



**Ng'ang'a & 2 others v Nyakoe & 8 others; Waswa Investment
Company Limited (Interested Party) (Commercial Case E123 of 2022)
[2022] KEHC 16069 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E123 OF 2022**

**WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

**JAMES MWANGI NG'ANG'A 1ST PLAINTIFF
MARY KIMANI MBUGUA 2ND PLAINTIFF
DAVID MOGENDI MICHOTI 3RD PLAINTIFF**

AND

**JAMES NYAKWEBA NYAKOE 1ST DEFENDANT
SAMMY MAINA MWANGI 2ND DEFENDANT
LILIAN AKEYO ONYANGO 3RD DEFENDANT
PEETER NJIHIA NJOROGE 4TH DEFENDANT
JOHN MURIRA MWICHIGI 5TH DEFENDANT
PHANCIE KESERI MAGALE 6TH DEFENDANT
VINCENT OGILO ONYANGO 7TH DEFENDANT
BERNARD KIRAGU KAMAU 8TH DEFENDANT
REGISTRAR OF COMPANIES 9TH DEFENDANT**

AND

WASWA INVESTMENT COMPANY LIMITED INTERESTED PARTY



RULING

1. The matter for determination is the application dated April 4, 2022 wherein the applicants seek the following orders:-
 1. Spent.
 2. Spent.
 3. That the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents, their servants, agents and any other representatives be restrained from taking any meetings, transactions, dealings or whatsoever kind of action on behalf of the interested party pending the hearing and determination of the main suit.
 4. That the 9th respondent be restrained from making any further changes to the directorship and ownership of the interested party pending the hearing and determination of this application .
 5. That the 9th respondent be restrained from making any further changes to the directorship and ownership of the interested party pending the hearing and determination of the main suit.
 6. That costs of this application be in the cause.
2. The application is supported by the 1st plaintiff's affidavit and is premised on the grounds that:-
 1. That the 1st to 7th respondents purported to carry out an annual general meeting on October 2, 2020 to appoint new directors of the company and purported to appoint themselves and directors.
 2. That this meeting was clearly an illegality as it was called by the 1st to 7th respondents in blatant disregard of a judgment in High Court Commercial Case 462/2011 and various order issued subsequently that had directed that the plaintiffs carry out an annual general meeting, not the 1st to 7th respondent.
 3. That the 1st to 7th respondents with the 9th respondent's acquiescence used the minutes of the illegal meeting to alter the company's details of directorship which now reflect the 1st to 7th defendant/respondents as the Directors of the company.
 4. That having illegally seized control of the company with the full acquiescence of the 9th respondent, the applicants are justifiably concerned that the 1st to 7th defendants may take actions that cause irreversible damage to the claimants' interests in the interested party, yet they have not been democratically elected by a majority of shareholders in accordance with the judgment issued in HCCC 462/2012 and the orders issued therein and subsequently.
 5. That the applicants are apprehensive that if interim orders are not granted against the respondents, the respondents may take irreversible changes to the interested party which will harm the rights of the applicants and the interested party's shareholders.
3. The 1st- 6th and 8th respondents opposed the application through the replying affidavit of the 7th respondent Mr Vincent Ogilo Onyango who avers that:-
 1. That the 1st and 2nd plaintiff's herein together with the interested party duly filed a suit against the then officials whom the court rules were not properly elected hence ordered an annual



general meeting be held within 45 days of the said judgment delivered on February 21, 2020 by Lady Justice Rachel Ng'etich.

2. That subsequently, the honourable court on the 2nd day of April 2020 extended the period for holding the annual general meeting by a further 30 days and September 14, 2020 issued further order for compliance with directions of the Registrar of Companies in his letter dated September 6, 2020.
3. That the 1st and 3rd plaintiffs subsequently advertised for the annual general meeting which was to be held on the 2nd day of October 2020 at Destiny Park, Kahawa Wendani (attached hereto and marked "VOO 1" is a copy of the notice of the annual general meeting).
4. That on the 2nd day of October, 2020 the annual general meeting was conducted at Destiny Park, Kahawa Wendani and was attended by 67 members (attached hereto and marked "VOO 2" are minutes of the annual general meeting).
5. That the annual general meeting was conducted in the presence of police officers from Kahawa Sukari Station, who provided security and the elections were conducted peacefully and the officers subsequently made reports on the same.(Attached hereto and marked "VOO 3" is a copy of the report dated the 25th day of October 2020 and October 28, 2020)
6. That although the plaintiff's we're aware of the annual general meeting they failed, ignored, neglected and/or refused to attend the meeting without any lawful and/or purifiable cause.
7. That on the same day the plaintiff herein held a parallel special annual general meeting wherein they together with Samson Lolo, Manaseh Odhiambo, Jonathan Nyangau and Muhuthu estate presented themselves as directors and subsequently elected themselves.
8. That I am counselled by my Advocates on record which counsel I believe to be true that the special general meeting of the plaintiffs was illegitimate and of no effect as directors cannot elect themselves in the case of a public company.
9. That according to the memorandum and articles of association the Directors of the company shall be determined in a general meeting except the first who shall be appointed by the subscribers to the said memorandum and articles.
10. That the shareholders of the interested party held an annual general meeting in 2011 and elected directors hence High Court Commercial Case 462/2011,
11. That it is a mandatory requirement that a change of directorship has to be filed with the Registrar of Companies within 14 days after elections which the 1st – 8th defendant/ respondents did and further held a board meeting on November 3, 2020 and appointed one Bernard Kiragu as the interested party's Secretary. (Attached hereto and marked "VOO 4" is a copy of the resolution of the board dated November 3, 2020)
12. That the plaintiffs, in breach of the law, purported to file the changes after illegally appointing themselves in the special general meeting.
13. That we are therefore opposed to the orders sought by the plaintiffs herein to restrain the 1st-8th defendant/respondents herein from acting in their capacity as officials of the interested party as they did not comply with the law and held a parallel meeting in breach of the court order.



