant's advocates wrote a letter to the Registrar of Companies protesting the intended meeting.

7. He asserts that the Respondents are not directors of the Plaintiff and cannot call for any meeting of the company, and that they have been interfering with the running of the Applicant and altering its document and every time a meeting is called by the directors of the company, the defendants have taken upon themselves to be sabotaging the said meetings to the detriment of the members.

8. He avers that contrary to the advertisement in the Newspaper, the Respondents herein have issued a second notice intimating that the meeting they have called for will be held at 10.00 p.m.

9. He asserts that the 1st defendant filed Nairobi CMCC No. E 12493 of 2021 Matheri Ndegwa v Waithanji Mwaura & Others which he subsequently abandoned and that the Defendants herein have filed various i.e. Nakuru ELC E021 of 2023- Matheri Ndegwa & 5 others v Eliud Mugo Mathenge & 5 others and Nakuru H.C. J.R No. E010 of 2023 which are yet to be determined.

10. It is his averment the Applicant herein has various suits against several people currently pending in the Environment and Land Court i.e. Nakuru ELC No. 111 of 2013, ELC 104 of 2019. That the Respondents have been trying to take over the company to compromise the same to the detriment of the Plaintiff and their shareholders.

11. It is his further averment that the applicant has more than 5000 shareholders who stand to be misled by the illegal conduct of the respondents and being a public limited liability company, the affairs of the Applicant ought to be handled with utmost care and attention.

12. The Application is opposed. The 2nd Respondent Sospeter Kabuba Kariuki swore a Replying Affidavit on his behalf and on behalf of his co-respondents on 31st January, 2024.

13. He avers that the Application has been brought with unclean hands as it is meant to restrain the members of the Plaintiff from exercising their right as enshrined.

14. He deposes that since the formation of the Plaintiff, its members have not been supplied with an audit report from 2022 when the current directors took office, and that strangers attended the meeting that was held by the Directors.

15. He contends that the directors listed in the CR12 which is marked as Exhibit PMM 1 have been fraudulently selling the Plaintiff's assets without accounting for the proceeds hence there is need for elections.

16. He states that the 1st respondent was included as one of the plaintiff's directors but surprisingly was fraudulently removed from being a director and that minutes marked as PMM 2 is unsigned by the purported members who are being used to elect Directors who do not want to leave the office as they have fraudulently engaged in double allocations of plots in issue which has been raised in Nakuru ELC No.21 of 2023.

17. He contends that the Applicant do not have an account and the money received are channelled through Equity Bank, Menengai Slopes Account No. 0130182313611.

18. He avers that the returns of the Plaintiff's in the year 2020, indicates the number of shares by some of the purported members to be less than the requirement of the Memorandum and Articles of Association.

19. He thus posits that unless an election of all registered members of the plaintiff is held, the company stands a chance of collapsing due to the irregularities of the current directors.

20. He prayed for the dismissal of the Application.

21. Parties agreed to proceed by way of written submissions. Only the Applicant's submissions are on record.

**Plaintiff Submissions**

22. The Counsel for the Applicant submitted that the Respondents did not deny calling for the AGM that was to be held on 4.1.2024 and the fact that they are not Directors of the Applicant and as such the Respondents have acted illegally and in contravention of the *Companies Act* and the Memorandum and Articles of the Applicant's Company.

23. The Counsel submitted that the Applicant has satisfied the requirements set out in *Giella v. Cassman Brown Co. Ltd* [1973] E.A. 358 and urged the court to grant the Orders sought.

**Analysis & Determination**

24. The only issue for determination is whether the injunctive order sought should issue.

25. The principles of injunctions as enunciated in the case of *Giella v Cassman Brown* (1973) EA 358 and as was reiterated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

> " in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially"

26. The Court of Appeal *Mrao Ltd v First American Bank Of Kenya Ltd* (2003) eKLR gave a determination on a prima facie case. The court stated that:

> "... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

27. In the instant case, the respondents did not dispute that they are not directors of the Applicant and calling for the aforementioned meeting as rightly submitted by the Applicant's counsel.

