



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: G.B.M. KARIUKI, SICHALE & KANTAL, J.J.A.**

**CIVIL APPLICATION NO. NAL132 OF 2017**

**BETWEEN**

**KIRU TEA FACTORY COMPANY LTD.....APPELLANT/APPLICANT**

**AND**

**KENYA TEA DEVELOPMENT**

**AGENCY HOLDINGS.....1<sup>ST</sup> RESPONDENT**

**KENYA TEA DEVELOPMENT AGENCY**

**MANAGEMENT SERVICES LIMITED.....2<sup>ND</sup> RESPONDENT**

*(Application for injunction pending the hearing and determination of an appeal from the ruling of the High Court of Nyeri (Matheka, J) delivered on 15<sup>th</sup> day of November, 2017*

*in*

**H.C.C.C. NO. 18 OF 2017)**

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**RULING OF THE COURT**

1. Kiru Tea Factory Company Limited (hereinafter referred to as “**KTFC**”) lodged in this court on 23<sup>rd</sup> November 2017 a notice of motion dated 22<sup>nd</sup> November 2017 seeking (under Rule 5(2)(b) of the Court of Appeal Rules) an order of injunction directed at Kenya Tea Development Agency Holdings Ltd (hereinafter referred to as “**KTDA-HL**”) and Kenya Tea Development Agency Management Services Limited (hereinafter referred to as “**KTDA-MS**”) the 1<sup>st</sup> and 2<sup>nd</sup> respondents, respectively, jointly and severally restraining them, *inter alia*, from convening or conducting a General Meeting purporting it to be a meeting of KTFC or nominating or causing the nomination or of any person as a member of the Board of Directors of KTFC or of Tea Buying Centre Committees or doing any of the acts set out in subparagraphs (a) to (m) of prayer 2 of the notice of motion application.

2. The application by KTFC was prompted by a decision of the High Court (Matheka, J) made on 15<sup>th</sup> November 2017 in Nyeri H.C.C.C. No.18 of 2017 [involving Kiru Tea Factory Company Limited versus KTDA Holdings Ltd and Another] in which the High Court, upheld an objection and held that it had no jurisdiction because there was another pending Suit No.106/2017 in the High Court.

3. The suit in which the impugned decision was made was filed by KTFC in the Civil Division of the High Court at Nyeri and was commenced by way of a plaint against KTDA-HL and KTDA-MS. KTFC averred in the suit that it (KTFC) has over 8000 shareholders who are small scale tea growers in Muranga County. It was averred in the plaint that around July 2009 KTFC entered into a Management Agreement with KTDA-HL constituting KTDA-HL an agent of KTFC, thus creating between KTFC and KTDA-HL a relationship of Principal and Agent. It was also averred in the plaint that in course of time, KTDA-HL assigned its obligations to KTDA – MS. However, it was contended that the Management Agreement between KTFC and KTDA-HL did not oust the lawful authority of KTFC’s Board of Directors over the company’s affairs and the latter remained KTFC’s apex decision making body legally responsible for the affairs of KTFC.

4. KTFC also alleged in the plaint that one John Kennedy Omanga purporting to act on behalf of KTFC as the Company Secretary at the behest of KTDA-HL and KTDA-MS convened an Annual General Meeting of KTFC on 20<sup>th</sup> November 2017 and illegally issued notices of KTFC’s buying centre Committee for electoral areas known as Mioro and Kiambuthia with a view to conduct elections in the said areas and have elected malleable candidates to supplant KTFC’s Board of Directors and thus silence the current Board of KTFC which is said to be resolute in its accountability, transparency and corporate governance principles. KTFC sought in the said suit a declaration and affirmation that the authority and mandate to determine the affairs of KTFC is vested in its Board of Directors and prayed for injunction directed at KTDA-HL and KTDA-MS restraining them from interfering with the conduct of elections for nominees to the Board of KTFC on KTDA-HL and KTDA-MS.

