



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 LIMITED.....PLAINTIFF

AND

WILLIAM EDWARD PIKE.....1ST DEFENDANT

NARESH MEHTA.....2ND DEFENDANT

GITAH I GETHENJI.....3RD DEFENDANT

SHEETAL KHANNA.....4TH DEFENDANT

KISHOR KUMAR VARSANI.....5TH DEFENDANT

MOHAN SINGH PANESAR.....6TH DEFENDANT

SAMUEL MWANGI WAMBU.....7TH DEFENDANT

VARSANI HARJI DHANJI.....8TH DEFENDANT

AND

COUNTERCLAIM

BETWEEN

WILLIAM EDWARD PIKE.....1ST PLAINTIFF

NARESH MEHTA.....2ND PLAINTIFF

GITAH I GETHENJI.....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

Introduction

1. The plaintiff is a limited liability company and the developer of what is known as Kihingo Village, a gated community. Its purpose is to maintain and secure the developer's interests, residual assets and property within the village and the area in which the company has responsibilities. It alleges that it is the majority shareholder of Kihingo Village (Waridi Gardens) Management Limited while the 1st to 8th defendant each hold a single share in the same company. The plaintiff's claim against the defendants is that they illegally convened a meeting at Capital Club on 13th April 2019 and made attempts to remove the shares held by the plaintiff and their representatives from the Board, administration and management of the Company. The plaintiff's case and the reliefs sought are in effect to restrain the implementation of the resolutions passed on 13th April 2019 and to annul the said resolutions.

2. Together with the plaint, the plaintiff filed a Notice of Motion dated 26th July 2019 supported by the affidavit of its director, Chacha Mabanga, and made, inter alia, under **Order 40 rule 8** of the *Civil Procedure Rules* seeking interim relief restraining the defendants from implementing the resolutions of the meeting of 13th April 2019. On the same day the application was placed before Muigai J., who certified the application as urgent and issued the following order:

[4] THAT in the interim this Honourable Court does issue an Order of 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 April 2019 at Capital Club, pending hearing and determination of this application inter-parties.

3. It is the aforesaid order issued by Muigai J., that precipitated a flurry of applications by the defendants. The subject of this ruling are two applications and a preliminary objection filed by the defendants. I shall refer to the parties as stated in the main claim for ease of reference.

The Preliminary Objection dated 1st August 2019

4. The defendants' preliminary objection is contained in the notice dated 1st August 2019. It seeks to strike out the plaintiffs' notice of motion dated 26th July 2019. The defendants aver that the claim is *res judicata* as the issue of shareholding in Kihingo Village (Waridi Gardens) Management Limited had been conclusively determined in an arbitral award dated 28th July 2016 which was adopted as a judgment of the court by a ruling dated 6th February 2019 in **Nairobi ELC No. 1225 of 2013 Kifaru Investments Ltd and Others v Kihingo Village (Waridi Gardens) Ltd and Another** and a resultant decree issued. The defendants' contention is that this suit goes against the resolutions passed by 95% of the shareholders who held the Special General Meeting on 13th April 2016 pursuant to orders made by the arbitrator.

5. The defendants further claim that the suit is incompetent as it does not fall within the boundaries of the exceptions to the rule in **Foss v Harbottle [1843] 67 ER 189** as the grievant is neither shareholder nor director of the plaintiff company as alleged and that the case is defective as it cannot override the statutory provisions of **Part XI** of the *Companies Act*.

6. The defendants further urge that the suit is incompetent and ought to be struck as the deponent of the verifying affidavit deliberately failed to disclose that there are pending matters namely; **Petition No. E105 of 2018, Gitahi Githinji and Others v James Ndungu Gethenji and Others** and **ELC No. 1225 of 2013, Kifaru Investments Ltd and Others v Kihingo Village (Waridi Gardens) Ltd and Another**. The defendants further contend that the suit was filed by an advocates who did not have authority to file suit on behalf of the Company.

