



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL

CIVIL SUIT 462 OF 2011

JAMES MWANGI NG'ANG'A.....1ST PLAINTIFF

MARY KIMANI MBUGUA.....2ND PLAINTIFF

WASWA INVESTMENT COMPANY LIMITED.....3RD PLAINTIFF

VERSUS

SAMMY MAINA.....1ST DEFENDANT

JAMES NYAKOE.....2ND DEFENDANT

VICENT OGILLO.....3RD DEFENDANT

JOHN MUCHIGI.....4TH DEFENDANT

MARY MUMBI.....5TH DEFENDANT

HANAH KARUTHI.....6TH DEFENDANT

VANICE MAKALE.....7TH DEFENDANT

JUDGMENT

BACKGROUND

1. The plaintiffs filed this suit way of Plaint dated 17th of October 2011 against the Defendants seeking the following prayers:-

i. That the Defendants, their servants , agents and or employee or otherwise howsoever be restrained from interfering with the Plaintiff's operations, management and running of Waswa Investment Company Limited and/ or in any manner dealing with the Company's affairs, its offices, bank Accounts and/or assets

ii. Costs of and incidental to the suit and interest at Court rate

iii. Any other remedies as the Honourable Court may deem fit and applicable in the circumstances.

2. Defendants filed defence dated 2nd November, 2011. The defendants availed 3 witnesses. They denied plaintiff's claim and prayed that plaintiff's claim be dismissed with costs. They also prayed for a declaration that they are duly elected officials of the 3rd plaintiff.

PLAINTIFF'S EVIDENCE

3. **PW1 Francis Mwangi Ng'ang'a** testified that he is the **Senior Deputy Registrar** in the Registrar General's Department and his work involves among others the registration of companies and keeping the company records.

4. He testified that he has records of **Waswa Investment Company Limited**. It was registered as **C 96490** and was incorporated on the **26th of November 2001** and as at that date, the original promoters were 4 namely: **Mr. Onchoke, Njeri, Mr. Mukambue** and **Mr. Odhiambo** and they doubled up as the directors of the company. He said the company was registered as a private company but it changed its character and started enrolling other members. He said the directors who were supposed to make this application did not effect this change of character. That according to his records no application had been made, they however treated the Company as a Public Company.
5. He said the directors contravened the law; however in their minutes they have indicated their intention to make it a Public Company. He said the Registrar decided to consider them as a public company by recognizing the directors who were elected on the **23rd of July 2011** and issuing a list of directors dated **3rd of August 2012** and by writing to **Ondiek & Co. Advocates** on the **27th of April 2012** informing them on the status of the Company. The Registrar recognized the fact that the Company had changed its character. The letter was signed by himself and the minutes were dated **23rd of July 2011**. As at **23rd of July 2011** there were existing directors of the company.
6. He further stated that there was no notice in his records to convene the Annual General Meeting for the said **23rd July 2011**. They were not given any registration letters or any notice convening the AGM. Article 21 of the Memorandum at page 17 spelt how the director was to be removed or disqualified. He did not have the notice for a special notice. The company had refused to apply for the change of its character. He said that in his letter dated **28th of October 2008** addressed to the original directors to effect the change. He wrote to **Newton Mukambua, Mannasseh Odhiambo, Rachel Njeri** and **Charles Onchoke**.
7. He confirmed knowing the signature on the CR 12. He stated that the group named were the ones in office. The letter dated **28th of October 2008** was addressed to the promoters. According to his records, his list of promoters had not changed. Their records show more than 1,000 members. The meeting held at Kariokor on the **23rd of July 2011** did not meet the quorum set. There was no agenda. The meeting was called and an election was held. He had a notice dated **28th of June 2011** by the Chairman, the Secretary and the Treasurer calling for a meeting for the **23rd of July 2011**.
8. He said the Agenda was progress report and subdivision of plots, financial status and A.O.B. the purpose of submitting this notice was to show that the people who attended that meeting called by directors are more than 50. He said there was no agenda for elections.
9. PW1 further stated he was aware that there was a society known as **Waswa Development Society**. He did not have the file relating to that society in Court. He said on page 39 of the Plaintiff's bundle there was a notice of cancelling a society by the name of **Waswa Development Society** dated **30th of August 2001** and a letter dated **8th of October 2001** by the Senior Assistant Registrar of the society addressed to the Town Clerk Nairobi. He said it was advising the clerk that the society known as **Waswa Development Society** had been deregistered.
10. He added that on Page 58 of the Plaintiff's bundle is a letter dated **5th of February 2002** by the Senior Assistant Registrar Societies to one **Julius Muhuthu** of **Waswa Development Society**. It informed the addressee of the rejection of extension of the time of the deregistration of the Society. On page 37 is a letter dated **8th of January 2002** by **Mr Julius Muhuthu, Newton Mukambue** and **Charles Onchoke** to the Attorney General which is an appeal against the cancellation of Waswa Development Society. On page 101 of the Plaintiff's bundle is a letter dated **12th of June 12** by the firm of **Otieno Armmad Company** to the Registrar of Societies requesting a list of the Directors. He said the letter was received on the **12th of June 2002** by the Registrar General and confirmed having received it but it was not responded to.
11. Further at Page 140 is a letter dated **27th of April 2012** from their office to **Ondieki & Ondieki Advocates** it was signed by **Francis S. M. Ng'ang'a Senior Deputy Registrar General**. The letter was informing those advocates that the company appears as Private Company but its membership exceeds 50. It was in contravention with **Section 30 of the Companies Act**. It is also indicated that the anomaly had been noted by the directors in their minutes of **5th of July 2009**. He confirmed that the signatures at page 101 and 140 were his. He confirmed that at Page 141 of the Plaintiff's bundle is a letter dated **3rd of August 2012** addressed to **Ondiek & Co. Advocate** by him advising the advocates on the position the directorship of the company. He said it was response to oral request made by the said advocates.
12. He said the Memorandum and Articles of the Company were never amended to reflect the fact the Company was a Public Company and by operation of **Section 30**, once the Company exceeds 50 members it becomes a Public Company. It was a decision of the Registrar to treat it as a Public Company. He said the office stopped acting on the matter of the company after the matter came to court.
13. He confirmed that at Page 62 and 63 is the Memorandum of understanding dated **19th of April 2009** between **Newton Mukambue, Rachel Njeri** as former directors and **James Mwangi Ng'ang'a, Mary K. Mbugua, David Mugedi, Manaseeh Odhiambo, Jonathan Ondieki Nyangau** and **Vicent Onyango Ogiro** as current directors. At page 63 it is shown as signed. The document was not filed with them.
14. The dispute in court is about directorship but he did not know when the suit was filed. He said changes were effected in August 2012. And that Registrar of Companies stopped dealing with the file because the matter came to Court; that he realized it was a matter in Court when they were served in June 2012. He said the Court orders were served on them but they did not restrain him from registering the particulars of the directorship.
15. He stated that the registrar effected the change of particulars after a year from the meeting on the **23rd of July 2011**. He stated that there was no resolution. It was the work of the shareholders and theirs was only to receive the records. He said records show that the entire office was removed and a new set of directors. He said he is not aware of any takeover of the Company by an entity known as **Waswa Land Trust Development**.
16. In cross-examination, he said he was served with a restraining order confirmed the directors on the **3rd of August 2012** and the letter was received on the **10th of August 2012**. The request by Ondiek and Company Advocates was received on the **24th of April 2012**.