5. The learned Judge was persuaded and having found that the 1<sup>st</sup> respondent was “a non-legal entity incapable of being sued or suing, and that the suit was *res sub judice* in view of Milimani High Court Civil Suit No.106 of 2017’ made a finding that she had no jurisdiction and therefore struck out the application with costs. That is the decision that prompted the intended appeal by KTFC, which, being aggrieved, proceeded on 20<sup>th</sup> November 2017 to give a notice of appeal pursuant to Rule 75 of this Court’s Rules manifesting its intention to challenge the said decision in this court.

6. The application dated 22<sup>nd</sup> November 2017 came up for hearing before us on 6<sup>th</sup> December 2017 when learned Senior Counsel **Mr. Paul Muite** appeared for the applicant, KTFC, and **Mr. Benson Mulimo** assisted by **Mr. Teddy Ochieng** appeared for the respondents.

7. Also before the court was an application No.133 of 2017 by notice of motion dated 24<sup>th</sup> October 2017 lodged in Court on 27<sup>th</sup> November 2017 by Geoffrey Chege Kirundi, the applicant, against the Dispute Resolution Committee of KTDA-HL and KTDA-MS, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, respectively, for hearing before us. We ordered with the consent of counsel of all the parties consolidation of the two applications which sprung from the same decision (by Matheka, J.) and directed that the record of the proceedings herein would be maintained in civil application number 132 of 2017 and that a composite ruling would be made, hence this ruling.

8. The respondents had placed before the court on 6<sup>th</sup> December 2017 a replying affidavit sworn on 5<sup>th</sup> December 2017 by John Kennedy Omanga and a bundle of authorities lodged on the same day.

9. Mr. Muite urged us to allow the notice of motion and grant the interim orders prayed for pending the hearing and determination of the appeals.

10. For record, the notice of motion dated 24<sup>th</sup> October 2017 sought orders that pending the determination of the intended appeal, the court be pleased to issue an order of injunction restraining KTDA-HL from confirming the nomination of the apparent victor in the elections for zonal representative to KTDA-HL’s Board of Directors for Zone 3 of KTFC’s electoral zones comprising Githambo, Kanyanya-ini, Gatunguru and Kiru or nominating to its KTDA-HL Board of Directors for zone 3 of KTFC’s said electoral zones.

11. The application (No.133 of 2017) was supported by an affidavit sworn by Geoffrey Chege Kirundi on 24<sup>th</sup> November 2017, and was pegged on the notice of appeal by Geoffrey Chege Kirundi filed on 17<sup>th</sup> November 2017 against the ruling of (Matheka J) dated 15<sup>th</sup> November 2017 made in JR Application No. 5 of 2017. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed in response to the application a composite replying affidavit sworn by John Kennedy Omanga on 5<sup>th</sup> December 2017.

12. Learned Senior Counsel **Mr. Muite** urged us to grant interim injunction pending the determination of the intended appeal and submitted that the authority of the applicant, KTFC, was being undermined by the respondents, KTDA-HL and KTDA-MS in that the respondents had imposed on the applicant one John Kennedy Omanga as a company secretary who purported to run the affairs

of KTFC and also attempted to cause to be nominated directors for KTFC in the Board of Directors of KTDA-HL notwithstanding that KTFC is an autonomous limited liability company with its own Board of Directors and a Company Secretary, known as Benard Kiragu Kamau who is said to have been duly elected. Our attention was drawn by learned Senior Counsel Mr. Muite to the resolution of the Board of Directors of KTFC and documentation to buttress the appointment of Benard Kiragu Kamau as KTFC's Company Secretary and the removal of John Kennedy Omanga, who is said to have ceased to hold the office of Company Secretary on 11<sup>th</sup> September 2017; Senior Counsel also drew our attention to the various dates on which the latter refused to vacate office of the Company Secretary of KTFC and purported to conduct elections on behalf of KTFC. Mr. Muite submitted that the respondents are intent on handpicking directors of their choice in the meetings intended to be held for election of directors in the Boards of KTFC and KTDA-HL and KTDA-MS so as to eschew accountability of funds belonging to farmers. We were told that there are sixty six (66) Tea Factories, and more than 8,000 farmers. It was also submitted that Geoffrey Chege Kirundi, the applicant in Civil Application No.133 of 2017 was removed as a director of KTDA-HL unfairly and in breach of the law on fair administrative action and that the ground advanced for his removal was predicated on institution by him of HC Civil Suit No.106 of 2017, on account of which he was said not to be a man of good standing.

