



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E229 OF 2019

BETWEEN

KIHINGO VILLAGE (WARIDI GARDENS)

MANAGEMENT ONE LIMITEDPLAINTIFF

AND

WILLIAM EDWARD PIKE.....1ST DEFENDANT

NARESH MEHTA.....2ND DEFENDANT

GITAHİ GETHENJİ.....3RD DEFENDANT

SHEETAL KHANNA4TH DEFENDANT

KISHOR KUMAR VARSANI.....5TH DEFENDANT

MOHAN SINGH PANESAR.....6TH DEFENDANT

SAMUEL MWANGI WAMBU.....7TH DEFENDANT

VARSANI HARJI DHANJİ.....8TH DEFENDANT

AND

COUNTERCLAIM

BETWEEN

WILLIAM EDWARD PIKE.....1ST PLAINTIFF

NARESH MEHTA2ND PLAINTIFF

GITAHİ GETHENJİ.....3RD PLAINTIFF

SHEETAL KHANNA.....4TH PLAINTIFF

KISHOR KUMAR VARSANI.....5TH PLAINTIFF

MOHAN SINGH PANESAR.....6TH PLAINTIFF

SAMUEL MWANGI WAMBU.....7TH PLAINTIFF

VARSANI HARJI DHANJI.....8TH PLAINTIFF

AND

KIHINGO VILLAGE (WARIDI GARDENS) ONE MANAGEMENT

LIMITED..... 1ST DEFENDANT

CHACHA MABANGA.....2ND DEFENDANT

JAMES NGUNGU GETHENJI.....3RD DEFENDANT

RULING NO. 4

Defendants'/Applicants' Case

1. This is the fourth interlocutory ruling in this suit's eight-month lifespan. The effect of the defendants Notice of Motion dated 15th January 2020 is to discharge the injunction I granted on 29th November 2019. They seek the following orders:

1. The Undertaking as to damages dated 6th September 2019 filed by the Plaintiff be struck out and consequently there be no extension of the interim order issued on 29th November 2019.

2. The Defendants to the Counterclaim file the witness statements and documents within 7 days failing which an Unless Order be issued striking out the Plaintiff and Defence to Counterclaim for non-compliance.

3. Alternatively, the court be pleased to order the proceeding be stayed and referred to the two shareholders of the Plaintiff, namely GITAHI GETHENJI and JAMES NDUNGU GETHENJI, who shall within 7 days of the Order of the court convene and urgent shareholders meeting to either ratify or repudiate the purported resolution dated 2nd May 2019 and file the minutes of the meeting within 3 days.

4. The costs of the application be provided for.

2. The grounds of the application are set out on the face of the motion and in the supporting affidavit Gitahi Gethenji sworn on 15th January 2020. The same grounds and arguments were reiterated in the submissions by counsel for the defendants, Mr Gichuhi. He submitted that the undertaking given in this case following the order of injunction granted on 29th November 2019 was invalid and unenforceable hence the injunction issued could not be extended as the plaintiff would not satisfy an award of damages should the court ultimately find that the injunction ought not to have been granted.

3. Mr Gichuhi proffered several reasons for attacking the undertaking. First, that the order of the court was clear that the undertaking should be executed the plaintiff's directors. He pointed out that the latest Certificate of the Registrar of Companies indicating the details of shareholders and directors (CR 12 form) of the plaintiff shows that it has two directors/shareholders with equal shareholding. Second, that the undertaking as to damages was executed by one director to the exclusion of the other in violation of the court order and that the undertaking was executed by the company secretary who does not have authority to bind the company on its finances. He further stated that since the undertaking was by the 3rd defendant to the counterclaim, it was incapable of binding the plaintiff.

4. The defendants further argue that the defendants to the counterclaim have failed to comply with the court's directions on case management issued on 29th November 2019 by failing to file their witness statements and documents. Counsel submitted that the court has power to issue an unless orders in default of compliance with case management orders and to strike out pleadings upon non-compliance with an unless order in line with **Rule 11** of the Practice Directions relating to the Case Management in the Commercial and Tax Divisions of the High Court.