17. He said The Company was formed as a Private Company and over time the number of shareholders increased to more than 50 and were actually issued with share certificates. On that claim alone the Company is a Private Company has no logic at all. The promoters and directors of the company went against the articles and recruited very many shareholders.

18. He said at page 112 ad 147 of the Defendant's bundle are copies of the shareholders issued by **Waswa Investments Company Ltd** to different members. They were signed by the directors. This is what changed the company from private to public.

19. Page 34 to 48 of the Defendant's bundle is the list of employees of the Nairobi City Council. It shows payroll deduction going to Waswa the 3rd Plaintiff. The list is extensive of up to 1000 and this changed the character pf the company. He said from minutes of the meeting of 23rd July 2011, in minute 5 the office was removed and new directors elected. In the AOB elections were conducted. This was lawfully constituted. According to his records, the attendance was more than 100 members. This buttresses the position that the company had a public character. That **Mr. James Mwangi Ng'ang'a** appear as No. 1 in the list and there is no indication that there were more than 1 meeting on that day.

20. He said at page 24 of Plaintiff's bundle is part of the Memorandum and Articles, at the page the Promoters are five in number. Page 33 of the Plaintiff's bundle article 21 (g) voting out by members is one of the ways of removing directors of the company. And at Page 58 of the Defendant's bundle is minutes of the meeting held on the 5th of September 2010 and minute 3 seems to have discussed the conversion of the company from Private to Public. And in Minutes of 23rd of July 2011, it would seem that the entire office was dismissed and a new office elected.

21. In re-examination PW1 stated that the Company is supposed to submit names of the members and he did not have the record of all the members of the company. A total of 125 members as per the list are shown to have attended. Under the law an election can be done under an AOB there was no requisition for the AGM.

22. **PW2 David Mugendi Michoti** testified that he became a director of WASWA Investment Company on 23rd February 2009 and was incorporated as a member in 2001. The transfer of shares was in writing as stated on page 62 of the Plaintiffs documents, that a Memorandum of Understanding which was signed then registered.

23. He testified that the chairman then Mr. Mwangi convened a meeting at Kariokor for the progress report on title deeds this was on the 23rd July 2011. He said according to him the meeting did not take off well as it was interrupted by some members saying that the meeting was for **WASWA Investment Trust** not **WASWA Investment Company Ltd** and the trust should address the issues of the company. He said the members disrupted the meeting, took their papers and declared themselves the directors. A notice of the meeting was issued but due to the interruptions, the Agenda of the meeting was not disclosed.

24. PW2 said there was WASWA Development Society which was formed around 1994 by **Julius Muthuri Muhuthu**. He said the Development Society was to take care of the investment of the employees of then NCC Water & Sewage Department it was also to advance welfare loans to the members; and the Society was later dissolved and Later Muhuthu and 8 others formed WASWA Investment Company Ltd (private) as shown on page 15-34 and was registered on 26th November 2001. He bought shares in WASWA Investment Company Ltd.

25. He said that as at 28th June 2011 **Vincent Ogiro** was a director and PW2 sued him after he discovered that he wanted to start another group thus abdicating duties as director of their company; he moved out and is yet to be replaced. He denied existence of an Investment Trust. He stated that **Ogiro, Nyakoe** and **Mwashihigi** are the ones in charge.