**13.** Mr. Muite contended that the learned judge erred in her impugned decision in holding that she had no jurisdiction to hear the notice of motion because the preliminary objection was not based on uncontested facts but rather on facts that were controversial and contested. He drew the attention of the court to the intended grounds of appeal and contended that the applicant had an arguable appeal and unless the orders prayed for were granted, the intended appeal would be rendered nugatory as the threatened elections would result in management of the applicant's affairs by directors not appointed in accordance with the Articles of Association of the applicant and that this would precipitate anarchy, a situation that could not be reversed if it took place.

**14.** The application was opposed by **Mr. Milimo**, learned counsel for the respondents. He contended that KTFC as an applicant was not properly before the court because its Board of Directors had not mandated it through a proper resolution to sue as it had done. According to counsel, the resolution relied on by the applicant dated 14<sup>th</sup> August 2017 was a mere letter although it is signed by two directors and is said to bear KTFC's company seal. Mr. Mulimo urged that the impugned decision dealt with the incompetence of the suit and there can be no arguable appeal against this. In the absence of capacity on the part of the applicant, it was contended by Mr. Milimo that there was no legal body before the court and that the application was misplaced. Moreover, contended counsel, as the impugned decision dealt with capacity of a party as opposed to merit regarding the matter in court, there can be no arguable appeal as the merit of the suit pending in the High Court cannot be a matter for the intended appeal. It was Mr. Mulimo's contention that the intended appeals will not be rendered nugatory if the injunction orders prayed for are not granted. He contended that KTFC as an applicant had not indicated inhibition to conduct elections. At any rate, submitted counsel, the applicant was seeking judicial review orders and not an injunction in application number 133 of 2017. It was counsel's submission that on the authority of the decision in **Cortec Mining Kenya Ltd Versus Cabinet Secretary, AG & 8 Others** [2015] eKLR this court can only grant what the High Court could have granted and that application No.133 of 2-17 was misconceived. Counsel further pointed out that to the extent to which the applicant was seeking to stop nomination of a director who had been elected, the application was flawed as the director was not a party to the proceedings and had at any rate vested rights having been elected. For that reason, the orders prayed for in application No.133 of 2017 ought not to be granted. Mr. Milimo drew our attention to a publication in the Daily Nation Newspaper concerning KTDA-MS notification concerning holding of contested directors' nomination elections signed by John Kennedy Omanga as company secretary of KTFC. Mr. Milimo urged us to dismiss both applications Nos 132/2017 and 133/2017.

**15.** In his short retort, learned Senior Counsel Mr. Muite pointed out that the respondents' counsel's submissions buttress the view that the orders sought in the applications ought to be granted. He pointed out that heavy reliance was placed on resolutions of KTFC made in November 2017 and emphasized that as the respondents admit that the resolution of the Board of KTFC of 27<sup>th</sup> November 2017 with regard to John Kennedy Omanga who was removed on 11<sup>th</sup> September 2017 as Company Secretary and was later restored to that position in a subsequent divided vote (**3 to 3**) there was an arguable issue. Moreover, as Stephen M. Githaiga was an interested person (as he was seeking to replace Geoffrey Chege Kirundi as chair), the Board would not have had a majority but for the vote by Stephen M. Githaiga. Mr. Muite further pointed out that Stephen M. Githaiga was suspended as a member of the Board of KTFC on 15<sup>th</sup> March 2017 and he subsequently filed Nairobi Civil Suit No. H.C.C.C. No.106 of 2017 against KTFC, Geoffrey Chege Kirundi, KTDA-HL, and KTDA-MS which is still pending.