7. Finally, the defendants submit that the ex-parte orders issued by the court on 26th July 2019 ought to be set aside on the grounds of non-disclosure of material facts and that the suit was presented in violation of the orders and decree issued in **ELC No. 1225 of 2013**.

The Notice of Motion dated 1st August 2019

8. The defendants notice of motion aforesaid is made under **Article 159** of the Constitution, **Rule 17** of the **High Court (Organisation and Administration) (General) Rules, 2016, section 108** of the **Penal Code, Section 56** of the **Advocates Act, Sections 1A, 1B, 3A** of the **Civil Procedure Act, Order 19 Rule 19, Rule 2, Order 40 Rules 7** and **Order 51 Rule 15** of the **Civil Procedure Rules**. It seeks the following orders:

[2] Pending the hearing of this application, the Order dated **26th July 2019** be stayed and/or set aside forthwith on account of serious material non-disclosure and all proceedings be stayed pending the hearing and determination of the application.

[3] Chacha Mabanga be summoned to appear before the judge for urgent cross-examination on the contents of his verifying affidavit deponed on **26th July 2019** and his supporting affidavit sworn on **26th July 2019** and show cause why he should not be punished for perjury.

[4] The **Plaint** dated **26th July 2019** and the **Notice of Motion** dated **26th July 2019** be struck out and the **Notice of Motion** dated **26th July 2019** be struck out with costs on an advocate client basis to be paid jointly and severally by the Plaintiff and the firm of Otieno Ogola and Company Advocates on full indemnity basis.

[5] The firm of Otieno Ogola and Company Advocates and in particular Willis Evans Otieno be found guilty of professional misconduct.

[6] The court be at liberty to make any other orders in the interests of justice.

[7] The costs of this application be paid by the plaintiff and the firm of Otieno Ogola and Company Advocates on full indemnity basis.

9. The application is supported by the affidavit of Gitahi Gethenji sworn on **1st August 2019** and is founded on similar grounds as the preliminary objection.

The Notice of Motion dated 16th October 2019

10. The Notice of Motion is made under **Article 159** of the Constitution, **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Order 40 Rules 7** and **Order 51 Rule 15** of the **Civil Procedure Rules** and it seeks the following orders:

[3] Pending the hearing and determination of this application, the Order dated **15th October 2019** be stayed and/or set aside.

[4] The OCPD of Gigiri Police Station or any other senior ranking officer do enforce injunctive orders issued herein by the court in the fact of any disobedience and arrest all agents of James Ndungu Gethenji and Julius Mabanga Chacha who have trespassed into the estate known as Kihingo Village situated on property LR No. 27754 grant IR 108885.

[5] Pending hearing of this application and further orders of the court, the court do issue injunctive orders restraining James Ndungu Gethenji and Julius Mabanga Chacha from directly or indirectly managing, calling meetings, issuing instructions or notices whether by themselves, servants or agents in any manner whatsoever, dealing or interfering with the business operation of the following companies:

a. Kihingo Village (Waridi Gardens) Management One Limited

b. Kihingo Village (Waridi Gardens) Limited

c. Kihingo Village (Waridi Gardens) Management Ltd

[6] The agents of James Ndungu Gethenji and Chacha Mabanga, namely Frankline Mutegei Kaburu and Derrick Koome Mbogori be restrained from interfering with the management company Kihingo Village (Waridi Gardens) Management Ltd in any manner whatsoever or carrying out any work whatsoever on behalf of Kihingo Village (Waridi Gardens) Management Limited pending the hearing and determination of the suit.

[7] Leave be granted to the 8 plaintiffs in the counterclaim to appear for all 54 out of 55 shareholders of Kihingo Village (Waridi Gardens) Management Ltd to the exclusion of James Ndungu Gethenji.

[8] Alternatively, proceedings in the counterclaim be continued by the 8 Plaintiffs in the counterclaim to appear for all 54 out of 55 shareholders of Kihingo Village (Waridi Gardens) Limited to the exclusion of James Ndungu Gethenji.

[9] The court be at liberty to make any other orders in the interest of justice.