26. He further stated that the Company was in the process of issuing title deeds to the members and they need the titles processed since the process was interrupted by the wrangles. He urged Court to end to the wrangles by enabling the office to operate again under the original directors, reinstating them as due process for removing them in office was not followed and they remain directors of the Company. The election alleged to have been conducted were unlawful since they were not in accordance to the Memorandum of Association.

27. In cross-examination PW2 stated that the company was a Private Company. On 5th July 2009 a meeting was held the minutes are signed, page 55-57. He confirmed that they did not discuss minute No. 6 on Public Company neither did they discuss minute No. 7. He also confirmed that he signed the minutes as it appears on the Defendants documents page 57. He said the share certificates issued by the company did not show that it was a Public Company.

28. PW2 denied forging 1st plaintiff's signature so as to withdraw money from the bank account. He said the cheques were in his name and they were signed by the Chairman and himself.

DEFENDANT'S EVIDENCE

29. DW1 **James Nyakoe Nyakweba** testified that he works for Nairobi Water Company. The defence side produced a list of documents, witness statements and a list of issues dated 8th April 2013. The Plaintiff's Advocate had an issue with the adoption of some additional documents dated 3rd May 2019.

30. As shown by Page 38 of the list of documents, DW1 was a member of **Waswa Investment Company Ltd**. He testified that he paid 1000/= for membership which was done through a check off system. He testified that he sued on behalf of the 3000 members.

31. He said **Waswa Investment Company Ltd** was a Public Company from the beginning which is on page 58 and that there was a general meeting as seen on page 63 which led to the 1st Plaintiff being removed from office as the chairman. The chairman then, **Mwangi** called for the general meeting and more than 150 members were present. The reason for the meeting was to remove the secretary from office, the chairman then claimed that the secretary was stealing money from the bank by forging his signature. He said Page 79-83 had the document

with the forged signature.

32. He said during the general meeting **Mwangi** and **Michoti** started blaming each other, Mwangi claimed Michoti forged his signature and stole from the company while Michoti accused Mwangi had sold land to prison. He said there were minutes on page 90 that the land was sold to the prison welfare and Mwangi was paid 600,000/= through a banker's cheque and 100,000/= cash, and the balance was to be paid once the title deed was issued to them. He said members were not aware of the transaction. The members then opted to throw them out and elect new personnel seven members were elected on that day.

33. He said the meeting was held at Kariokor Social Hall then they went to their offices and Mwangi handed over the keys, the stamp and the rest of the documents that he was holding.

34. DW1 stated that new officers were registered as the official directors and he was one of the elected officials. He said some members of **Waswa Investment Company Ltd** had not received their title deeds and the current directors followed up on a few titles before Mwangi blocked them from getting their titles from the land registrar who is his relative.

35. DW1 confirmed that the members were issued with the payment certificate after being issued with the allotment letters. They were issued with share certificates and that they more than 50 confirming that it was a public company not a private one.

36. The Plaintiff's Advocate opposed the adoption of the additional documents; they needed original copies of some documents and a short list of **WASWA** that had been alleged to be authored by one of the plaintiff witnesses. The Honourable Judge agreed to the adoption of the additional documents and asked the Defendant's side to produce the original documents that the Plaintiffs had requested.

37. He testified that one Major under the instructions of Mwangi and Mary had sold land was not sold on behalf of the members; some members had lost their land due to fraudulent transaction. He said at page 14 is the mutual agreement made by **Mwangi, Michoti, Manasseh** and **Mary** indicating they were the ones signing the documents for title deeds to be issued from Machakos and following investigation Plaintiffs were sued before the Machakos due to the said transactions done on 10th February 2009 as shown on Page 49 another on 20th December 2010.

38. He said that on 11th June 2011 the members learnt of fraudulent transactions and called for a general meeting, which was held on 23rd July 2011. After the annual general meeting on the 24th August 2011, a resolution was made which declared that Mr. Mwangi had grossly misconducted himself and the affairs of the company and Mr. Ogiro would take charge of the office until a special general meeting was held as investigations were being carried out; that he was to take charge to elect new directors.

39. He stated that the Registrar of Companies was not notified of the change of directors. He said they were being dragged to Court by the Plaintiffs and that Plaintiffs were still selling their land. He prayed that the Court settle the matter so they are able to allocate the members their plots. He also asked the Court to assist the directors' exercise their mandate as directors.

40. In cross-examination by counsel for the plaintiff, the DW1 stated that Allotment letter and payslips of the deductions were proof that he was a member of **Waswa Investment Company Ltd** and the chairman in his note stated that he had transferred all 3000 members from Development Society to **WASWA Investment Company** and he was among the members.

41. He said he became a Director of **Waswa Investment Company Ltd** on 23rd July 2011. He confirmed that from page 64-73 of the Defendants documents, there was no agenda for election of new company officials and that election was done after the members discovered that the directors are selling the land without their consent. He said from the minutes dated 23rd July 2011 the agenda was not to conduct an election.

42. He further stated that it was meant to be a general annual meeting but instead they learnt of the fraudulent activities of the directors and opted to elect new officials and that's how he became a director of the company.

43. ISSUE. (Whether officials were properly elected. General meeting didn't have agenda of election, decided to elect when they discovered fraudulent activities. What are the requirements as per articles)

44. The Plaintiffs document page 25 contained the Articles of Association, Article 20 provided for the disqualification of directors and from the Article of Association for a director to be removed from office by an extraordinary resolution of the company a special notice has to be issued and the witness could not recall if the notice was issued or not, the witness requested for time to look for the notice and if found avail it to the Court.