**16.** Mr. Muite urged us to allow the applications which he contended are arguable and submitted that chaos would ensue and havoc would be wrecked in the tea industry and the intended appeals would be rendered nugatory if the orders sought are not granted.

**17.** We have perused both applications (No.132/2017 and No.133/2017). They are both premised on rule 5(2)(b) of the rules of this court. Application No.132/2017 seeks in prayer 2 an order that pending the hearing and determination of the intended appeal by the

applicant, this court be pleased to issue an injunction directed to KTDA-HC and KTDA-MS jointly and severally restraining them from all the acts referred to in the notice of motion in subparagraphs (a) to (m) which include convening or conducting a general meeting of KTFC, nominating or causing the nomination or election of any person to the Board of KTFC or Tea Buying Centre Committees or interfering with the proceedings of the Board of KTFC or the shareholders or employees of KTFC.

18. In application No.133 of 2017, Geoffrey Chege Kirundi seeks an order of injunction restraining KTDA-HC from holding, confirming the nomination of or nominating the victor in the elections for zonal representative to KTDA-HC's Board of Directors for Zone 3 of the KTF's electoral zones comprising Githambo, Kanyanya-ini, Gatunguru and Kiru, or installing any person to the Board of KTFC in that basis.

19. We have duly considered the submissions of the parties in light of the material placed before us. The power of the court under rules 5(2)(b) is discretionary. It is exercised to serve the interest of justice. It is intended to balance two propositions by ensuring that a litigant who is aggrieved by a court decision is not deprived of his/her right to challenge the impugned decision to the next higher court by granting orders to prevent the appeal or intended appeal from being rendered nugatory while at the same time ensuring that a successful litigant should not be deprived of the fruits of a judgment in his/her favour. (see **Butt v Rent Restriction Tribunal [1982] KLR 417; Kenya Shell Ltd v. Kabiru & Another [1986] KLR 410**. In granting orders under Rule 5(2)(b) (supra), the Court is guided by principles it has developed which are designed to balance these two parallel propositions. These principles require that an applicant satisfies the court first, that he has an arguable appeal, and secondly that if the order sought is not granted, the appeal, if successful, shall be rendered nugatory. In the recent case of **Multimedia University & Another versus Prof Gitile N. Naituli [2014] eKLR** this court in considering an application under rule 5(2)(b)(supra) aptly expressed itself as follows –

*“when one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2)(b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs Tony Ketter & Others [2013] eKLR as follows:*

*(i) In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.*

*(v) The discretion of this Court under Rule 5(2)(b) to grant a stay of injunction is wide and unfettered provided it is just to do so.*

*(vi) The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.*

*(vii) In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.*

*(viii) An applicant must satisfy the Court on both the twin principles.*

*(ix) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.*

*(x) (An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.*

*(xi) In considering an application brought under Rule 5(2), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.*

*(xii) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*

*(xiii) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.*

20. In these applications, the intending appellants have given notices of appeal as earlier stated. Do they have arguable appeals" If so, will their appeals be rendered nugatory if the orders sought are not granted"

