



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO. 13 OF 2018

GITAMAIYU TRADING COMPANY LTD.....PLAINTIFF/APPLICANT

VERSUS

ZEPHANIA MWANGI NYORO.....1ST DEFENDANT/RESPONDENT

JOHN NJOROGE MUGANA.....2ND DEFENDANT/RESPONDENT

AND

HIGH COURT CIVIL CASE NO. 16 OF 2018

ZEPHANIA MWANGI NYORO & 5 OTHERSPLAINTIFFS/APPLICANTS

GEOFFREY GACHURA MBUURI & 2 OTHERS.....DEFENDANTS/ RESPONDENTS

CONSOLIDATED R U L I N G

1. The individual parties in the two suits before me all claim to be directors of **Gitamaiyu Trading Company Ltd** (hereinafter the Company) and to be acting on its behalf. From the material placed before the court, it is common ground that the said individual parties are shareholders of the Company, primarily a land buying company. In or about 1977, the Company transacted with a third party in relation to the purchase by the Company, of two land parcels described in the pleadings as **LR.NO. 89/14** and **LR.NO.89/20**. It appears however that the said parcels were subsequently acquired by an entity known as **Mugumo Nyakinyua Kiambaa Ltd.(Mugumo Nyakinyua)** . A dispute having broken out between the Company and the said entity, the parties eventually ended up in the High Court but the suit by the Company was found to be time-barred. An appeal No.84 of 2013 was preferred and is still pending in the Court of Appeal.

2. During the pendency of the appeal, the Defendants in **HCCC 13 of 2018**, and also among the 1st to 5th Plaintiffs in **HCC 16 of 2018** along with others allied to them , decided to approach the National Land Commission (NLC) seeking a review of the grant issued in favour of **Mugumo Nyakinyua**. Some of the shareholders including the 1st Defendant in **HCCC 16 of 2018** , also the alleged chairman of the board of directors involved in **HCCC 13 of 2018** apparently opposed the move.

3. The NLC however conducted proceedings and rendered a determination on 18th April, 2018 to the effect that, the title held by **Mugumo Nyakinyua** had been irregularly acquired. The NLC further ordered that the two companies engage in some form of alternative dispute resolution mechanism with a view to arriving at an amicable solution. Dealings in the disputed titles were restricted pending that process. Subsequently, the Defendants in **HCCC 13 of 2018** disseminated notices through radio and newspaper advertisements calling for an annual general meeting (AGM) of the shareholders of the Company. Included in the agenda of the meeting for deliberation was the determination by NLC and election of the executive committee.

4. On 9th May,2018, the suit **No. 13 of 2018** was filed in the name of the Company, contemporaneously with a motion seeking an interlocutory injunction, primarily to stop the AGM. On 10th May, this court granted an *ex parte* injunction prohibiting the Defendants, **Zephania Mwangi Nyoro** and **John Njoroge Mugana** from calling the AGM scheduled for 12th May 2018.

5. The live prayer in the above motion seeks an interim injunction to restrain the Defendants from calling any meeting of the Company members, interfering with the running of the affairs of the Company, purporting to hold any office, filing, maintaining or commencing any legal action in the name of the Company and from disseminating any information purportedly on behalf of the Company, pending the hearing and determination of the suit.

6. **Geoffrey Gachura Mbuuri** (also the 1st Defendant in **HCCC 16 of 2018**) swore the affidavit in support of the motion. He describes himself as the Chairman of the Company's board of directors, having allegedly been elected by members in a meeting of the Company held on 14th May 2016. He set out the history of the dispute and asserted that the Defendants in **HCCC 13 of 2018** are not directors of the Company and therefore had no mandate to call the subject AGM or to run the affairs of the Company. He asserted that the said Defendants were meddling in the management of the Company affairs.

7. It seems that, suit **No. HCCC 16 of 2018** was prompted by the service of the *ex parte* orders upon the Defendants in **HCCC 13 of 2018**, namely, **John Njoroge Mugana, Zephania Mwangi Nyoro** (Defendants in **HCCC 13 of 2018**). On 22nd May 2018, these Defendants together with **Charity Wanjiru Gitau, Peter Kimani Njuguna, Haroun Muchai Kamau and Gitamaiyu Trading Company** filed the latter suit against **Geoffrey Gachura Mbuuri, the Registrar of Companies** and the **Attorney General**.

8. Contemporaneously, these Plaintiffs also filed a motion seeking to set aside the order of this court of 10th May 2018 and injunctive orders to restrain the 1st Defendant therein from interfering with the conduct of the business of the Company, or passing himself off as a director of the Company, or purporting to carry out any business on behalf of the Company. Prayers sought against the Registrar of Companies were essentially to restrain him from amending the particulars of directors of the Company.