45. The witness said he was aware of a Court Order dated 3rd May 2012 that prevented the defendants from participating in the company affairs and that there was another Court Order dated 10th August 2012 which restrained the Company Registrar from effecting any changes regarding the directors and shareholders of **Waswa Investment Company Ltd**. He however said that by the time the order was issued the change of directors had already been effected through the yearly returns and on Page 141 of the supplementary list of the Plaintiffs is a confirmation by the Registrar of Companies showing the **PW1, Maina, Ogiro, Mwichigi, Karuti** and **Mumbi**.

46. The letter was dated 3rd August 2012 and the first Court Order was dated 3rd May 2012. He said they assumed office on the 23rd July 2011 and the Defendants advocate was to produce the Court Order that set aside the order restraining him and defendants from participating in company affairs.

47. He said they had been issuing titles to the members since they had been allocated with land and this was after they assumed office on 23rd July 2011. The members that were present in Court some had not been issued with land since the previous officials sold their land. The

current directors used the registers to issue title deeds to the members and they did this when the order to allow them do business was issued this was after 23rd July 2011 the order was issued on June 2016. He said the order would be availed to the court.

48. When the witness was asked whether he knew the difference between **WASWA Development Society** and **WASWA Investment Company** he said he did and stated that **WASWA** came from a Welfare Development to an Investment Company and all the members of the Development Society became members when **WASWA** became an Investment Company. It had about 3000 members based from the founder's chairman report.

49. He said the share certificates that were issued by Mwangi confirmed that there were more than 50 members. The witness was not aware that **Waswa** started with 50 members and it started as a private company according to him he it started as a public company. From the Plaintiffs document page 25 states that **Waswa** was a private company supported by Article 2.

50. In respect to the dates on the minutes held being indicated as 24th August 2011 yet the witness says they assumed office on the 23rd July 2011, PW1 said it might have been an error since the minutes were done before the elections were conducted.

a. The case that was before the Kangundo Court the witness claimed that the piece of land in question was his but he was not the complainant in the matter but he was called as a witness in the issue.

b. The cheque and Mary's KRA Pin were among the files that were in the office. The witness confirmed that Mary was not a director of the company. The original handing over was not presented to court though the witness confirmed that it was signed by Mr. Mwangi.

51. In re-examination, he confirmed that the order setting aside the order that was restraining the defendants from assuming their duties as directors was dated 11th June 2012. The Defendant's advocate confirmed that there were no orders issued in 2011 they were all issued in 2012. DW1 stated that they were properly elected as directors after a member expressed the lack of confidence in the previous officials, as stated in page 66 minute No. 5.

52. He stated that at Page 69 of the Plaintiffs document, a meeting was held on 5th July 2009 and minute No. 6 stated the change of the company from a private one to a public one and the directors' resolved to change it from a private to a public company so as to cater to the members. The comp-any had more than 50 members and the minutes were signed by Mr. Mwangi, Mr. Michoti and Mary.

53. DW1 confirmed that the shareholders meeting that was held on 24th August 2011 led to the proper removal of Mr. Mwangi from office as chairperson as stated on page 66. The process of removing him from office started in July and was concluded in August and they were properly confirmed into office.

54. He said the previous directors acted as trustees of **Waswa Development Company** so they could take care of the land they bought on behalf of the members. He was called as a witness in the case against Mr. Michoti since he was the rightful owner and it had been sold to Allan Ndungu.

55. DW2 **John Karianjani Muthemba**, testified that he became a member of Waswa in 1995 while working at City Hall Annex. He paid for 2 plots one in phase 1 and another in phase 2. He said for phase, his allocation was frustrated by **Manasseh Odhiambo** who sold it to **Isaac Muriithi Donde** but it was later transferred back to him and for phase 2, he did not get it because Mr. Mwangi wanted money from him which he did not give.

56. He confirmed that an AGM was called by **Mr. Ng'ang'a Mwangi**, the 1st Plaintiff; that he was invited to the meeting and that plaintiff accused Mr. Muchoti the secretary had forged his signature and gone to the bank to withdraw money which belonged to the society and was also selling the plots of Waswa that belonged to member. He showed court notice of the meeting signed by the Plaintiff and Mary Mbugua, the 2nd Plaintiff. He said the meeting was properly constituted.

57. He read out minute 3 on page 64 of the documents where "the Chairman reported to shareholders that there are a group of cartels including Mr. Major to sell Waswa plots to present before the members"

58. He said the Chairman asked the members to elect a team to oversee acquisition of title deeds and also to register to replace the secretary Mr. Muchoti and Major whom he said were stumbling blocks. He said Mr. Muchoti objected saying that the sale of the plots were done with the consent of the plaintiff and that they agreed on a meeting dated 4th March 2011.

