

1. A temporary injunction doth issue preventing the respondents or their agents and representatives from interfering with the management or corporate affairs of African Fine Coffees Limited and from taking over and controlling the affairs of African Fine Coffee Limited until the final determination of the main company cause/petition or any further order of this court.

2. A temporary injunction order doth issue halting any form of process, disciplinary action, or decisions as against the applicant in regard to his position as the executive director of the applicant until the final determination of the main application or any further orders of this Honourable court.
3. Costs of the application be provided for.

The application was supported by the affidavit of Samuel N. Kamau, the applicant in the case with grounds that briefly stated;

1. That he is a contributor of African Fine Coffees Association Limited, a subscriber to its memorandum and articles of association, the executive director, chief executive officer and board of secretary of the company.
2. That the company is governed by the registered articles of association which are the constitution detailing the rules and regulations of the company and the procedures to be followed in setting up each of the management structures and offices of the company.
3. That in addition to the articles of association, the company has a human resource manual and a financial management manual which set up the policies of the company and govern affairs of the company.
4. That the respondents in total disregard of the articles of association have attempted to constitute themselves into a board of directors and have illegally usurped the powers and role of the executive director and purported to elect from amongst themselves a chairperson, vice chairperson and treasurer.

5. That the applicant continuously highlighted to the respondents these anomalies which both ultravires and illegitimate however, the respondents have ignored the guidance and they are determined to mismanage the company.
6. That the company lawyers Bitanguma & Co. Advocates also wrote an opinion to the respondents about the illegal actions and decisions being made however the respondents ignored the lawyer.
7. That in a board meeting held online on the 21<sup>st</sup> of August, 2020, the 1<sup>st</sup> respondent and 3<sup>rd</sup> respondent brought forward a matter which was not on the agenda of the meeting and other members were not aware about any such matters.
8. That when these matters were raised, the AFCA secretariat management including the respondent were ordered to immediately exit the meeting and matter to be discussed was classified as anonymous.
9. That about an hour later after the deliberations, the respondent and the others were invited back to the meeting and suspended with immediate effect without any hearing or presentation of the alleged document to them nor were they given a chance to tender an explanation or respond to the allegations as raised to the rest of the members.
10. That the respondents have unjustly summoned me for a disciplinary hearing on the 18<sup>th</sup> January, 2021.

11. That because of the actions of the respondents, the company is continuing to lose revenue and the smooth operations of the company have been hindered by the actions of the respondents.

12. That the applicant has petitioned court for declarations and remedies against this prejudicial conduct, mismanagement of the company and illegitimate action of the respondents and this company cause has a high probability of success considering its merits.

The respondents through the affidavit in reply of Kenneth Barigye to the application denied that the applicant's averments and stated that;

1. The applicant ceased being a board secretary by virtue of the board resolution dated 25<sup>th</sup> October, 2020 and registered on the 25<sup>th</sup> November, 2020 wherein it was resolved that the 3<sup>rd</sup> Respondent be appointed as the board secretary to the company to replace the applicant.
2. The appointment of the 3<sup>rd</sup> respondent as the secretary to the board of directors was as a result of the prevailing conditions of the Covid-19 pandemic which due to restrictions in movement coupled with the fact that the then board secretary was out of the country necessitated that the position be filled to facilitate the continued functioning of the association.
3. Article 13.1 (d) of the amended memorandum and articles of association provides for one of the ways a director is disqualified from the board which is by ceasing to be fully paid member of the company and not defaulting in payment of the subscription fees and dues as per the assertions of the applicant.

4. The respondents are legally constituted as a board of directors as per the amended memorandum and articles of association which stipulate in articles 12.3 that the term of office of the board commences at the AFCA annual general meeting wherein it was resolved that the board whose term of office had expired on the 13<sup>th</sup> February, 202 be relieved of their duties and a new board appointed to replace them.
5. The board of directors is legally in office following an ordinary resolution wherein they were appointed to office. That since the board is legally constituted, its actions are legitimate and intravires in accordance with the company's amended memorandum and articles of association.
6. The Company Cause No. 002 of 2021 is frivolous, vexatious and has no possibility of success but rather, it is only intended to circumvent the duties of the board of dealing with insubordination by an employee/ member of the association and if court were to grant this injunction, it would be interfering with the internal measures that govern the association.
7. This application is prematurely before court upon dispute involving any members of the association shall be referred to an independent arbitrator and the parties may appeal against the arbitrator's decision in a court of law.
8. The acts that the acts the applicant seeks to stop have since been ratified and overtaken by events and to reverse the status quo would cause irreparable to the respondents and the company.

