



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL DIVISION

CIVIL CASE NO. 74 OF 2019

SAGALLA RANCHERS LIMITED.....PLAINTIFF

-VERSUS-

- 1. WILMOT MWADILO.....1ST DEFENDANT**
- 2. PATRICK MWADILO.....2ND DEFENDANT**
- 3. AMOS NYATTA.....3RD DEFENDANT**
- 4. EDWIN MWAKAYA.....4TH DEFENDANT**
- 5. HARUN MNJAU.....5TH DEFENDANT**
- 6. REGISTRAR OF COMPANIES.....6TH DEFENDANT**

RULING

1. Who and how to manage **Sagalla Ranchers Limited** has been a point of controversy between its stakeholders and the end result has been multiple suits being filed mainly on the same issue by the its stake holders inter see, with the present suit initiated vide a **Plaint** dated **4th September, 2019** being a pittance of such suits.

2. Among the substantive prayers sought in the present suit are for a declaration that the 1st to 4th Defendants are neither Shareholders nor Directors of the Plaintiff Company and a permanent injunction be issued barring them, the 5th Defendant included, from engaging or in any way participating in the Plaintiff's affairs by purporting to be the Directors in the Plaintiff's Company.

3. The Plaintiff also sought for an order for the removal of the 1st to 4th Defendants' names from the Company's Register where they are listed as Directors of the Plaintiff Company, that a declaration be issued that the Directors elected in the Plaintiff's **Annual General Meeting** on **29th July, 2017** as they appear in **Draft CR 12** dated **26th September, 2017** are the proper Directors or in the alternative the court does direct either the Registrar of Companies or a person appointed by the court to supervise a fresh election of Directors.

4. However, the subject of this Ruling are two applications, one dated **5th September, 2019** filed simultaneous with the **Plaint** by

the Plaintiff while the second one is a **Notice of Motion** application dated **6th December, 2019** and filed by the 1st to 4th Defendants. For purposes of discussion in this Ruling, I will refer to the applications as the Plaintiff's and Defendants' applications respectively and discuss them serially.

5. Turning to the merits of the applications, the Plaintiff's application dated **5th September, 2019** seeks for the following orders;

a. Spent;

b. Spent;

c. Spent;

d. That an order for interim injunction be and is hereby issued barring, preventing and prohibiting the 1st to 5th Defendants/Respondents whether by themselves, nominees, representatives, or agents from interfering with, engaging in, participating in affairs of the Plaintiff whatsoever as Directors and or purporting to be or representing themselves out as Directors of Sagalla Ranchers Ltd pending the hearing and determination of this suit;

e. An order of permanent injunction be and is hereby issued barring, preventing and prohibiting the 1st to 5th Defendants/Respondents whether by themselves, nominees, representatives, or agents from interfering with, engaging in, participating in affairs of the Plaintiff whatsoever as Directors and or purporting to be or representing themselves out as Directors of Sagalla Ranchers Ltd;

f. It is hereby declared that the 1st, 2nd 3rd and 4th Defendants/Respondents are neither shareholders nor Directors of Sangalla Ranchers Limited;

g. It is hereby declared that the Directors elected in the Plaintiff's AGM on 29th July, 2017 and appearing in the draft CR12 dated 26th September, 2017 are proper Directors of Sagalla Ranchers Limited;

h. An order requiring the entry by the Registrar of Companies of the names of the persons appearing in the Draft CR12 dated 26th September, 2017 in the Plaintiff's Company Register under the Plaintiff's list of Directors be and is hereby issued, or in the alternative;

i. The Registrar of Companies and or an officer of the court hereby appointed by the Honourable Court do supervise a fresh election of Directors of Sagalla Ranchers Limited within sixty (60) days from the date hereof;

j. The costs of this application be in the cause.

6. The grounds upon which the application is predicated are that the 1st Defendant while fraudulently representing himself as the Plaintiff wrote a **letter** dated **19th August, 2019** purposing to conduct a board meeting and invited among other persons, the 2nd to 5th Defendants who have also falsely represented themselves as Directors and/or the Plaintiff's shareholders. The issue intended to be discussed in the purported meeting are likely to prejudice the day to day operation and management of the Plaintiff Company whereas the 1st to 5th Respondents have no colour of right to manager the Company.