59. He said the secretary showed members copies of the minutes where the requested one member to reach the signed minute minutes of 14th March 2011 signed by the Chairman's Secretary and the Treasurer Mr. Ogingo and Plots, currently transferred to Susan Njoki Njuguna the rightful owner was engineer Jacob Maunda. 291 transferred to **Evans Mwangi Ng'ang'a** the rightful owner was **James Ouma**,

60. He testified that the Chairman told members that the Secretary has in several occasion been forging his signature and that he was not willing to work with him, he presented copies of Cheques purported to have been forged by the Secretary. He said the Chairman asked the Shareholders to vote to give the way forward. The members voted by Acclamation to have an entire office removed and a new team of 7 members elected. The names of the people elected were as follows:

i. **T Samuel Maina Mwangi**

ii. **Vincent Onyango Ogiro**

iii. **Fanice Magare Ongeni**

iv. **Jane Mucheni**

v. **Mary Mumbi**

vi. **Hannah Karuthi**

vii. **James Nyakoe**

61. He stated that these were the people appointed to lead the office in the AGM which was attended by about 150 members. He confirmed that there was a handing over report on page 72 and further that the AG's office recognized the new members. He also confirmed that the Certificates issued by the company for membership and the public character of the company.

62. He said it was not true that once you were fully paid you were issued with a certificate of payment. He stated that the meeting of the new directors was on 5th of July 2009 and 5 people were absent with apology during the meeting, these were **Jonathan, Patrick, Ondiek, Nyangau** and **Vincent Ogiro**. He stated that **Jonathan, Patrick, Ondieki** and **Nyangau** were absent with apology while **Manasseh Odhiambo** and **Vincent Ogiro** were absent without apology. He stated that Minute 1 had the heading of Bank Account at Family Bank. The signatories were the Chairman, the Secretary and the Treasurer who were **James Mwangi Ng'ang'a, David Mogendi Michuki** and **Mary Kimani Mbugua**.

63. He stated that page 2 minute 6 had the heading of change from private Company Ltd to Public Company Ltd. He further stated that since the members were more than 50 it was resolved that special meeting be called so that members could rectify this resolution. He stated that the more than 50 members were members of **Waswa** and he confirmed that the directors stated that they were more than 50 and this is why they were changing from **Waswa Investment Society to Company**. The document was signed by **James Ng'ang'a, David Michuki Mugendi** and **Mary Kimani Mbugua**. He stated that in the meeting on page 74 of the document was attended by 10 members. Those present were 19 and 4 were absent. He confirmed that he had been in the company since it started.

64. He stated that **Water Development Society** had grown from 300 members in 1994 to the present 3,000 members drawn from all City Council Department. He further stated that the second objective of the organization on page 2 paragraph 1 was the purchase of land, phase 1 comprising of 1,800 plots which are fully purchased at a cost of Kshs.33,400,000 and at the moment they were paying for phase 2. He stated that the Water Development Society was formed to buy them plots which they were being charged Kshs 1,000 through Check off system from Waswa Welfare Society, it came to Water Sewerage to Water Development society and lastly Waswa Investment Company.

65. He stated that they had problems with **Britam Groups** led by Okumu and had been battling the matter in Court for the past one year. He said at the moment **Waswa Development Society** remains registered at the AG's Office which they had gotten on the 5th of September 2001. He stated that he proposed that all the members of **Waswa Development Society** to join **Waswa Development Society** as soon as it was registered. He stated that they appealed against them and were awaiting a reply.

66. He stated that he was aware that some members had been taken to Court for fraudulent transaction of land. He confirmed that the discussion on minute was about title. He confirmed that the 1st Plaintiff sold plots belonging to the members.

67. He further stated that they declared that Mr. Mwangi had grossly mismanaged the affairs of the company, shareholders were shocked and directed that Mr. Mwangi vacate office to stop further transactions on behalf of WASWA as investigations were being carried out with the help of various government institutions, churches, CID and Mr. Ogiro was called upon to take charge of the office as the Chairman and choose Special General Meeting to elect new directors. He confirmed that the next meeting was conducted on the 23rd of July 2011 which removed the 1st Plaintiff from office.

68. DW2 **John Karianjahi Muthemba** testified that he has been a member of Waswa since 1995. He stated that Waswa stood for Water and Sewerage. Waswa Development Society. He stated that Mr. Muhuti the Chairman took them to the site to see the Plot. He said he was given the first plot by Waswa Sewerage Society. He confirmed that on page 64 on the member/ directors present he could see James Mwangi Ng'ang'a and his name was not on the list. He stated that his name was not on page 64.

69. He stated that on page 68 the document had the list of members for Waswa. He stated that he could see 125 members on the document. He confirmed that the check off system was used to make payments. He confirmed that the document on page 35 was the certificate of incorporation of **Waswa Investment Company Ltd** which showed the date as 26th November 2001. He stated that the register of Waswa Investment Co. Ltd would show that he was a member but he did not have any document in Court since he was not an official. He further stated that he could not confirm if the special general meeting ever occurred because he was not an official. He also stated that he was not aware of the meeting on the 24th of August 2011.

70. He denied that Mr. Mwangi was still the Chairman and that is why Mr Ogiro was called to take over at meeting held on the 24th of August 2011. He confirmed that the meeting held on the 23rd of July 2011 the chairman asked for voting where members voted by way of acclamation to have the entire office removed and a team of 7 elected. The meeting took place at Kariokor Social Hall. He stated that the meeting on the 24th August 2011 is where Mr. Mwangi declared himself director. He stated that he declared himself on the 23rd. he stated that they removed him on the 23rd. on the 24th the meeting was held on Lagos road.

71. He confirmed that the meeting in August was a progress report meeting where the Chairman was removed. He further confirmed that the Chairman was removed by the authority in minute 5. He further confirmed that the members' payment was by check off system.

72. He told the Court he became a member of WaSwa because he wanted an asset and that's why they began deducting his money by the City Council on behalf of WASWA. He stated that the certificate of incorporation of Waswa Investment Company was dated 20th November 2001. The proposal made by the Chairman on the 4th of October 2001 was that all members of Waswa Development society join Waswa Investment Company as soon as it was registered.
73. He stated that the 125 members of Waswa Investment Co. Ltd and the ones who removed the Chairman on the 23rd July 2011. He concluded that he wanted the Court to assist them achieve their plots from these people. He stated that they did not want Mwangi in office and they wanted the new members to continue because they had shown they had interest for them to have their plots.
74. DW3 **John Murira Muchegi** testified that he was given the allotment after 18 months. He further stated that being given the Allotment letter showed that he was allotted the plot upon showing the chairman he was not given the title deed. He stated he was given the allotment letter around 1997 after 18 months after he had paid though not everything. He paid Kshs 18,000/- then he was given the allotment letter. He then paid the rest till it was Kshs 46,000/- he stated that he may not remember when he was given the certificate of payment. However it is available. However to date he had not been given his title deed.
75. He said he knew Mwangi as the chairman but he could not remember his election. He further stated that he blamed him because he had paid everything but he had not been given his title deed. He stated he was given his Certificate of payment by Julius Muhuthu. He denied having his title before Mwangi became the Chairman. He confirmed that the period between 1997 and 2009 he would blame the office. Both of them were there. Referring to Muhuthu and Mwangi.
76. He confirmed that at the time he was given the allotment letter Muhuthu was the chairman. He reiterated that he would blame the office for not getting his title the time that Muhuthu was in office.
77. He stated that his name was not on page 64 and confirmed that his name appeared on page 66 minute 5 and his name appeared on page 70.
78. He confirmed that the Document on page 72 had signatures on the side of the names. He stated that on the document there was no agenda to elect official. He stated that he did not know whether before a meeting there was need to have an agenda however he knew that the constitution of the Company stated that there was need to have notice. He stated that he was not in the meeting. He also denied being told that there was a resolution to sell 3 acres to the members. He denied saying that there was 3 acres being sold at the Prisons at the meeting.
79. He confirmed that Mwangi was issuing certificates haphazardly. He stated that he did not have the list of the people who issued the certificate because he was not an official. He stated that he had his but he did not have them with him in court.
80. He stated that **Banice Wangari Kairu** is the Complainant who was indicated on page 48 but he did not know her. At page 50 he stated that the Complainant was **Allan Ndungu Ngare** but he had not heard of him. He denied saying that someone had his land taken away. He stated that he knew **Allan Ndungu Ngare** because he went to the office to complain but he was not a member.
81. He confirmed that Banice was a complainant and so he is a member as per page 48. He further stated that there were deliberations about elections of office bearers authorized by the Annual General Meeting.
82. He read out page 64 "over 120 members attended as attached". He further confirmed that on page 70 number 75 his John Murila Muchegi was recorded and he therefore attended the meeting. He stated that on page 68 number 1 was James Mwangi Ng'ang'a and number 2 was Mary K. Mbugua number 3. Samson Lolo number 4 Munyi. He confirmed that on page 64 James Mwangi Ng'ang'a and Mary K. Mbugua were the same on page 68.
83. He confirmed that at the meeting on the 23rd of July 2011 is where they took direction. He stated that on page 73 the heading of the Document was Waswa Investment Company handing over process. The date is 23rd of July 2011 the member number 4 is Vincent Ogelo, number 1 is Sammy Maina, Number 2 is Vincent Ogiro, number 3 is James Nyakoe, number 4 is James Mwangi Ng'ang'a and he signed on the 23rd of July 2011.
84. He confirmed that **Waswa Development Society** was deregistered and it became necessary to incorporate **Waswa Investment Society**. He concluded by asking Court to help him together with all other members of the Organization to get their title deeds because the property it was being stolen by people collaboration with the 1st plaintiff.
85. DW3 **John Murira Muchegi** stated as follows: Member of WASWA he joined in 1996, he was deducted 1000/= every month for 18 months then he was issued with an allotment. He was shown the land he was allocated and all that's remaining is the title deed, his land was in Phase 5. He worked with the Ministry of Water at Nairobi since 1992.
86. On the 23rd July 2011 Mwangi asked for an Annual General Meeting at Kariokor Social Hall and the question of the title deed was brought up. The chairman and the secretary started to blame each other, Mwangi accused Michoti of stealing and forging documents with his signature. Due to this the members opted to remove Mwangi from office afterwards they accompanied Mwangi to the office where he handed over the office.
87. He identified the notice from the list of documents page 63 and confirmed that Mwangi was the one who called for the meeting on 23rd July 2011 and the meeting was attended by more than 120 members Page 72 stated how the handing over was done.
88. He confirmed the plots on Phase 4, 5, 6 and 7 and the plots were more than 1800 and the plots were owned by members of WASWA. He

also confirmed that some people had received their titles while some had not received their title deeds, The certificates on page 103-105 were been issued by the 1st plaintiff and he issued them on his own merit since he had completed payments and had not received the title deed yet.

89. The witness stated that WASWA started as a welfare then later became a development, WASWA Development Society then later became WASWA Company Ltd. Further stated that the members were the same all through. He also confirmed the history of WASWA as stated on Pages 1-3.

90. He said the Plaintiffs had been arraigned before Court and charged with selling the members plots as seen on Page 48 -53 without the members consent.