In the interest of time the respective counsel filed written submissions and I have considered the respective submissions. The applicant was represented by *Mr. Barenzi John Patrick* whereas the respondents were represented by *Mr. Sseninde Saad* and *Ms. Stella Twikiriza*.

### ***Applicant's submissions***

The applicant's counsel submitted that the law on granting temporary injunctions in Uganda was well settled in the locus classicus case of *E.LT Kiyimba Kaggwa vs Haji Adbu Nasser Katende [1985] HCB 43* where Odoki, J as he then was laid down the rules for granting a temporary injunction as;

*Granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of.*

*The conditions for the grant of the temporary injunction are that; the applicant must show a prima facie case with a probability of success or that there are serious questions and issues to be tried and determined by court, that he will suffer irreparable injury which would not adequately be compensated by an award of damages if not granted and if the court is in doubt, it would decide an application on the balance of convenience.*

In respect of the prima facie case, counsel noted that there are serious issues for trial and determination and consideration which can only be determined by court through trial production of evidence. the applicant noted that the respondents are acting hastily to alter matters that concern the above issues with the intention of frustrating the entire hearing and depriving them a fair hearing and trial.

The applicant alleged that the respondents disregarded the articles of association and have attempted to constitute themselves into a board of

directors. He noted that the respondents have filed various resolutions reflecting positions that are being challenged and there is every reason for them to be stopped which warrants the grant of an injunction by court.

In respect of the status quo, the applicant submitted that he is a subscriber to the articles and memorandum of association and the secretary to the board. He submitted that the applicant has been the executive director of the company for over 10 year and the same has been a going concern to date. Counsel therefore prayed that the status quo is maintained until the questions before the court have been determined.

On whether the applicant will suffer irreparable damage which cannot be adequately compensated by an award of damages, the applicant submitted that the company was incorporated in July, 2000 and has active presence in eleven countries in Africa for over 10 years which has accorded it a reputation, invaluable value and good will.

He alleged that the respondents have orchestrated illegalities and decisions that have frustrate the company's operations and caused discontent of the partners. He noted that the company has already lost USD. 200,000\$ and it is further accruing liabilities and the creditors now demanding for money.

Counsel submitted that the company is already experiencing monetary loss and loss of earning and finances. It was therefore submitted that the company and the applicant are being affected as a result of the illegal activities of the respondents that cannot be adequately atoned for by any award of damages.

On the balance of convenience, the applicant submitted that he is a subscriber to the memorandum and articles and the current executive director and secretary to the board. He stated that the respondents are not

members of the company and they have never been involved in its management.

He therefore submitted that if court is in doubt, it should find it more convenient, equitable and proper to keep the applicant and affairs of the company as is until determines the issues in the petition.

On costs, counsel submitted that section 27 (2) of the Civil Procedure Act provides that costs should follow the event unless for good reasons and there's no reason to deprive the plaintiff of costs.

### ***Respondents' submissions***

The respondents opposed the applicant's submissions and the application when they stated that the applicant falls short of satisfaction of the said requirements for grant of a temporary injunction.

The respondents submitted that the company held the annual general meeting and they were elected to serve on the board in the applicant's presence and he never contested their election in the said meeting.

It was further submitted that the questions raised by the applicant in his submissions were all resolved by having the annual general meeting of the company. upon being elected into a board, the board with the respondents inclusive took decisions as expected among others to appoint auditors as per their powers under Article 15 of the amended memorandum and articles of association. Counsel submitted that the applicant raises baseless, frivolous and vexatious as all procedures taken prior to that company's general meeting where the board was elected.