28. Pursuant to Section 276 of the *Companies Act*, the power to convene meetings in a company typically lies with the board of directors and if members need a meeting to be convened they have to request the Director to do so as stated under Section 278 of the *Companies Act*.

29. Sections 279 and 280 of the said *Act* then provides as follows;

> " 279. Power of members to convene general meeting at the expense of the company
>
> (1) If, after having been required to convene a general meeting under section 277, the directors fail to do as required by section 278, the members who requested

the meeting, or any of them representing more than one half of the total voting rights of all them, may convene a general meeting.

(2) If the requests received by the company included the text of a resolution intended to be moved at the meeting, the members concerned shall include in the notice convening the meeting the text of the intended resolution.

(3) The members concerned shall ensure that the meeting is convened for a date not more than three months after the date on which the directors were requested to convene a meeting.

(4) The members concerned shall convene the meeting, as nearly as practicable, in the manner in which meetings are required to be convened by directors of the company.

(5) The business that may be dealt with at the meeting includes a resolution of which notice is given in accordance with this section.

(6) The company shall reimburse the members concerned for all reasonable expenses incurred by them because the directors failed to convene a meeting as required by section 278.

(7) The company shall deduct from the remuneration payable to the directors who were in default the amount of expenses reimbursed to members under subsection (6).

280. Power of Court to order general meeting to be convened

(1) This section applies if for any reason it is impracticable—

(a) to convene a meeting of a company in any manner in which meetings of that company may be convened; or

(b) to conduct the meeting in the manner required by the articles of the company or this Act.

(2) The Court may, either on its own initiative, or on the application—

(a) of a director of the company; or

(b) of a member of the company who would be entitled to vote at the meeting, make an order requiring a meeting to be convened, held and conducted in any manner the Court considers appropriate.

(3) If an order is made under subsection (2), the Court may give such ancillary or consequential directions as it considers appropriate.

(4) Directions given by the Court under subsection (3) may include a direction that one member of the company present at the meeting be regarded as constituting a quorum.

(5) A meeting convened, held and conducted in accordance with an order under this section is taken for all purposes to be a meeting of the company properly convened held and conducted."

30. The respondents have not shown the court that they have complied with either of these provisions, which provide adequate protection and locus standi for members of a company to call for a general meeting if the directors fail to do so.

31. I therefore find that the respondents did not have locus standi to call for the meeting and their actions in that regard were in contravention of Section 276 of the Company Act.

32. I therefore find that the Applicant has established a prima facie case.

33. The second limb under *Giella v Cassman Brown*(*supra*) is that an applicant must also establish that it will suffer irreparable loss if an order of injunction is not issued.

34. In *Halsbury's Laws of England* [Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] it is stated that: -

> "It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"
>
> In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance,"[ Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

35. It is decipherable from the Respondents' Replying Affidavit that they intend to call for a meeting to appoint new directors as they believe the current ones are committing irregularities to the detriment of the company.

36. If the directors are removed without due process, the same can lead to breach of Companies Regulations and may result in disputes among shareholders and internal conflicts and unnecessary litigations that could have significant implications on the Applicant's performance, and if the respondents are not stopped by way of a temporary injunction then the applicant is likely to suffer irreparable harm.

37. Thus, I find that the applicants have surmounted the second hurdle.

38. The law is that if the court is in doubt over the first two tests, the Plaintiff/Applicant has to demonstrate that the balance of convenience tilts in its favour.

39. The concept of balance of convenience was defined in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR as:

'The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

40. In the case of *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus: -

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

41. The Applicant has its lawful directors, from the latest CR12 as at 8th September 2023, who are likely to be unlawfully removed from their positions by the Respondents. The probability of chaos or disorder is quite high.

42. I therefore find that the balance of convenience tilts in favour of the Applicants.

43. In sum, the applicant has met the threshold for grant of temporary injunction. The same is hereby allowed as prayed.

44. Having stated the above, I further hold that should the respondents feel that they need to act in the interest of the company, then they should proceed to as provided above. That way they will have complied with the law.

45. Costs shall be in the cause.

Dated, Signed and Delivered at Nakuru this 30th day of April, 2024.

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

Court Assistant Kipsugut

Ms Wangari for Plaintiff/Applicant

No appearance for Respondent