91. In cross examination by counsel for the plaintiff, DW3 said WASWA was the same since he joined though there have been a few changes. He confirmed been a member of WASWA when it was a development society and is still a member of WASWA Investment Company. He could not remember if WASWA started in 2001. The Plaintiffs Advocate referred him to their list of documents page 35 which stated that WASWA Investment Company was started on the 26th November 2001.

92. He confirmed that he was issued his allotment letter after 18 months; after completing the payment, 18,000/=; he could not however remember the exact date he was issued with the letter of allotment, he said he continued paying until he was given the certificate of payment around the year 1997. He said at the time, Julius Muhuthu was the chairman and 1st plaintiff was an official. He said he could not recall if at the time of being issued with the certificate of payment, it was Water and Sewerage or WASWA Development and he could not remember if he was issued the certificate of payment by the former chairman Muhuthu.

93. He said he had paid Kshs 18,000/- at the time he was given the allotment letter and he continued paying up to Kshs 46,000/- he could not remember when he was given the certificate of payment but to date he had not been given his title deed.

94. He stated that he knew the 1st plaintiff as the chairman but he could not remember his election. He further stated that he blamed him because he had paid everything but he had not been given his title deed. He stated he was given his Certificate of payment by Julius Muhuthu. He denied having his title before Mwangi became the Chairman. He confirmed that the period between 1997 and 2009 he would blame the office. Both of them were there. Referring to Muhuthu and Mwangi.

95. He confirmed that at the time he was given the allotment letter Muhuthu was the chairman. He reiterated that he would blame the office for not getting his title the time that Muhuthu was in office.

96. He stated that his name was not on page 64 but page 68 had the names of the members and phone numbers and confirmed that there was no written attachment. He confirmed that his name appeared on page 66 minute 5 and on page 70.

97. He confirmed that the Document on page 72 had signatures on the side of the names but had no agenda to elect official. He stated that he did not know whether before a meeting there was need to have an agenda but he knew that the constitution of the Company required notice. He stated that he was not in the meeting. He also denied being told that there was a resolution to sell 3 acres to the members. He denied saying that there was 3 acres being sold at the Prisons at the meeting.

98. He stated that 1st plaintiff was issuing certificates haphazardly. He stated that he did not have the list of the people who were issued the certificate because he was not an official and didn't have his in court.

99. He stated that Banice Wangari Kairu is the Complainant who was indicated on page 48. He stated that he did not know her. At page 50 he stated that the Complainant was Allan Ndungu Ngare but he had not heard of him. He denied saying that someone had his land taken away. He stated that he knew Allan Ndungu Ngare because he went to the office to complain and he stated that he was not a member

100. He confirmed that Banice was a complainant and so he is a member as per page 48. He further stated that there was deliberations about elections of office bearers authorized by the Annual General Meeting.

101. He read out page 64 "over 120 members attended as attached". He further confirmed that on page 70 number 75 was **John Murila Muchegi** who was him therefore he attended the meeting. He stated that on page 68 number 1 was James Mwangi Ng'ang'a and number 2 was Mary K. Mbugua number 3. Was Samson Lolo number 4 was Munyiri. He confirmed that on page 64 James Mwangi Ng'ang'a and Mary K. Mbugua were the same on page 68.

102. He confirmed that at the meeting on the 23rd of July 2011 is where they took direction. He stated that on page 73 the heading of the Document was Waswa Investment Company handing over process. The date is 23rd of July 2011 the member number 4 is Vincent Ogelo, number 1 is Sammy Maina, Number 2 is Vincent Ogiro, number 3 is James Nyakoe, number 4 is James Mwangi Ng'ang'a and he signed on the 23rd of July 2011.

103. He confirmed that Waswa Development Society was deregistered and it became necessary to incorporate Waswa Investment Society

104. He concluded by asking Court to help him together with the others all members of the Organization to get their title deeds because the property there was getting stolen and they were collaboration with Mwangi.

PLAINTIFFS' SUBMISSIONS

105. In submissions dated 16th of October 2019, the Plaintiffs stated that 1st and 2nd Plaintiffs had at all material times been shareholders,

directors, chairman and treasurer respectively of the 3rd Plaintiff.

106. Plaintiff submitted that they convened a meeting at Karioko Social Hall and at the meeting, the Defendants who were not shareholders purported to take over the meeting without authority or company resolution and purported to proceed to take over the office on the basis that they has been constituted as a trust to run the affairs of the Company and to take over the managements of the Company.

107. The plaintiffs submitted that the 3rd Plaintiff was a legal entity incorporated as Waswa Development Society with up to 3,000 members. They stated that at the time the letter was authored there were 2 legal entities at play namely Water and Sewerage Society and Waswa Development Society. That Membership to the latter was not automatic

108. Plaintiffs submitted that in order to pass a resolution removing directors, 3 elements must exist:-

a. Special notice.

b. An ordinary resolution by shareholders of the company.

c. A record of shareholders present and how they voted.

109. The plaintiffs submitted that any action relied on the purported resolution dated 23rd July 2011 is null and void

DEFENDANT'S SUBMISSIONS

110. In submissions dated 11th of October 2019 the defendants submitted that Waswa is an initial for Water and Sewerage Welfare Association for Nairobi City Council Water and Sewerage Department employees. That the idea was formulated in 1990s to empower Water and Sewerage Department employees to acquire assets like land, shares etc through check off system. That Members paid Kshs 1,000/= as membership fee totalling to Kshs 36,000/= plus other overhead to bring the total amount to Kshs 46,000/=and were issued with a certificate and allotment letter.