9. **John Njoroge Mugana** swore the supporting affidavit which is in similar terms with the Replying affidavit filed simultaneously in opposition to the motion in suit **No. 13 of 2018**. The gist of the affidavits is that the 1st to 5th Plaintiffs in **HCCC 16 of 2018** were the *bonafide* directors of the Company (6th Plaintiff therein) and that following the decision of the NLC, had convened a meeting of members to deliberate on the next course of action. That they were subsequently served with an order restraining them from proceeding with the AGM scheduled for 12th May 2018.

10. He contended that contrary to the depositions of **Geoffrey Gachura Mbuuri**, no AGM was held on 14/5/2016 and the assertion that the said person and others were elected as new directors on that date was false; that the shareholders were not even notified of the alleged meeting; that the purported list of members in attendance of the alleged meeting was a fabrication; that he and other Plaintiffs in **HCCC 16 of 2018** were the true directors of the Company and that, the injunctive *ex parte* order, has had the effect of crippling the operations of the Company, to the detriment of members. When the motion in **HCCC 16 of 2018** was placed before me under certificate of urgency on 23rd May 2018, I directed that it be heard alongside the similar motion in **HCCC 13 of 2018**, having noted that both related to the same subject matter.

11. **Geoffrey Gachura Mbuuri** subsequently filed a further affidavit, exhibiting a letter from Registrar of Companies, disputing the authenticity of the copy of **CR 12** dated 29th March 2018 exhibited in the affidavits by the Defendants in **HCCC 13 of 2018**.

12. Parties agreed to canvass the two motions by way of written submissions. For the purposes of the said motions and this ruling, the court will refer to **HCCC No. 13 of 2018** as the first suit and **HCCC No. 16 of 2018** as the second suit. Moreover, in view of the common subject matter, the nature of the dispute and the Court's direction on 23rd May 2018, the Court will treat all affidavits and submissions by the respective parties, whether filed in the first or second suit, as filed in respect of both motions.

13. Submissions filed on behalf of the Company and on behalf of **Geoffrey Gachura Mbuuri**, in the first and second suits respectively reiterate the affidavit material and in particular the assertion that the Respondents in the first suit and 1st to 5th Plaintiffs in the second suit are not *bona fide* officials of the Company and have submitted false records; and therefore have no mandate to conduct any business on behalf of the Company and to convene any meeting of members.

14. On the other hand, it is submitted on behalf of the Company that **Geoffrey Gachura Mbuuri** was duly elected, with other directors of the Company at an AGM held on 14th May 2016. Thus, it was argued that a *prima facie* case has been made out in respect of the motion filed in the first suit, and moreover, that if the Respondents therein are not restrained, the company may suffer damage. Reliance was placed on the decision in **Giella v Cassman Brown and Company [1973] EA 358**.

15. The submissions on behalf of the Plaintiffs in the second suit, two of whom are Defendants in the first suit, are to the following effect. **Geoffrey Gachura Mbuuri** has not demonstrated that he is a director of the Company or that a board of *bonafide* directors of the Company authorized the filing of the first suit. Reiterating the contents of the Company **CR 12** tendered in the two causes, it was argued that this is *prima facie* evidence that the Plaintiffs in the second suit are the directors of the Company. It is pointed out that no legal change of particulars of directors had been effected pursuant to the disputed elections of 14th May 2016 asserted by **Geoffrey Gachura Mbuuri**; that the said person had not been duly authorized to file the first suit on behalf of the company, and obtained *ex parte* orders from this court through misrepresentation, regarding his *locus standi*.

16. It was further submitted that the stay order in the first suit do not augur well for the interest of the Company whereas there was no evidence of violation of the rights of the Applicant in the first suit. In the view of the Plaintiffs in the second suit, their rights have been threatened by the said order due to the paralysis of operations of the Company, in particular the efforts to recover the suit land pursuant to the decision of the NLC.

17. The court has considered the material canvassed by the parties in respect of the two motions. In order to justify the issuance of an interim injunction in their favour, the Applicants must bring their respective motions with the principles enunciated in **Giella's case**.

18. The decision of the Court of Appeal in **Nguruman Ltd v Jan Bonde Nielsen and 2 Others [2014] e KLR** is particularly illuminating as to the principles to be considered with respect to interlocutory injunctions. The Court described the role of the judge to be merely to consider whether the principles for the grant of the interlocutory injunction were met. The court further observed that:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella* case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

- a) establish his case only at a *prima facie* level
- b) demonstrate irreparable injury if a temporary injunction is not granted.
- c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”

19. The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. Such that, it is not enough that the Applicant establishes a *prima facie* case, he must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no *prima facie* case is established, the court need not consider irreparable injury or balance of convenience. The court emphasized that the standard of proof is to *prima facie* standard.

20. Regarding the meaning of “*prima facie case*” the Court stated:

“Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “*prima facie case*” in civil cases in the following words:

“In civil cases, a *prima facie case* is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie case* is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie case* lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie case* has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie case*. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie case* is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

21. A *prima facie case* is built upon evidence and the law. On the affidavit evidence on record, it is evident that the Company is fraught with wrangling between shareholders and that there are different factions asserting themselves as the rightful directors of the Company. The first suit on the face of it was brought by the faction led by **Geoffrey Gachura Mbuuri** who claim to have been elected in a disputed election held on 14th May 2016.

22. The second suit is brought by a group of directors (1st to 5th Plaintiffs) who claim to be the duly elected current directors of the Company. The former group rely on minutes of the alleged meeting (**annexure GG4**) to the Supporting affidavit, and a notice of an ordinary resolution (**annexure GG5** to supporting affidavit) to shore up their claims. As correctly pointed out by the Plaintiffs in the second suit, the said faction has not tendered official evidence of change of directors of the Company at the Office of the Registrar of Companies. Moreover, they could not tender evidence despite being challenged, of the notice issued to members prior to the alleged meeting of 14th May 2016. Further, the notice of ordinary resolution ‘GG5’ merely indicates that the company had resolved “**that the minimum number of Directors of the Company will be two and not more than fifteen.**”

23. For their part, the Plaintiffs in the second suit annexed to their affidavits two copies of **CR 12** dated 29th March 2018 and 14th January 2010 respectively (**annexure JNM 1**) to Replying affidavit in the first suit, as evidence that they were the *bonafide* directors of the Company. **Geoffrey Gachura Mbuuri** by his further affidavit attached a letter from the Registrar of companies (**JKK2**) discounting the genuineness of the **CR 12** copy dated 29th May 2018. However, it is evident from his annexure “**JKK1**” being the request to the Registrar of Companies, that both **CR 12** copy dated 29th March 2018 and 14th January 2010 had been forwarded to the said Registrar for verification. However the Registrar’s response **JKK2** is silent on the latter stating only that:

“We refer to your letter dated 25th May 2018.

Kindly note that the attached **CR 12 Gitamaiyu Trading Company Limited** dated 29th March 2018, is not genuine hence does not originate from this office.”

24. The said letter is curiously silent on the **CR 12** dated 14th January 2010. It also appears that there was no request made by **Geoffrey Gachura Mbuuri** to the registrar to supply the current details of the directors in office at the material date. This court cannot make a final finding at this stage as to the true directors in office in the material period as that must await the full trial of the cases. Nonetheless, considering the material proffered on both sides, the court is inclined to accept that *prima facie*, the list of directors of the Company is as stated in the **CR12** dated 4th January 2010. And that, notwithstanding any members' meeting that may have been held on 14th May 2016, it appears doubtful that the group of alleged directors allied to **Geoffrey Gachura Mbuuri** had at the material time assumed the office of directors and therefore, mandated to conduct any business or to take any action on behalf of the Company. This means that the interim orders granted in the first suit cannot be confirmed and the motion filed on 9th May 2018 is dismissed.

25. With regard to the motion in the second suit, it is not in dispute that the AGM called by the Plaintiffs and scheduled for 12th May 2018 was had the object of deliberating upon the decision of the NLC regarding the land dispute pitting the Company against **Mugumo Nyakinyua**. Although it seems that there was no unanimity among the company members regarding overtures to the NLC, on the face of it, deliberations on the determination by the NLC appear to be in the interest of the Company as all members would potentially have a chance to participate in the deliberations. And in light of the nature of the appeal pending in the Court of Appeal, the objections by **Geoffrey Gachura Mbuuri** to the AGM appear farcical.

26. Indeed, on the contrary, the Company might suffer irreparable damage if objections at the behest of those opposed to the NLC report were upheld at this stage. Secondly, the Company operations will be jeopardized by and chaos will ensue if the court allows a situation where persons who apparently lack *bona fides* as directors, continue to transact and hold themselves out as the directors of the Company. The balance of convenience appears to tilt in favor of the Plaintiffs in the second suit. In the circumstances, I am satisfied that it is met and just to grant prayers (d) and (f) in the motion filed on 22nd May 2018 in the second suit.

27. There being no evidence that the said motion was served on the 2nd and 3rd Defendants in the said suit, I decline to grant the orders sought against them. For the avoidance of doubt, the Plaintiffs in the second suit (and Defendants in the first suit) are at liberty to proceed, in compliance with the Company's articles of association to convene the intended company AGM that was the subject of the orders of this Court issued on 10th May 2018.

28. I also direct that **HCCC 13 of 2018** and **HCCC 16 of 2018** are hereby consolidated and the head file to be HCCC 16 of 2018. Parties are directed to comply with Order 11 of the Civil Procedure Rules so that the suits are perfected for purposes of expediting the hearing.

Costs will abide the outcome of the suits.

DELIVERED AND SIGNED AT KIAMBU THIS 30TH DAY OF MAY 2019

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C. MEOLI

JUDGE

In the presence of: _____

Zephania Mwangi – in person

John Njoroge Mugana – in person

Geoffrey Gachura – Absent

Court Assistant – Nancy/Kevin