21. In both applications, the salient issue relates to alleged rights that are said to be threatened with violations in intended elections. In application No132/2017, there is evidence to show that KTDA-HC and KTDA-MS appear intent on causing KTFC's Board meetings to be held so as to effect changes in KTF's Board of Directors allegedly with a view to cause to be nominated or nomination to be affirmed in respect of John Kennedy Omanga as the company secretary in place of Bernard Kiragu Kimani. The evidence presented to us shows that the applicant (KTFC) and the respondents (KTDA-HL and KTDA-MS) are involved in a war of attrition in which each side is ceaseless in its efforts in trying to ensure that their candidate of choice holds sway as the company secretary of KTFC. We keep in mind the fact that a considerable portion of the farming community will be affected by the outcome of the rivalry in the tea industry leadership. We also observe that there is evidence to show that John Kennedy Omanga is alleged to have been removed on 11<sup>th</sup> September 2017 from office as company secretary but appears to have been restored later by the respondents. There is also evidence to support the averment that Bernard Kiragu Kimani was appointed as Company Secretary of KTFC and that the office of The Attorney General on 3<sup>rd</sup> October 2017 and again on 16<sup>th</sup> November 2017 confirmed that Bernard Kiragu Kamau (Cs Reg 1765) was the person duly appointed Company Secretary on 11<sup>th</sup> September 2017. The documentation produced by KTDA-HL and KTDA-MS, to support their view that John Kennedy Omanga was "the duly appointed" Company Secretary did not on the face of it contain official record from the office of the Attorney General.

22. In our view, at this interlocutory stage when definitive findings should not be made, it is arguable whether the person legitimately holding office as Company Secretary is the person confirmed by the Attorney General's Office, or whether it is the person the respondents support through the documentation they rely on. We have also looked at the applicant's draft memorandum of appeal. It exemplifies other arguable points of law which we find unnecessary to delve into. In our view, there can be no doubt that the intended appeals are arguable.

23. Application No.133 of 2017 shows that the Board of Directors of KTFC authorized Geoffrey Chege Kirundi on 14<sup>th</sup> April 2017 to file suit and act for KTFC. Whether the judicial review proceedings application filed by Geoffrey Chege Kirundi was proper and whether the parties named in the Misc Civil Application No. 5 of 2017 had capacity to sue and to be sued is a matter for determination by the court that shall hear the appeal. The issue before this court is whether the parameters set in Rule 5(2)(b) (supra) have been satisfied. Consideration as to whether this Court can make orders under Rule 5(2)(b) at this interlocutory stage which the High Court could not make in the judicial review is a matter that counsel for the respondent relied on the decision in **Cortec Mining Kenya Limited vs. Cabinet Secretary, Attorney General & 8 Others [2015] eKLR** in his contention that injunction is not available. In Cortec's case (supra) the application under Rule 5(2)(b) emanated from an impugned decision made in a Judicial Review application. In these 2 consolidated applications No. 132/2017 & 133/2017, the application for injunction under Rule 5 (2)(b) springs from a decision made in a preliminary objection in a suit No. 18 of 2017 in application No. 132 of 2017 and in a Judicial Review motion in application No. 133 of 2017. To this extent the decision in Cortec's case can be distinguished from these two consolidated applications both of which impugn the decision that the High Court had no jurisdiction as contended in the preliminary objection. An injunction under Rule 5(2)(b) is not related to the substance of the appeal. Rather, it seeks to balance the interest of the appellant who has an undoubted right of appeal with the interest of the successful party in the lower court who is entitled to the fruits of his decree or order. An order under Rule 5(2)(b) is intended to serve the interest of justice and does not necessarily have bearing on orders the court may give in its final determination of the appeal.

24. As regards the issue whether the appeals shall become nugatory if stay is not granted in application No.132/2017, it is plain to see that unless the respondents are stopped from conducting elections or doing any of the acts set out in subparagraphs (a) to (m) of the notice of motion dated 22<sup>nd</sup> November 2017 the appeals shall be rendered meaningless, and the purpose and object of the appeal shall be defeated. In short, if the appeal succeeds, it shall be rendered nugatory if injunction is not granted now. We accordingly allow the applications, grant the orders sought in both applications number 132/2017 and No.133 of 2017 which are consolidated.

25. The costs of these applications shall abide the outcome of the appeals.

*Dated and delivered at Nairobi this 20<sup>th</sup> day of December, 2017.*

**G.B.M. KARIUKI SC**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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