111. Defendants submitted that due to greed of the ousted directors of the 3rd Plaintiff, the 1st and 2nd directors started issuing share certificate and actually they issued share certificates more than 50 confirming that the company was a public company.

112. That these events culminated in the Annual General Meeting held on the 23rd of January 2018 where the delegates resolved to remove the entire management because of misappropriation of the company resources, illegal allocation and sell of company properties and failure to make full disclosure on the events taking place. The Defendants were then registered as the official directors and they are still the official directors of the 3rd Plaintiff.

113. Defendants submitted that **Clause 11** allows members to vote by a show of hands it is instrumental to note that resolution to remove the Plaintiffs was unanimous and in execution of this mandate the Plaintiffs were lawfully removed from office.

114. Further, that **Clause 21 (g)** stipulated that a director may be removed from office by an ordinary resolution of the Company of which a special notice has been given in accordance with **Section 142 of the Companies Act (repealed)**. They further submitted that the Plaintiffs owed fiduciary duties of utmost good faith, scrupulous honest and loyalty for the shareholders, the Plaintiff failed this test by selling land to 3rd parties.

115. The Defendants in their supplementary submissions dated 22nd of October 2019 submitted that the Plaintiffs have not given any evidence to meet the threshold of **Section 107** and 108 of the **Evidence Act**.

116. Further that the resolutions of the meeting were done fairly and openly; and the Company being a public company, the directors retire based on age as per the provisions of the Public Service, the 1st Plaintiff is retiree and is technically disqualified from being a director of Waswa Investment Company Limited.

ANALYSIS AND DETERMINATION

117. Issues for determination

i. Whether the 1st and 2nd Plaintiff were properly removed from leadership of Waswa Investment Co. Ltd.

ii. Whether there was a change in the directorship of the 3rd Plaintiff's Company.

iii. Who shall bear the costs of the suits?

(i) Whether the 1st and 2nd Plaintiff were properly removed from leadership of Waswa Investment Co. Ltd/whether there was change of directorship in the 3rd Defendant's Company.

118. The defence witnesses confirmed that a meeting was called by the 1st Plaintiff who was the chairman of the 3rd Defendant. They

confirmed that in the meeting the chairman/Plaintiff and the secretary Michoti each accused one another of defrauding the company. The secretary-accused Plaintiff was selling members plots while the Plaintiff accused the secretary of forging his signature and withdrawing money from the 3rd Defendant's account. They said the caretakers of the company were appointed and the officials were officially removed in a meeting held on 23rd August 2011.

119. None of the witnesses however saw any notice for resolution to elect new officials. What is the procedure of holding company's meetings?

120. **Section 133 (3) (a) of the Companies Act Cap 486 (Repealed)** provides that minimum notice is required for company's meetings, statute or articles must provide proper length of notice. Other than the adjourned meeting is as follows: -

(a) In case of Annual General Meeting, 21 days' notice in writing is given.

(b) In case of a meeting other than AGM or a meeting of passing a special resolution, 14 days' notice in writing and 7 days in case of unlimited company.

121. Any provision contained in the articles shall be valid in so far as it provides for the calling of a meeting by a short notice than it is provided by this section.

122. **Section 130 (8) of the Companies Act Cap 486 (Repealed)** provides that the meeting may adjourn from time to time and at any adjourned meeting, a resolution can be passed after due notice in accordance with the articles has been given so that if the company at the original meeting wishes to pass a resolution and sufficient notice has not been given, it can resolve to adjourn for the necessary period in order to allow notice to be given. The adjourned meeting is treated as if it is an original meeting for transacting business.

123. Defendant's evidence is that the Annual General Meeting was scheduled for 23rd of August 2011 where the entire management of the 3rd Defendant were officially voted out.

124. The question is, and the question that arise therefore is whether a valid company resolution to elect new officials on 23rd August 2011. It was agreed that all the court orders restraining election and registering of new officials were issued in the year 2012 and not 2011.

125. Was a notice issued to that effect? None of the witnesses confirmed receiving notice for such resolution.

126. It may be true that members were dissatisfied with the performance of the plaintiffs as officials of the company but from evidence adduced, the right procedure of removal from office was not followed.

127. New officials take over the office based on unprocedural elections. That was about 9 years ago. Plaintiffs seek restraining orders against the Defendants to restrain them from running affairs of 3rd Defendant. My view is that a an AGM should be convened for purposes of electing new official; the correct procedure as per the Company Act and per articles of the 3rd Defendant, this is necessary for purposes of carrying out the objectives of 3rd defendant.

(ii) Was there change in directorship

128. In view of unprocedural process of elections, the officials elected on 23rd August 2011 were not properly elected and there was therefore no legal change in directorship of 3rd Defendant.

(i) Who should pay costs?

129. I have found that the proper procedure of removing official of 3rd defendant on 23rd August 2011 but in view of circumstances leading to the desire of members to change management I am inclined to deny the plaintiffs costs.

130. **FINAL ORDERS**

a. The defendants were not properly elected as official of 3rd Plaintiff.

b. An AGM be convened within 45 days from today's days for purposes of electing new officials to manage the 3rd Plaintiff.

c. Each party to bear own costs.

Judgment dated, signed and delivered at Nairobi this 21st day of February, 2020.

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Langat: Court Assistant

Kimani h/b for Wanduyi for all Plaintiffs.

Ongwae for Defendants