7. The application is further supported by the **affidavit** of its Director, **Raphael Lewela Mbinga** sworn on **5th September, 2019**. He reiterated the grounds of the application with an addition that the 1st Defendant ceased to hold the office of Directorship since **25th January, 2014** when he was not re-elected as Director whilst the 2nd, 3rd and 4th Defendants resigned from the position of Directorship on **25th January, 2014** on their own volition. However, since then the 1st to 5th Defendants are said to have attempted to fraudulently transfer the Plaintiff's property and even went ahead to employ the court process by filing numerous malicious proceedings including **Mombasa HCCC No.86 of 2014; Voi HCCC No.8 of 2015; Mombasa CMCC No.1218 of 2017 and Voi CMCC No.195 of 2015**, some of which are still pending and mainly directed to either stop the Plaintiff's **Annual General Meeting** or stall its accounts.

8. In any event, it is averred that the Plaintiff Company managed to properly convene an **Annual General Meeting on 29th July, 2017** and elected new Directors and the list thereof was subsequently forwarded to the registrar of Companies for purposes of updating the Plaintiff Company's Register under the list of Directors. Nonetheless, the Registrar of Companies received the Plaintiff's annual returns dated **15th September, 2017** and prepared **CR12** dated **26th July, 2017** reflecting the list of Directors elected **29th July, 2017** but refused to sign the **CR12** on grounds that there was no evidence that the disputes pending in court had been compromised. It is averred that the Registrar of Companies never undertook due diligence to ascertain the existence of the alleged pending suits and whether the parties instituting them had the capacity to do so.

9. In the premises, the Plaintiff calls upon the court to interfere with the Plaintiff's internal affairs and put to an end to the legal circus occasioned by the Respondents by directing the 6th Respondent to update the Plaintiff's list of Directors or in the alternative to oversee the election of the Directors to enable the Plaintiff resume its normal operations.

10. The Registrar of Companies, the 6th Respondent responded to the application by filing a **Replying Affidavit** sworn on **2nd March, 2020** by the Assistant Registrar of Companies, **Joyce Koech**. She averred that the 6th Respondent's record reflect, that a meeting was held on **9th September, 2017** and elected among other persons were **Davis Mwalughu Mwakireti, Alfred Kilonzo Njau, Valentine Gombe Nyange, Samson seleman Mwamunga, Leonard Mwandimo Mutima and Abdi Satar Haji** as Directors of the Plaintiff Company. The 1st to 4th Defendants were however not re-elected as Directors and the changes were effectively made in the Plaintiff's register.

11. The 1st to 5th Defendants/Respondents opposed the application as well as the averments made in the 6th Defendant's **Replying Affidavit** on basis of the **affidavit** sworn by the 4th Defendant on **16th March, 2020** and filed on **14th July, 2020**. He described the affidavit of the 6th Defendant as full of falsehood and the documents annexed thereto being in variance hence unreliable. He averred that whereas it was stated in the affidavit sworn by the Plaintiff's Director in support of the Plaintiff's application that the Plaintiff has not been able to file any returns from **2011 to 2019**, the 6th Defendant's affidavit purported that there were returns filed in the **year 2017**.

12. In addition to that, it is averred that **Wilmot Mwandilo**, the 1st Defendant herein and **Peter Mwamondo Nguta** had obtained orders in **Voi HCCC No.8 of 2015** and **Mombasa CMCC No.1218 of 2017** restraining the Plaintiff from holding any **Annual General Meeting** that was to take place on **29th July, 2017** and this meant that there could not be an election of Directors as alleged. The ultimate result therefore is any purported rectification of the Plaintiff's list of Directors by the 6th Defendant is a nullity.