5. The other ground of attack is that there is no valid resolution by the plaintiff company to institute this suit and to appoint the firm of *Otieno Ogola and Company Advocates* to act for it. Mr. Gichuhi referred to the decision of the Court of Appeal in *East African Safari Air Limited v Anthony Ambaka Kegode and Another* [2011] eKLR to support his contention that where any resolution authorizing institution of a suit is challenged, the court must stay the proceedings and refer the matter to the shareholders for ratification or repudiation. The defendants further point out that the resolution filed contemporaneously with the plaint herein is invalid as Chacha Mabanga who is purported to be a director of the plaintiff be expunged on account of his fraudulent appointment. Counsel submitted that the evidence placed before this court to that effect has not been controverted by the defendants and is deemed an admitted and uncontested fact. The defendants' urge that based on the reasons advanced that no further injunctions should be extended.

Plaintiff's Case

6. The plaintiff opposed the application through the replying affidavit of Chacha Mabanga sworn on 21st January 2020. In addition, Mr Otiemo, counsel for the plaintiff, made submissions to support its position. The plaintiff contends that the purpose of the application is to undermine and delay the hearing of the suit. As regards, the undertaking as to damages, the plaintiff's case is that it is given to the court and it is the honourable court to satisfy itself of its sufficiency and not the applicants. Counsel submitted that the undertaking was signed by the plaintiff's chairman and secretary hence it was valid.

7. The plaintiff further submitted that its advocates on record were properly appointed by a resolution of the company. Counsel pointed out that the chairman of the company has a majority vote in all meetings of the company and where there is a tie in votes then he has a casting vote under Article 89 of the Articles of Association. Consequently, he submitted that the undertaking given was sufficient as it was in accordance with plaintiff's Articles of Association.

8. As regards the failure to comply with case management orders, the plaintiff contends that the defendants have refused to file their witness statements and hence they cannot rely on their own non-compliance to demand that the orders issued by the court be set aside.

2nd and 3rd Defendants to the Counterclaim's Case

9. The position taken by the 2nd and 3rd defendants to the counterclaim is set out in the grounds of opposition dated 22nd January 2020 and the submissions of their counsel, Mr Osiemo, who supported the position taken by the plaintiff's counsel. Counsel stated that he wrote to the defendant's counsel requesting for pleadings as his clients had not been served. He therefore filed a holding defence and could not file witness statements unless he was served with the pleadings. He added that the defendants have not complied with pre-trial orders.

Determination

Discharge of injunction

10. The defendants' application is in essence an application to discharge the injunction already granted. In my ruling of 29th November 2019, I granted the injunction after finding that in fact Muigai J., and Odero J., had already dealt with the matters raised in that application. The directorship of the company is one of the issues that had been raised and one of the grounds of the preliminary objection I dismissed on 29th November 2019 was that Chacha Mabanga was neither shareholder or director of the plaintiff. In relation thereto, Odero J., in her ruling dated 14th November 2019, expressed the following view of the matter:

It is my considered view that at the present time there is need to preserve the present status quo for the time being. Serious allegations of fraud and perjury have been made and it has been alleged that Mr Charles Mabanga is not currently a director of the plaintiff company. These are all matters of evidence which will have to be interrogated and proved at the hearing of the suit. I find that the Defendant does not stand to suffer any real prejudice by an extension of the interim orders

11. It is for the aforesaid reason that I stated in my ruling dated 29th November 2019 that:

[30] In effect the learned judge was convinced that there was sufficient basis upon which the status quo ought to be preserved pending hearing of the suit. Since the matter was heard inter parties hence I do not consider it necessary to rehash what had been determined save to state that the parties have raised various factual issues which, as the learned judge observed, ought to be ventilated at the trial. These factual issues are underpinned by prayers such as those requiring the cross-examination of Chacha Mabanga on the verifying affidavit. By acceding to that application I would, in effect, be hearing the matter in full.

