



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL SUIT NO. E015 OF 2021

THOMAS WACHIRA NJUU.....1ST PLAINTIFF/APPLICANT

JAMES GITHINJI GUTU.....2ND PLAINTIFF/APPLICANT

PETER MWAI MIGWI.....3RD PLAINTIFF/APPLICANT

JAMES GITARI NYAGA.....4TH PLAINTIFF/APPLICANT

SAMUEL KINYUA MURIITHI.....5TH PLAINTIFF/APPLICANT

JOHN MUCHIRI NGONDO.....6TH PLAINTIFF/APPLICANT

JEFFITHAH NYAGA KURIA.....7TH PLAINTIFF/APPLICANT

VERSUS

PATRICK MUGO ZACHARY.....1ST DEFENDANT/RESPONDENT

PATRICK GITHINJI KIGUNDU.....2ND DEFENDANT/RESPONDENT

DOUGLAS MUCHIRI GICHORI.....3RD DEFENDANT/RESPONDENT

JOSEPH KINUTHIA NJERU.....4TH DEFENDANT/RESPONDENT

SYMON NJERU NDAMBIRI.....5TH DEFENDANT/RESPONDENT

NAHASHON MWANIKI KARIMI.....6TH DEFENDANT/RESPONDENT

BENRAD WACHIRA KIBANYA.....7TH DEFENDANT/RESPONDENT

AND

KIMUNYE TEA FACTORY CO. LTD.....INTERESTED PARTY

RULING

1. Before me is a notice of motion dated 25.11.2021 wherein the applicant seeks for orders as follows:

i. Spent

ii. That pending the hearing and determination of this application, a temporary order of injunction be issued as against the defendants, their agents, representatives and or other persons acting under their instructions and or their behalf barring them from organizing, attending and passing resolutions of the alleged annual general meeting scheduled on 03.12.2021 purporting it to be that of the interested party including barring them from misrepresenting themselves as directors of the interested party.

iii. That pending hearing and determination of this suit, a temporary order of injunction be issued as against the defendants, their agents, representatives and or other person acting under their instructions and or their behalf barring them from organizing, attending and passing resolutions of the alleged annual general meeting scheduled on 03.12.2021 purporting it to be that of the interested party including barring them from misrepresenting themselves as directors of the interested party.

iv. That there be an order of injunction barring the implementation or further implementation of any resolution passed at any purported general meeting as called for and attended by the defendants more so that scheduled on the 3rd December, 2021.

v. That leave be granted for this suit to proceed as a derivative suit.

vi. That cost of this application and the entire suit be borne by the defendant/respondent.

2. The application is premised on the grounds on its face and further supported by the affidavit of Thomas Wachira Njuu sworn on 25.11.2021 in which he reiterates the grounds as set out on the face of the notice of motion. The defendants have opposed the application vide a reply affidavit sworn on 01.12.2021 by the applicant Patrick Maina Ngunjiri.

3. I have considered the brief submissions made by the counsel for the parties herein.

4. When the application came up before the court on 01.12.2021, counsel for the applicant had just been served with a replying affidavit and he sought leave to file a supplementary affidavit. Further, he prayed for an order of status quo which was strongly opposed by counsel for the defendants. Both parties made brief submissions on that aspect and the ruling herein relates to the oral application on the status quo and not to the main application and for that reason, the court will not delve into the substance of the application but only to the extent that it touches on the subject at hand and the brief submissions that both counsel made in that regard.

5. In his submissions, counsel for the plaintiffs/applicants contended that the plaintiffs are the bonafide directors of the interested party having been validly appointed as such, to serve for a period of three (3) years. Further that, the defendants have proceeded to issue a secret notice calling for an Annual General Meeting of the interested party which notice is different from the public notice as published through the dailies on the 18.10.2021, which has different agenda item from an earlier published notice, thus denying the shareholders of the interested party an opportunity to understand what agenda items are to be discussed at the secretive annual General Meeting including the agenda referred to as “to consider any other business of which due notice has been given”.

6. Counsel averred that by calling the Annual General Meeting, the defendants are in breach of an express court order dated 27.10.2020. He argued that to allow the defendants to call for the said meeting would prejudice the plaintiffs because the defendants would be rendered directors without the procedure under the Company’s act being followed. Further that, if the meeting is allowed to continue, it would cause anarchy to the tea factory while to the contrary, if the same is temporarily stopped by a way of a temporary injunction, the defendants will suffer no prejudice.

7. On his part, counsel for the defendant contended that the defendants are the bonafide directors of the interested part and annexed form CR12 to the replying affidavit asserting that the defendants have every right to call for the meeting. He averred that if the meeting is enjoined, it will defeat the whole purpose of the company law as there has been no evidence from the plaintiffs to prove that they are bonafide directors. That, it has not been demonstrated that the defendants are not bonafide directors and the plaintiffs’ needs to show some locus to entitle them to the orders sought in the interim.

8. Going by the brief submissions that were made before me, the bone of contention is on whom between the plaintiffs and the defendants are the bonafide directors of the interested party and whether the notice for the Annual General Meeting scheduled to take place on 03.12.2021 was properly issued by the defendants.

9. The court notes that the counsel for the plaintiffs sought leave to file a supplementary affidavit to answer to some of the issues raised in the replying affidavit. The issue as to who are the bonafide directors of the interested party is yet to be determined conclusively and at this point, it is not desirable that the court makes a conclusive finding with the scanty material before it and before receiving comprehensive submissions from the parties to enable the court to weigh the merits of the case. I say this bearing in mind the provisions of section 133 of the Company's Act 2015 which binds companies with resolution passed by directors even if when they are illegally in office. Further, the form CR12 annexed by the defendants shows the records of the interested party as at 21.06.2021. The case herein was filed on 26.11.2021 and it is not an up to date record reflecting the state of directorship of the interested party at the time the suit was filed.

10. In my view, CR12 is not conclusive evidence of the state of a company regarding directorship but it is only prima facie and that is why I am of the view that at this stage, the court cannot make a conclusive finding on it.

11. In the premises aforesaid, I find that the balance of convenience tilts more on granting interim orders than not.

12. I hereby grant prayer (2) of the application dated 25.11.2021 pending the hearing of the application *inter partes*.

13. These orders to apply to the following cases;

- i. HCCC NO. E012 OF 2021
- ii. HCCC NO. E013 OF 2021
- iii. HCCC NO. E014 OF 2021
- iv. HCCC NO. E016 OF 2021

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF DECEMBER, 2021.

L. NJUGUNA

JUDGE

.....**FOR PLAINTIFFS/APPLICANTS**

.....**FOR DEFENDANTS/RESPONDENTS**

.....**FOR INTERESTED PARTIES**



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