13. Further, the Defendants/Respondents filed a **Notice of Motion** application dated **6th December, 2019** which is more or less a response to the prayers sought by the Plaintiff. The Defendant's application seeks for the following orders;

a. Spent;

b. Spent;

c. Spent;

d. That pending the hearing of this suit the court do issue an order of injunction prohibiting any person from holding any Annual General Meeting of the Plaintiff on 13th December, 2019 or any other date thereafter.

e. That pending the hearing of this suit the court do issue an order to maintain the status quo existing prior to filing of the suit herein and to direct the 6th Defendant herein, the Registrar of Companies not to register any resolution regarding any change of the status of the Plaintiff.

14. The application is premised on ten grounds on its face and further supported by the **affidavit** of **Edwin Mwakaya**, the 4th Defendant herein. In the affidavit, it is purported that the 1st to 4th Defendants are Plaintiff's Directors as set out in the **CR12** dated **15th December, 2014** where some persons in conjunction with the interested parties have colluded to intermeddle with the Plaintiff's affairs by purporting to conduct an **Annual General Meeting** and or dispose the Plaintiff's assets.

15. The two applications were thereafter disposed of by way of written submissions and the record reflects that each party filed two sets of submissions. The Plaintiff's first set of submissions was filed on **2nd March, 2020** and the supplementary set of submissions was filed on **15th December, 2020**, while for the Defendant the first set of submissions was filed on **5th February, 2020** and the second set which seems more of a duplication of the first was filed on **21st July, 2020**.

16. I have read through the submissions and they reflect much on the pleadings by the parties and I do not wish to reproduce them here but will highlight them in my determination.

ANALYSIS AND DETERMINATION

17. This Court has considered the grounds set out on the face of the two **Notice of Motion** applications and the facts deponed in the affidavits supporting and opposing either Motion together with the contending written submissions and authorities relied upon therein. Having set out the respective positions of the parties, this Court takes the view that the following are the issues for determination in this matter:-

a. If an injunction can be issued, whether interim or permanent barring the 1st to 5th Defendants/ Respondents from engaging or participating in the affairs of the plaintiff as its Directors or in the alternative.

b. A declaration can be issued against any person prohibiting them from holding an annual general meeting of the Plaintiff Company.

c. Whether in the meantime it can be declared that the 1st to 4th Defendants are neither shareholders nor Directors of the Plaintiff Company.

d. Whether an order can be issued compelling the Registrar of Companies to enter in the Plaintiff's Register names of persons appearing in the Draft CR.12 dated 26th September, 2017 as Directors of the Plaintiff.

e. What other orders the court can make in the interest of justice.

18. I will address the first two issues conjunctively as they commonly point on whether or not an order for injunction can issue. It is clear that the Plaintiff in its **Motion** is seeking the twin prayers of a temporary injunction and a permanent injunction as against the 1st to 5th Defendants. However, it is instructive to note that a permanent injunction is not the same as an interim injunction. Whereas the principles underpinning the granting of the two types of injunction might be similar, a permanent injunction, also known as perpetual injunction, is granted upon the hearing of the suit and is different from a temporary/interim injunction which is only meant to be in force for a specified time or until the issuance of further orders from the court.

19. In the case of **Kenya Power & Lighting Co. Limited –vs- Sheriff Molana Habib [2018]Eklr**, the court held thus;

“A permanent injunction fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

20. It therefore follows that a permanent injunction cannot issue in this matter and the court finds no merit in such a prayer as the case has not proceeded for hearing on its merits, thus the court is yet to consider the evidence to be relied on by the parties.

21. With regard to whether an interim injunction can issue, it is trite in law that an Applicant seeking the grant of interim injunction must show to the satisfaction of the court that it has a *prima facie* case; that it stands to suffer irreparable injury in the event that the orders are not granted and lastly, that even if the court is in doubt, the balance of convenience tilts in its favour. See the case of **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others, CA No.77 of 2012; [2014]eKLR**. These are the three pillars on which the foundation of any order of injunction, interlocutory or permanent rests. It is also established that all the three conditions above are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially.

22. It is established in law that *'he who alleges must prove'*. Therefore, all the Plaintiff and the Defendants shouldered the burden to establish the three conditions for grant of an injunction as they each sought. On the part of the Plaintiff, it is argued that 1st to the 5th Defendants continue to intermeddle with the Plaintiff Company's affairs by representing themselves as its Directors when on the contrary they are not. While it is agreeable that the 1st to 4th Defendants were at some point Directors of the Plaintiff Company, it is submitted that the 1st Defendant was not re-elected and the 2nd to 4th Defendants voluntarily relinquished their positions and since then, they ceased being Directors and cannot purport to conduct any **Annual General Meeting**.