I thereafter concluded that:

[32] In view of the decisions by Muigai J., and Odero J., I think that the proper course is to have the matter heard in full in order to resolve all the issues between the parties. The appropriate order would be to maintain the status quo pending of the suit by affirming the interim order issued by Muigai J., on 26th July 2019.

12. In light of those findings and since it is not alleged the facts have changed since the orders were issued, the question of the shareholding and directorship of the plaintiff is still a live issue to be resolved at the trial. At this stage therefore, the case of **East African Safari Air Limited (Supra)** may not assist the court particularly where position is that there are only two shareholders. The proper course, as I and my colleagues have stated, is to hear the matter fully. I therefore decline to pray (3) of the motion.

The Undertaking

13. I now turn to the issue of the undertaking. In **Cheltenham and Gloucester BS v Ricketts and Others [1993] 4 All ER 276**, the court described an undertaking as to damages as, "the price which the person asking for an interlocutory injunction has to pay for its grant." Neill L.J., further held that, "the undertaking is not given to the party enjoined but to the court." In prayer (c) of my ruling of 29th November 2019, directed that, "The directors of the plaintiff shall execute and file an undertaking as to damages within 7 days of this order." That undertaking, under seal, was signed by the one director and secretary and was filed on 6th December 2019.

14. It is clear that the undertaking does not comply with the orders of the court as it is not executed by both persons who allege to be directors of the plaintiff. I doubt that the omission was deliberate to the extent of calling upon this court to exercise drastic powers by discharging the injunction. I have also taken into account the sentiments of the defendants that the Company may be unable to pay damages in the event the injunction is discharged should the suit fail. Since the directorship and the ability to bind the plaintiff is in dispute, it would be improper to saddle the Company with damages not of its own making. In the circumstances I not only direct the persons asserting to be

directors of the company to execute the undertaking on behalf of the plaintiff but also execute the undertaking on their own behalf within 7 days.

Pre-trial directions

15. The final issue is in regard to pre-trial directions which I issued on 29th November 2019 as follows:

[2] The Defendants to the Counterclaim to file and serve the defence within 14 days.

[3] Parties to agree on facts, issues and uncontested documents.

[4] Mention on 16.01.2020 for directions/further orders.

16. It is obvious that none of the parties have complied with those directions. I hasten to add that under the overriding objective advocates and parties have an obligation to assist the court in ensuring that justice is conducted in a fair, just and proportionate manner. **Section 1A(3)** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** provides as follows:

1A (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

17. The reasons for the failure by the counsel for the defendants to the counterclaim to file witness statements does not conform with the provisions of the **Civil Procedure Rules** (“the **Rules**”). The 2nd and 3rd defendants state that they are directors of the plaintiff in the matter which had been served with court process. To contend that they have not been served or that they cannot file a substantive defence in view of the nature of the matter and their respective positions is to engage in sophistry. **Order 7 rule 5** of the **Rules** provides for documents to accompany defence or counter-claim. It states as follows:

5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11. [Emphasis mine]

18. The duty of the defendant to the counterclaim is to file the defence with the witness statements which it has not done. The 2nd and 3rd defendant ought to have filed their witness statements with the defence to counterclaim.

19. Since the parties have not complied with my orders of 29th November 2019, I propose to give directions upon delivery of this ruling. I wish to emphasize, once again, what the judges who have handled this matter have stated; that the case should now proceed for hearing to enable the parties ventilate their grievances fully.

Disposition

20. I dismiss the Notice of Motion dated 15th January 2020 save that I direct the persons asserting to be directors of the plaintiff to execute the undertaking on behalf of the plaintiff and on their own behalf within 7 days from the date hereof.

21. Costs in the cause.

DATED and DELIVERED at NAIROBI this 20th day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

Mr Willis Otieno instructed by Otieno Ogola and Company Advocates for the plaintiffs.

Mr Waiyaki instructed by Wamae and Allen Advocates for the defendants.

Mr Osiemo instructed by Osiemo Wanyonyi and Company Advocates for the 2nd and 3rd defendants to the counterclaim.