



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E 229 OF 2019

KIHINGO VILLAGE (WARIDI GARDENS) MANAGEMENT

ONE LIMITED.....PLAINTIFF

VERSUS

WILLIAM EDWARD PIKE.....1ST DEFENDANT

NARESH MEHTA.....2ND DEFENDANT

GITAHU GETHENJI.....3RD DEFENDANT

SHEETAL KHANNA.....4TH DEFENDANT

KISHOR KUMAR VARSANI.....5TH DEFENDANT

MOHAN SINGH PANESAR.....6TH DEFENDANT

SAMUEL MWANGI WAMBU.....7TH DEFENDANT

VERSANI HARJI DHANJI.....8TH DEFENDANT

RULING

By a certificate of urgency application dated 26th July 2019 the Applicant raised the following issues for determination:-

- a. That the Defendants at an illegally convened special general meeting of Kihingo Village (Waridi Gardens) Management Company (hereinafter the company) passed an illegal resolution to transfer and do away with the shares held by the Applicant and to remove the Applicant's representatives from participating in the affairs and management of the Company. The said meeting was not called by the Company secretary as required under the MEMARTS of the Defendant Company and the law;**
- b. That the Defendants have since made attempts to effect the said changes arrived at in the illegally convened special General Meeting to remove the shares held by the Applicant by attempting to file the said changes with the Registrar of Companies;**
- c. That the Defendants have made attempts to remove and stop the representatives of the Applicant from participating in the meeting and affairs of the Company in direct violation of the rights and interests of the Applicant;**
- d. That it is important that the Court issue orders to preserve the substratum of the case and stop the Defendants in the interim from proceeding with their illegal acts of undermining the Applicant's participation in the administration and management of the Company;**
- e. That it is in the interest of justice that the present application be expeditiously heard to enable the preservation of the**

substratum of the case and avoid a situation where the Defendants unilaterally and illegally alter the Company's constitutive shareholding in a manner that would constitute an illegality.

On 26th July 2019, in respect to the Application this court as Duty Court granted the following orders;

- a. That mater be mentioned before the Trial Court of 31st July 2019 for directions;
- b. That the application be served to the Respondent;
- c. That the Respondent to file Replying Affidavit and serve;
- d. That prayer (3) interim orders granted pending directions from Trial court.

On 29th July 2019, this court granted further orders that;

- a. This was a matter this court dealt with as the Duty court on 26th July 2019 and allocated it to L. J. M. Odero. That the said court was sitting on 29th July 2019; in light of the urgency of the matter and the new developments the same was to be placed before the trial court that day for directions.

NOTICE OF PRELIMINARY OBJECTION

The Defendant filed on 1st August 2019 and raised a Preliminary Objection to the Plaintiffs' Notice of Motion application of 26th July 2019 and sought specifically with regard to this Court which granted the *ex parte* injunction and orders of 26th July 2019 the following:

1. That the exparte orders issued by this Court ought to be set aside in the wake of material non-disclosure of facts by the alleged grievant to wit:
 - a. Chacha Mabanga is guilty of perjury contrary to **Section 108 of the Penal Code** and should be cross examined forthwith for perjury;
 - b. The non-disclosure of current proceedings touching on the same subject matter in **ELC 1225 OF 2013 and COMM. PET No. 105 of 2018**;
 - c. There are exparte orders issued in **ELC 1225 OF 2013** on 10th July 2019 restraining James Ndungu Gethenji and Chacha Mabanga (the complainant herein) from holding out as directors of Kihingo Village (Waridi Gardens);
 - d. There are pending contempt proceedings against James Ndungu Gethenji and Chacha Mabanga for undermining and failing to comply with the decree issued in **ELC 1225 of 2013**;
 - e. The non-disclosure of a Ruling on the execution of the decree in **ELC 1225 of 2013** coming up on 26th September 2019.

ORAL SUBMISSIONS (P.O.)

APPLICANT'S SUBMISSION

Counsel for the Applicant/Respondent stated that the Court granted interim orders in terms of paragraph 3 of the Notice of Motion filed on 26th July 2019 which provides;

- a. A temporary injunction stopping the implementation of the purported resolutions of the Kihingo Village (Waridi Gardens) Management Company prepared by the Defendants arising from a purported Special general meeting held on the 13th at Capital Club, pending hearing and determination of the Application *inter partes*.

Counsel for the Applicant who filed the Notice of preliminary Objection stated as follows;

- a. Paragraph 8 of Supporting Affidavit of Mutahi Githenji to the Notice of Motion of 1st August 2019 that the Applicant in the Notice of Motion of 26th July 2019 failed to disclose in the pleadings filed that the issue of Class B shares had been addressed conclusively in the Arbitral award and in **ELC 1225 of 2013 Kifaru Investments Ltd & Others vs Kihingo Village (Waridi Gardens) Ltd** where L.J.Komingoi adopted the arbitral award on 6th February 2019.
- b. At Clause 5 of the decree at pg26-28 it provides;

“That Clause 5 of the memorandum of Association of the 2nd Defendant shall be rectified to remove the 2 classes of ordinary shares and be replaced with only 1class of shares”

In compliance with the decree a notice of special General Meeting was issued on 11th March 2019 by the members after some of the then directors, James Ndungu Gethenji and Chacha Mabanga refused to comply with the decree and the Arbitrator's order of 28th July 2016 for a meeting to be called of the members within 90 days of publication of the award.

A special general meeting of Kihingo Village (Waridi Gardens) Management One Limited was held on 13th April 2019 which was attended by 54 out of 55 members and the majority of the members resolved as per the outlined resolutions in the instant application.

It was disclosed that there are contempt proceedings **ELC 1225 of 2013 Kifaru Investments Ltd & Others vs Kihingo Village (Waridi Gardens) Ltd** whose Ruling is scheduled on 26th September 2019.

The jeopardy is that the Court order from the above stated matter will not be executed as this Court will hinder compliance of the said court orders by the existing interim orders.

The Applicant and Counsel for the Respondent in the Preliminary Objection failed to disclose **HCC 105 of 2018** in the Commercial and Tax Division. That there are orders restraining the Applicants in the instant application Notice of Motion filed on 26th July 2019 as shown in the decree of the Court in **ELC 1225 of 2013 of 9th July 2019** and were set aside on 1st August 2019 when the Notice of Preliminary Objection was filed.

The Arbitral Award of 28th July 2016 Pg 2-25 of the Respondent's application filed on 1st August 2019 and the Ruling by L.J.Komingoi of 6th February 2019 at Pg 59 -64 of the application were not disclosed to this Court during the application filed under certificate of urgency on 26th July 2019.

Counsel informed the Court that whereas it was not at this point that determination of the issues would be done; he was of the view that material non disclosure of material facts as raised hereinabove ought to have been disclosed by the Respondent in the 1st Place.

He relied on the case of;

Republic vs Principal Registrar of Government of Lands & 3 Others Exparte John Nguqi Gathumbi [2014]

Where the Applicant filed suit based on fraud and with forged documents; the Court held;

“With respect to the issue of non disclosure, the law is clear that where a party at exparte stage of an application fails to disclose relevant material to the Court and thus obtains an order from the Court by disguise or camouflage the Court will set aside the exparte orders so obtained.”

On the basis of the submissions, the Court should vacate the orders forthwith, give reasons later as the non disclosure caused by the Applicant's abuse of the court process.

RESPONDENT'S RESPONSE

The Respondent's Counsel submitted at length on the matter but of relevance at this stage is the following; he stated;

Mr Chacha Mabanga swore the supporting affidavit to the application of 26th July 2019 as Director of Kihingo Village (Waridi Gardens) Management One Limited.

There was no injunction from any Court issued to stop Mr Chacha Mabanga as Director of the Plaintiff Company; Kihingo Village (Waridi Gardens) Management One Limited as opposed to Kihingo Village (Waridi Gardens) Management Limited.

The Respondent's Replying Affidavit to Defendant's Notice of Preliminary Objection of 1st August 2019 filed on 14th August 2019 at Pg 8 is CR-12 of 6th August 2019 it shows Julius Chacha Mabanga and Fredrick Gitahi Gethenji and James Ndungu Gethenji as Directors of Kihingo Village (Waridi Gardens) Management One Limited.

Therefore; the 1st ground that the interim orders be set aside on the basis of perjury fails as Chacha Mabanga was/is Director of the Plaintiff as he swore the Supporting affidavit to the application of 26th July 2019. The CR-12 annexed at Pg 12 of the Replying Affidavit to the Defendant's Notice of Motion also shows that as at 23rd November 2018 the same persons named were Directors of the Plaintiff Company.

With regard to non disclosure of the existing cases, the Respondent relied on **Section 6 & 7 of Civil Procedure Act 2010** where suits of similar parties and same subject matter ought to be disclosed.

The Respondent, Counsel intimated that these cases were filed before the meeting of 13th April 2019 when the cause of action in this case arose.

In **ELC 1225 of 2013 & HCC 105 of 2018**, the Plaintiff in this matter is not a party and the causes of action are different from the cause of action in the instant matter.

The Respondent stated that any of the parties who attended the meeting of 13th April 2019 was at liberty to question how the votes were recorded if they felt aggrieved. Counsel said the contention is the interpretation of arbitral award that was recognized for enforcement by a decree of the Court.

Clause 5 of the Arbitral award is in issue, the Respondent claims nowhere did the award imply that any of the shares held shall be withdrawn instead the Arbitral award's interpretation is that each individual holding of shares shall remain but the shares shall be of I class. What all parties lost were class references but the shareholding remained. Once a Company is formed, the shares are issued by the Company and that is what gives life to the Company and the shares cannot be taken away without 'killing' the Company. The class of shares may change but share holding cannot change.

The Respondent's Counsel explained that the Notice of Motion filed on 26th July 2019 sought judicial discretion to grant interim orders pending the hearing of the substantive matter.

What prejudicial effect would the Applicant suffer if the interim orders are not granted or the ones in force are vacated?

For the Plaintiff in the application of 26th July 2019 if the interim orders are vacated the plaintiff's application will be rendered nugatory as nothing will be left for resolution. The properties will be transferred and by the time the application is heard and determined, the Plaintiff will have lost ground.

The Respondent's Counsel urged the Court that there is need to preserve the substratum of the case which is the challenge of the resolutions of the meeting held on 13th April 2019. The plaintiff will be greatly prejudiced as the status quo of the Company before 13th April 2019 will continue and new Directors will operate the Company without the Plaintiff.

The Applicant relied on the case of ;

St Patricks Hill School Ltd vs Bank of Africa Kenya Ltd [2018] eKLR, where the Applicant sought to set aside the orders of temporary injunction granted restraining the Defendant from issuing demand or statutory notices or in any way interfering with the Plaintiff's property. The Court considered the following;

“Interlocutory injunctions are concerned with;

- a) the maintenance of a position that will more easily enable justice to be done when the final order is made and**
- b) an interim regulation of the parties that is most just and convenient in all the circumstances.”**

Referring to the case of **Siskena 1977 3 All E.R.** the Court stated;

“A right to obtain an interlocutory injunction is not a cause of action; it cannot stand on its own. It is dependant on there being a pre-existing cause of action against the Defendant arising out of an invasion, actual or threatened by him of a legal or equitable right to the Plaintiff for the enforcement of which the Defendant is amenable to the jurisdiction of the Court. The right to obtain Interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending ascertainment by the Court of the rights of the parties and grant to the Plaintiff of the relief to which his cause of action entitles him which may or may not include a final injunction.”

APPLICANT'S REPLY

The Applicant's Counsel reiterated that the Applicant failed to disclose the cases in Court, the arbitral award, the decree and orders of other Courts.

That the proceedings in Court are not to determine whether Class B shares are removed or not but **95%** of shareholding passed resolutions and did not join the Plaintiff Company.

It would be an embarrassing situation that the interim orders continue to be in force and the Court orders by L.J Komingoi are issued on 26th September 2019 and there will be conflicting orders. The interim orders ought to be vacated forthwith.

DETERMINATION

The only issue before this Court is whether the interim orders issued on 26th July 2019 should be vacated or to remain in force.

Law

ORDER 40 CPR 2010 provides;

1. Cases in which temporary injunction may be granted

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

2. Injunction to restrain breach of contract or other injury

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

4. Notice of application [Order 40, rule 4.]

(1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction *would be defeated by the delay*, it may hear the application *ex parte*.

(2) An *ex parte* injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.

(3) In any case where the court grants an injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.

(4) All applications under this order shall be heard expeditiously and in any event within sixty days from the date of filing unless the court for good reason extends the time.

In the celebrated case of *GIELLA VS CASSMANN BROWN CO LTD [1973] EA 358* it was held that in order to grant the temporary injunction, the Court must be satisfied that;

a. The Applicant ad established a prima facie case with probability of success

b. The Applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and

c. If the Court was in doubt, the application would be determined on a balance of probabilities/convenience.

The Court has considered the oral submissions of Counsel and evidence from pleadings and states as follows;

a. This Court finds that the suits **ELC 1225 of 2013 & HCC 105 of 2018** though not expressly disclosed to this court, the Respondent claimed that the plaintiff herein was/is not party to those proceedings. Secondly, by the time the cause of action in instant matter arose from the meeting of 13th April 2019, these cases were already filed and proceedings had taken off. These facts were not controverted and this Court agrees that there was no material non disclosure.

b. The issue of arbitral award and decree of enforcement of the award was/is disclosed by the Minutes of Extra Ordinary General meeting held at Capital Club on 13th April 2019 attached to the Applicant's application of 26th July 2019. The 1st paragraph 1st page is reference to the arbitration award of 28th July 2016 and the Court issued a decree on 6th February 2019.

c. The issue of perjury by Mr Chacha Mabanga who swore supporting affidavit to the application of 26th July 2019 and was/is not a Director of the company and that no meeting was held to appoint him a Director; is buttressed by the CR-12 of 6th August 2019 and that 23rd November 2018 and they both confirm him as one of Directors of the Plaintiff Company.

d. The temporary injunction of 26th July 2019 was granted for 5 days upto 31st July 2019 when the Trial Court would give further directions,

e. The Court was inclined to grant the *ex parte* temporary injunction because from the Applicant's application I was satisfied *prima facie* of ownership and to *locus standi* of the Plaintiff Company by the Memorandum of Association and Articles of Association annexed to the application.

f. The impending dispute is detailed by the annexed Minutes of Extra Ordinary General Meeting held at Capital Club Imperial Court Westlands Nairobi on 13th April 2019 where 13 resolutions were passed which are the subject of dispute resolution in the instant matter. If implemented while being challenged, the Applicant would be locked out without fair hearing.

g. These resolutions if implemented before the hearing of the matter *inter partes* would be final, the plaintiff Company would be ousted from the management of parent Company and dispossessed of shares and/or properties. In effect if *status quo* was not maintained then there would be nothing left for hearing and determination.

h. At this stage and in this Court none of the contentious issues raised by parties as to the substance of the dispute can be heard and determined as that is within the purview of the Trial Court L. J. Odero.

i. The issue of legality of the process and outcome of the resolutions of the meeting of 13th April 2019 and the interpretation of Clause 5 of the arbitral award and subsequent decree comprise of the cause of action which can only be heard while the substratum of the case is maintained.

j. Therefore, this court will not venture into whether a *prima facie* case is established as that will involve considering matters reserved for hearing; but with regard to irreparable loss, the Applicants who are already ousted from the management and operations of the parent Company are suffering damage and/or loss. If resolutions that are challenged are implemented the suit/application will be rendered nugatory; there will be loss which cannot be compensated by damages. On a balance of convenience therefore, the balance tilts in favour of the Plaintiff/Applicants to preserve and maintain status quo by temporary injunction pending directions on hearing and determination of the application/suit in light of **Order 40 CPR 2010**.

DISPOSITION

1. Temporary injunction remains in force for 14 days and the matter be placed before Trial Court L.J.M Odero on 15th October 2019 for directions.

2. Each party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 27TH SEPTEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

COUNSEL FOR APPLICANT

COUNSEL FOR RESPONDENT

COURT ASSISTANT