In respect of irreparable damages, the respondents submitted that the applicant has neither demonstrated how actions of the respondents are illegal nor frustrated the operations of the company. the respondents stated



that the applicant did not show how the company has lost income of USD 200,000\$ or accruing losses.

Counsel argued that the respondent and the entire board are responsible for the management of the company and so by the applicant having this application granted and the board barred from the management if the company which will then be at his sole management.

It was further argued that the applicant which has put the operations of the company at risk, refusing to comply with the audit exercise and moving large sums of money from the company's fixed account to an operational account with the sole intent of spending the money as he pleases. He therefore stated that it is convenient and much safer to leave the company in the management of the respondents and the board than one person.

He submitted that there is no possibility of irreparable loss occurring to the applicant in the event that this application is not granted and the applicant neither pleaded or demonstrated any likelihood to suffer any irreparable loss that would prejudice him in any way.

On the principle of balance of convenience, counsel noted that granting this application shall expose the company to be managed by the applicant without anybody to account to. Counsel therefore submitted that it is convenient to dismiss the application and leave the management of the company in the hands of the board and the respondents.

Counsel submitted that the purpose of granting the temporary injunction is for preservation of the parties legal rights pending litigation. He stated that the status quo of the company is the board is present and managing the company affairs having been elected into office with a resolution to the same effect. The respondents submitted that once this application and orders therein are granted, are intended to change the status quo and

prayed that the orders sought be denied since they are contract to the purpose of a granting temporary injunctions

On costs, counsel submitted that the it is trite that costs follow the event and prayed that this application be dismissed with costs to the respondent.

### **Analysis**

An injunction is by its very nature a coercive order. The main question for this court establish is whether in such circumstances the temporary injunction can still be justified. See *Regent Oil Co Ltd v JT Leavesley (Lichfield) Ltd* [1966] 1 WLR 1210. The legal principles upon which Court exercises its discretion to grant a temporary injunction in all actions pending determination of the main suit is now well settled as seen in the wealth of authorities.

The granting of a temporary injunction is an exercise of judicial discretion as was discussed in the case of *Equator International Distributors Ltd v Beiersdorf East Africa Ltd & Others Misc. Application No.1127 Of 2014*. Discretionary powers are to be exercised judiciously as was noted in the case of *Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29*.

It should be noted that where there is a legal right either at law or in equity, the court has power to grant an injunction in protection of that right. Further to note, a party is entitled to apply for an injunction as soon as his legal right is invaded *Titus Tayebwa -vs- Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009*.

It is trite law that for an application to be maintained three conditions must be satisfied by the Applicant as was discussed in the case *Behangana Domaro and Anor -vs- Attorney General Constitutional Application No.73 of 2010* that is; - The applicant must show a prima facie case with a

probability of success, that the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and if the court is in doubt, it would decide an application on the balance of convenience.

In the circumstances of this case, the applicant submitted that there was a prima facie case and triable issues that merited the court's determination. He submitted that the respondents in total disregard of the articles of association have attempted to constitute themselves into a board of directors and have illegally usurped the powers and role of the executive director.

The applicant did not however adduce cogent evidence on the court record to show that there is a bonafide dispute. It should be noted that directors represent the directing mind and will of the company, and control what they do. In the case of *HL Bolton Co vs TJ Graham and Sons [1956] 3 All ER 624*, Lord Denning held at page 630;

*"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are Directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.... That is made clear in Lord Haldane's speech in Lennard's Carrying Co Ltd Vs Asiatic Petroleum Co Ltd ([1915] AC 705 at pp 713, 714.*

In the case of *Irene Kulabako v Moringa Limited & 2 Others Company Cause No. 21 of 2009*; Justice Bamwine held that: " I would add that matters of

*managing the company are better resolved in the company board room. In meetings, members normally express their wishes as to how the affairs of the company ought to be run. This is done through voting for and against resolutions. The decision of the majority will normally prevail."*

Company matters should come to court as a last resort and the court should discourage the practice of every shareholder or member and more so a minority to act in a manner that frustrates the general or majority interest under such derivative actions except in those cases of minority oppression and actions that are detrimental to the operations or general survival of the company. The Registrar of companies is mandated to resolve such company issues and also determine disputes between the shareholders and members and should always be the first dispute resolution tribunal in company issues.

