



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 184 OF 2019

MOSES NGACHA GITHINJI.....1ST PLAINTIFF

GREY HOLDINGS LIMITED.....2ND PLAINTIFF

VS.

ARTHUR KIMANI MWANGI.....1ST DEFENDANT

RICHARD KAMOTHO.....2ND DEFENDANT

GAMECO LLP.....3RD DEFENDANT

RULING

1. Stripped to its core, the dispute set out in the Complaint dated 29th July 2019 and filed on 31st July 2019 is the ownership, control and management of the affairs of Grey Holdings Limited (the 2nd Plaintiff or Company).

2. It is the case of Moses Ngacha Githinji (the 1st Plaintiff) that his shares in the Company were illegally and fraudulently transferred by Arthur Kimani Mwangi (the 1st Defendant) to Richard Kamotho (the 2nd Defendant). Further that he has been wrongfully removed as a Director of the Company. The 1st Plaintiff complains that he has been excluded from the management of the Company and its affairs.

3. The Plaintiff seeks the following prayers:-

I. A mandatory injunction compelling the 1st Defendant to produce and deliver to the Plaintiff a true and accurate record of all the financial records of the Company from the year 2016 to the date of judgement.

II. A Declaration that the 1st Defendant has acted in breach of his statutory duty to promote the success of the Company and avoid conflict of interest to the detriment of the Company.

III. A Declaration that the removal of the Plaintiff as a Director is in conflict with the 1st Defendant's duty to promote the success of the Company and the Articles of Association of the Company.

IV. A mandatory injunction compelling the Registrar of Companies, the interested Party herein, to reinstate the 1st Plaintiff as a Director shareholder and remove the 2nd Defendant as a Director shareholder of the Company.

V. Costs of the suit.

VI. Interest on costs at court rate from the date of judgment until payment in full.

Any further relief that the Court deems fit to grant

4. Gameco LLP is also sued in these proceedings as a 3rd Defendant. One notices, however, that no prayers are sought against it and Gameco

has filed a Notice of Motion dated 22nd October 2019 seeking that the Plaintiffs' suit as against it be struck out with costs. Gameco contends that no reasonable cause of action is disclosed against it.

5. Arguing the Application, Counsel S. Amin for Gameco reiterates that no allegation is made against the 3rd Defendant nor is any prayer sought against it.

6. In response Counsel Nyanchoka for the Plaintiffs argues that there is a commercial agreement between the 2nd Defendant and the Gameco and the joinder of the Gameco is necessary for purposes of gaining access to its accounts for purposes of effectively rendering of accounts by the 2nd Defendant.

7. Whilst the Plaintiff does not impute any wrongdoing on the part of Gameco he avers:-

“Specifically, there was hesitancy in accurately reporting the financial gains obtained from the 3rd Defendant arising out of the income from the 2nd Plaintiff's Betting Control and Licensing Board (BCLB) license.”

8. If those allegations are accepted to be true, then the obligation of Gameco to the Company was payment of fees for use of its license. If the Plaintiffs' case in this respect is, as it seems to be, that the 1st and 2nd Defendants have failed to accurately account for the assets and income of the Company then it has sought a prayer compelling the 1st Defendant to produce and deliver to the Plaintiff a true and accurate record of all financial records of the Company from the year 2016 to the date of judgment (prayer (i)).

9. There is no allegation that Gameco has colluded or otherwise participated in the alleged misrepresentation or meandering of accurate accounts. This Court agrees with Gameco that no wrongdoing is alleged against it and it is little wonder that no orders have been sought against it.

10. It seems patently unfair to burden a party with the responsibility of defending a suit merely because it has a commercial contract with one of the Defendants whose validity or propriety is not questioned. The party asked to render accounts is the 1st Defendant and not Gameco. Any doubt as to the veracity of the accounts, if eventually rendered, can be checked and verified without involving Gameco as a substantive party to the suit.

11. Gameco should be relieved of the burden, expense and possible reputational risk associated with being joined as a Defendant. The Notice of Motion dated 22nd October 2019 is hereby allowed with costs .Gameco will also have costs of the struck out suit.

Dated, Signed and Delivered in Court at Eldoret this 29th Day of April 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT: