REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 173 of 2006

MAGANIA TEA FACTORY CO. LIMITED……..……..…PLAINTIFF

VERSUS

JOHN NAAMAN MUTAVI NYAGA……..1ST DEFENDANT

PATRICK KATHURI AMOS…….……2ND DEFENDANT

JOSIAH KARIUKI NJAGI……..…….3RD DEFENDANT

JOSHUA MAONI ARONI……4TH DEFENDANT

R U L I N G

The application is a Notice of Motion dated 24th October, 2008. It is an application by the Defendant expressed to be brought under Order XXXIX rule 4 and Order L rule 1 of the Civil Procedure Rules. It seeks orders:

1. THAT this Honourable Court be pleased to discharge and/or set aside the orders of injunction granted herein on 30th June 2006.

2. Cost of this Application be provided for.

3. Any such order as this Honourable Court may deem just to issue in the circumstances.

The application is based on four grounds namely:

a) The Defendants/Applicants are dissatisfied with the said order issued on 30th June 2006.

b) THAT the orders herein have remained on record for more than two years to the prejudice of the Defendants/Applicants.

c) THAT it is unjust and inequitable to maintain the said order in force.

d) THAT it is in the interest of justice that the said orders be discharged and/or set aside.

The application is supported by the affidavit sworn by the 1st Defendant. I have considered the contents of the affidavit together with the annexed exhibits.

The application is opposed. The Plaintiff has through its Advocates filed 10 grounds of opposition namely:

1. THAT, the reliefs sought are not available to the Defendants.

2. THAT, in filing multiple applications, the last one having been dismissed only on 27.08.08, the Defendants are subverting the Judicial Process in not allowing the Plaintiff from scheduling the main suit for hearing.

3. THAT, the Court Diary for 2009 has just been opened and the Plaintiff intends to invite the Defendants as soon as their application is disposed of.

4. THAT, if the Defendants were aggrieved by delay, they would either have scheduled the suit for hearing or applied for its dismissal for want of prosecution instead of filing multiple applications.

5. THAT, the application is scandalous, frivolous and vexatious.

6. THAT, application is not maintainable.

7. THAT, the application is mala fide.

8. THAT, the exhibits annexed to the application are invalid and of no probative value.

9. THAT, the application is an abuse of the court process.

10. THAT, the Defendants are busy-bodies and vexatious litigants.

Mr. Nyamwake for the Defendant/Applicant made submissions in support of the application. The main argument advanced for the application to set aside the injunction is that the Defendants were desirous to participate in an Annual General Meeting (AGM) of the Company and elections of office holders coming up soon. The other reason given for the application is that the injunction was meant to be temporary and that same has been defeated since it has now been 2 years since the injunction was issued.

Mr. Kipkorir opposed the application on behalf of the Plaintiff Company. Counsel submitted that the 1st Defendant had defied the injunctive order of 30th June, 2006 by swearing the supporting affidavit as Interim Chairman of the Plaintiff company, a matter he was injuncted in the said order from doing. Mr. Kipkorir also drew the court's attention to the application dated 19th August, 2008 which court dismissed. Counsel submitted that in that application one of the orders sought was a review of the injunction order. Counsel also submitted that rule 4 upon which the Applicant had relied could only be invoked by a party who had not participated in the interpartes hearing which resulted in the injunction which, counsel submitted was not the case.

I have considered submissions by both counsel. There are undisputed facts that the order of 30th June, 2006, which is the subject matter of this application, was made after interpartes hearing. It is not disputed what the terms of the order were, but I will reproduce them here below for ease of reference.

1. THAT, a temporary injunction be and is hereby issued restraining the 1st, 2nd and 3rd Defendant/Respondents by themselves, their servants, agents or otherwise howsoever, from

undertaking or dealing in any way with the Plaintiff Company as its Directors or holding themselves out as its Directors, pending the hearing and determination of this suit or until further Orders of this Court.

2. THAT a temporary injunction be and hereby issued against the 1st, 2nd and 3rd Defendants/Respondents by themselves, their servants, agents or otherwise howsoever, from calling for and/or chairing any or any purported general meeting or any other meeting as Directors of the Plaintiff Company in any way or at all, until the hearing and determination of this suit or until further Orders of this Court;

3. THAT, a temporary injunction be and is hereby issued restraining the 1st, 2nd and 3rd Defendants/Respondents by themselves, their servants, agents or otherwise howsoever from imposing any or any purported direction or in any way dealing in the management of the Plaintiff Company in any way as purported Directors in any way or at all, until the hearing and determination of this suit or until further Orders of this Court.

4. THAT, a temporary injunction be and is hereby issued restraining the 4th Defendant/Respondent by himself, his servants, agents or otherwise howsoever from acting and/or purporting to act as the Plaintiffs Company Secretary or in any way holding himself out as the Plaintiff's company Secretary.

The Respondents have opposed the application on grounds it was *mala fide,* was an abuse of the court process by reason of being a part of multiple applications filed by the Defendant in the suit and for reason of being scandalous, frivolous and vexatious. My attention was drawn to the application dated 19th August, 2008, the last by the Applicant before the instant one. Prayer 5 of that application seeks:

"5. In the alternative and without prejudice to prayer 1 above, the court be pleased to review the order made on 30th June, 2006 by the Hon. Lady Justice Kasango."

That prayer was sought under Order XLIV rule 1 and 2 of the Civil Procedure Rules. That application was dismissed on 28th August, 2008. Two months later the current application was filed by same parties. This time under Order XXXIX rule 4 of the Civil Procedure Rules seeking to discharge and or set aside the injunctive orders of 30th June, 2006.

I have considered the two applications and the grounds upon which the two were brought. I notice they are based on similar grounds including the fact the orders have been in force for a prolonged period of time.

Order XLIV rule 1 and 2 stipulates:

"1(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when

the decree was passed or the orders made, or on account of some mikes or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

Order XXXIX rule 4 stipulates:

"4. where a summon is issued to a firm, and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner."

The subject matter of the application dated 19th August, 2008 is basically the same as that of the instant application. In **Nairobi HCCC No. 1322 of 1993, Caltex Oil (K) Limited v. Mohamed Yusuf & Others,** Bosire J. (as he then was) held:

"The third and the last issue is one of res judicata. The doctrine is provided for under section 7 of the Civil Procedure Act. For the doctrine to apply three basic conditions must be satisfied. The party relying on it must firstly, show that there was a former suit or proceeding in which the same parties as in the subsequent suit litigated. Secondly, the matter in issue in the latter suit must have been directly and substantially in issue in the former suit. Thirdly, that a court competent to try it had heard and finally decided the matter(s) in controversy between the parties in that former suit."

Applying the principle set out in the above case, **Caltex Oil (K) Limited**, supra, it is clear that the Applicant has raised two applications raising similar issues and seeking orders of similar effect. It is therefore clear that the instant application is *res judicata*, as it raises similar subject matter that was substantially in issue in the previous application. This previous application was heard and determined on merit. The application is an abuse of the court process and for that reason ought to be struck out. **Accordingly, the Defendant's application dated 24th October, 2008 is struck out with costs to the Respondent**.

Dated at Nairobi this 5th day of December, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Nyamwake for the Applicant

Mr. Kipkorir for the Plaintiff Company

LESIIT, J.

JUDGE