The applicant did not adduce any evidence to support his notion of a *prima facie* case as whatever was done by the respondents was in their duty as directors of the company.

It is very clear that for a temporary injunction to be granted, the applicant must set out a *prima facie* case in support of the right claimed by him. The court must equally be satisfied that there is a *bonafide* dispute raised by the applicant, that there is an arguable case for trial which needs investigation and a decision on merits and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him.

The burden is on the applicant to satisfy the court by leading evidence or otherwise that he has a *prima facie* case in his favour. But a *prima facie* case should not be confused with a case proved to the hilt. It is no part of the Court's function at this stage to try and resolve the conflict neither of evidence nor to decide complicated questions of fact and law which call for detailed arguments and mature considerations.

In the circumstances, I find that this application does not raise any serious issue to be tried in the main cause and or a prima facie case.

The other cardinal consideration is whether in fact the Applicant would suffer irreparable injury or damage by the refusal to grant the Application. If the answer is in the affirmative, then Court ought to grant the order. See: *Giella vs Cassman Brown & Co. [1973] E.A 358*. By irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or material one that is; one that cannot be adequately atoned for in damages.

It is the submission of the applicant that if the actions of the respondents are not restrained by this Honourable Court, the applicant will suffer irreparable loss that cannot be atoned by damages. This court disagrees with the said submission since as stated above, the directors who are the respondents are the minds and will of the company. To grant this injunction would be to stifle the operations of the company, African Fine Coffees Association Limited which would have the effect of causing serious financial loss to the company and also its employees.

On the above principle, the instructive words of **Lord Diplock** in the case of *American Cynamide vs Ethicon [1975] 1ALL E.R. 504*. He states;

*"The governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a Permanent Injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant's continuing to do what was sought to be enjoined between the time of the Application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no Interlocutory Injunction should normally be granted..."*

In *Commodity Trading Industries v Uganda Maize Trading Industries [2001 -2005] HCB 119*, it was held that this depends on the remedy sought. If damages would not be sufficient to adequately atone the injury, an injunction ought not to be refused. In this case, the plaintiff's injury if there be can be atoned for in damages in any amount of money by way of compensation as the same can be quantified.

An order of temporary injunction is intended to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a *fait accompli* before the final hearing. The court would have to preserve the status quo prevailing at the moment which is the company board is present and managing the company affairs having been elected into office with a resolution to that same effect. This application seeks to alter this status quo which is not the intention of a temporary injunction.

It is also trite law that if the Court is in doubt on any of the above principles, it will decide the application on the balance of convenience. The term balance of convenience literally means that if the risk of doing an injustice is going to make the Applicant suffer then probably the balance of convenience is favorable to him/her and the Court would most likely be inclined to grant to him/her the application for a Temporary Injunction.

In the case of *Victor Construction Works Ltd -vs- Uganda National Roads Authority HMA NO. 601 OF 2010*. The High Court while citing the decision in *J. K. Sentongo -vs- Shell (U) Ltd [1995] 111 KLR 1*; by Justice Lugayizi observed that if the Applicant fails to establish a *prima facie* case with likelihood of success, irreparable injury and need to preserve the status-quo, then he/she must show that the balance of convenience was in his favour.

The balance of convenience simply means that the applicant has to show that failure to grant the temporary injunction is to his greater detriment. In *Kiyimba Kaggwa v Haji A.N Katende [1985] HCB 43* court held that the balance of convenience lies more on the one who will suffer more if the respondent is not restrained in the activities complained of in the suit.

As I have stated above, the company will suffer irreparable harm and this will seriously affect the business of the company if this injunction is granted against the respondents. It is indeed noted that the company has suffered due to the interim order which was obtained.

In the result for the reasons stated herein above this application fails and is dismissed with costs.

I so order.

**SSEKAANA MUSA**

**JUDGE**

**10<sup>th</sup> DECEMBER 2021**