23. The Plaintiff further submitted that the 1st to 5th Defendants without any authority have instituted several suits, some of which have been turned down by the court although in the end the said suits have altered the smooth operation of Company affairs.

24. Further, the Plaintiff added that it elected new Directors in an **Annual General Meeting** held on **29th July, 2017** who should now be considered as the legitimate Directors and a declaration issued to that effect.

25. On the other hand, the 1st to 5th Defendants heavily submitted that they are rightfully the Plaintiff's Directors as set out in the **CR12** dated **15th December, 2014** and accused among other people, the interested parties for intermeddling with the Company's affairs. They also emphasized that there was a court order barring the **Annual General Meeting** which was to be held on **29th July, 2017** and therefore no new Directors could be re-elected as averred by the Plaintiff. In any event, if the elections were conducted, then the same was done in contempt of court hence a nullity. In addition to that, the 1st to 5th Defendants implored upon the Plaintiff to produce minutes for the **Annual General Meeting** purported to have been held on **29th July, 2017** as the same were not at all attached to the documents presented to this court. Based on the foregoing, the 1st to 5th Defendants sought the court to issue an injunction restraining any person from subsequently organizing the Company's **Annual General Meeting** pending the determination of the suit.

26. Peremptorily, it is my view that the prayer for injunction as sought by both the Plaintiff and the Defendants cannot be granted. A rational decision on whether the 1st to 4th Defendants are legally the Plaintiff's Director could only be reached at upon considering the suit on its merits. It is only until then, that a declaration to that effect can be issued.

27. The documents presented to this court also reflect that on **28th July, 2017** the Chief Magistrate's court in **Mombasa CMCC No.1218 of 2017** issued a temporary injunctive order restraining the Plaintiff Company from holding an **Annual General Meeting** on **29th July, 2017**. It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.

28. The Plaintiff had the obligation to comply with the order issued **28th July, 2017** and could not be excused on grounds of the order being irregular or on the belief that the suit had been initiated by persons without authority. The plaintiff should have applied for the order to be discharged and since that was not the case, the order should not be disobeyed.

29. It therefore follows that the Plaintiff proceeded in contempt of the said court order in holding the **Annual General Meeting** on **29th July, 2017** and any decision agreed on the **29th July, 2017** by the Plaintiff, including the election of Directors was a nullity. For that reason, the court cannot compel the Registrar of Companies to enter the name of persons improperly elected as Directors on **29th July, 2017**.

30. The other reason for not issuing an injunction as sought by the parties is because an injunction being a discretionary relief, should not be issued where the detriment that the injunction would inflict is disproportionate to the benefit it would confer or where the damage feared by the Applicant is trivial. In the present case it would be in the interest of justice and all the parties concerned for the company to remain as a going concern and an injunction restraining the holding of **Annual General Meeting** for election of new Directors would serve the contrary purpose.

31. In the upshot, I am of the view that the proper order for this court to issue in the circumstance is to direct a fresh election of Directors in an **Annual General Meeting** as is custom of most corporate entities. Having said that much, I proceed therefor to make the following orders:-

a. The Plaintiff Company is hereby directed to issue proper notification to all its members for Annual General Meeting to be held within ninety (90) days from the date hereof.

b. That pending the hearing and determination of this suit, an order do issue directing the 6th Respondent; the Registrar of Companies to oversee a fresh election of the Plaintiff's Directors and update register accordingly.

c. The Plaintiff shall meet the costs of the 6th Respondent for the exercise.

d. That in the meantime, it is hereby ordered that the status quo existing before the filing of the suit as far as the Directorship of the Plaintiff Company is concerned be maintained.

e. Costs of the two applications be in cause.

Orders accordingly.

RULING DELIVERED VIRTUALLY DATED, AND SIGNED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Gikandi for the Plaintiff

No appearance for the Defendants

Gitonga - Court Assistant



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