14. That we have already executed the orders of the judgment of the court given on February 21, 2020 and the order given on September 9, 2020, September 16, 2020 and the orders given on October 1, 2020 in civil suit No 462 of 2011.
 15. That this matter has been in court for over 10 years, the honourable court addressed all the issues and made a determination on February 21, 2020 and on September 23, 2021 the parties conceded that the annual general meeting was held on October 2, 2021.
 16. That as per the court order issued by Honourable D Majanja J on October 2020, the parties herein convened elections on a special annual general meeting (AGM) by members of Waswa Investments Company Limited (C96490) at Kahawa Wendani (a venue proposed by the plaintiffs herein and approved by the court on October 1, 2020 (Attached hereto and marked "VOO 5" is a copy of the order of the court issued by Honourable Justice Majanja).
 17. That I am also aware that immediately after the elections of October 2, 2020, we filed another application dated June 24, 2021 requesting the honourable court to direct that the Registrar of Companies captures the results of the election that took place and amend the CR 12 to reflect the results of the outcome of the election of a special annual general meeting (AGM) convened by members of Waswa Investment Company Limited (C96490) held at Kahawa Wendani and that the honourable court be pleased to issue an order compelling the plaintiffs herein James Mwangi Nganga, Mary Kimani Mbugua & others to handover the company seal, incorporation documents ie memorandum & articles of association, certificate of incorporation, financial statements, books of accounts, any other company documents, company items, registers, title deeds, all records including bank accounts relating to Waswa Investment Company Limited, and any other company property to the newly elected members of Waswa Investment Company Limited (C96490) as per the elections conducted on October 2, 2020.
 18. That the court then directed that the parties proceed to the Registrar of Companies offices and have the said changes effected.
 19. That I am counselled by our advocates on record which counsel I believe to be true that the he who comes to equity must come with clean hands yet the plaintiffs/applicants herein have come with unclean hands.
 20. That I am further informed by my advocates and which information I verify believe to be correct that the application herein is bad in law, incompetent, misconceived, amounts to an abuse of court process and therefore should be dismissed.
 21. That I am aware that the plaintiffs are trying to revive this suit before the court, in another way and in the form of a new cause of action a transaction which they had already put before a court of competent jurisdiction in the earlier proceedings and which has been adjudicated upon.
 22. That I am also aware that on September 23, 2021, Honourable David Majanja directed that the case had been closed and that he would not entertain any further applications as parties had already complied with the orders.
 23. That I informed by my advocates and which information I verily believe to be correct that litigation must indeed come to an end.
4. Parties canvassed the application by way of written submissions which I have considered. The main issued for determination is whether applicants have made out a case for the granting of the orders of injunction sought.



5. The principles governing the granting of orders of injunction were set out in the case of *Giella vs Cassman Brown* [1973] EA 358 as follows:-

“The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

6. Applying the above principles to this case, I note that it was not disputed that in a related case being HCCC 462/2011 the court ordered the parties herein to call for annual general meeting (AGM) which annual general meeting was conducted on October 2, 2020. The applicants’ claim however, was that the annual general meeting was conducted in blatant disregard of the court judgment which directed that applicants carryout the annual general meeting and not the 1st- 7th respondents.
7. The applicants contend that the respondents have used the outcome of the annual general meeting to seize control of the company’s directorship thus putting their interests into jeopardy as the respondents were not democratically elected.
8. The respondents, on the other hand, argued that the application does not meet the threshold of the conditions for the granting of orders of injunction. The scenario presented in this case is that of different factions in a company who have longstanding wrangles over its management.
9. Courts have taken the position that they will not interfere with the internal affairs of a company. (See *Foss vs Harbottle* [1843] 2 Hare 461).
10. Guided by the above cited case, I note that the parties have not demonstrated that their disputes cannot be resolved by the company itself at their meetings where the majority vote carries the day.
11. I am not satisfied that the applicants have presented a *prima facie* case to warrant the issuance of the orders of injunction. Furthermore, no material was placed before the court to show that the loss, if any, that the applicants will suffer if the orders sought are not granted cannot be compensated in damages.
12. Taking a cue from the holding in the *Nguruman vs Jan Bonde Nielsen & 2 others* CA No 77 of 2012 wherein it was held that all the conditions for the granting of orders of injunction must be met, I do not find it necessary to belabor the requirement that an applicant for an order of injunction must demonstrate that the balance of convenience tilts in his favour.
13. Be that as it may, I find that that the balance of convenience tilts in favour of the respondents who have demonstrated that they complied with the court judgment and conducted an election at the annual general meeting.
14. In a nutshell, I am not satisfied that the application dated April 4, 2022 is merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -



Mr. Machina for plaintiffs

Ms Ayego for Odera for 1st-8th defendants

Court Assistant- Sylvia