11. The application is supported by the affidavit of Gitahi Gethenji sworn on **16th October 2016**. The defendants contend that a very grave injustice has been occasioned as the majority of 54 out of 55 shareholders have been condemned unheard as their unanimous shareholders' resolution of **13th April 2019** has been stayed at the instance of a person who is not a shareholder and without the authority of the plaintiff and further that their democratic rights have been frustrated by the grant of interim orders without considering the uncontroverted evidence presented by them being considered. The defendants also reiterate the grounds set out in the preliminary objection and the other notice of

motion.

Plaintiff's response

12. To oppose the preliminary objection, the plaintiff relied on the application of Chacha Mabango filed on 14th August 2019. The thrust of that affidavit was that the issue of *res judicata* could not arise as the cause of action arose out of a meeting held on 13th April 2019 at Capital Club in Nairobi. It further contended that the defendants' contention that the votes casts were not in accordance with the Articles of Association of the Company and that the matter was different from what was what was decided in **ELC No. 1225 of 2013, Kifaru Investments Ltd and Others v Kihingo Village (Waridi Gardens) Ltd and Another**.

13. The plaintiff also relies on the replying and further affidavit of Chacha Mabanga sworn on 1st August 2019 and 20th August 2019 respectively. The plaintiff's contention is that the issues raised in the application to set aside the orders of 26th July 2019 was determined by Muigai J., who dismissed the issues raised by the defendants in a ruling dated 27th September 2019. It adds that Odero J., considered the application to set aside the orders of 26th July 2019 and in a ruling dated 15th October 2019 reinstated and extended the orders. In light of the orders, the plaintiff submits that defendants' preliminary objection and applications have been determined. It urges that in effect, this court would be sitting on appeal from the decisions of judges of concurrent jurisdiction if it determined the defendants' preliminary objection and the applications.

Determination

14. As is clear from the facts and brief procedural history that I have outlined, the issue raised in the application is whether the interim orders made by Muigai J., should remain in force or be discharged. The other orders sought by the defendants are in my view ancillary to main orders seeking discharge of the injunction.

15. While I am tempted to make a finding on each of the issues raised, I have reviewed the record and I am constrained to agree with counsel for the plaintiff that in fact the issues raised by the defendants were dealt with Muigai J. After the interim orders of 26th July 2019 we made, the matter came up several times and on 11th September 2019 Muigai J., heard arguments on the preliminary objection dated 1st August 2019. At this stage, I would note that the defendants' arguments in support of the preliminary objection are the same arguments in support of the defendants' applications.

16. In the ruling dated 27th July 2019, Muigai J., considered whether the interim orders of 26th July 2019 should be vacated or remain in force and by a ruling dated 27th September 2019, the learned judge held as follows;

[f] The impending dispute 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 and were in the process of implementation.

[g] These resolutions if implemented before the hearing of the matter inter parties 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 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.

[k] Therefore, this court will not venture into whether a prima facie case is established as that will involve considering matters reserved for hearing; with regard to irreparable loss, the Applicants who are already out of management and operations of the parent Company have demonstrated the challenge are suffering. 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.

17. 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.

18. The same view was expressed by Odero J., in her ruling dated 14th November 2019 as follows:

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 s 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

19. In view of the decisions by Muigai J., and Odero J., I think that the proper cause it 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.

20. For reasons I have set out above, I now make the following orders;

(a) I dismiss the preliminary objection dated 1st August 2019 and the defendants notices of motion dated 1st August 2019 and 16th October 2019 save for the prayers already granted.

(b) The plaintiff's Notice of Motion dated 26th July 2019 is allowed to the extent that an order of temporary injunction be and is hereby issued stopping the implementation of the resolutions of the Kihingo Village (Waridi Gardens) Management Company Limited prepared by the defendants arising from a special general meeting held on the 13th April 2019 at Capital Club, Nairobi.

(c) The orders in (b) shall remain in force for a period of 45 days unless otherwise extended by this court.

(d) The directors of the plaintiff shall execute and file an undertaking as to damages within 7 days of this orders.

(e) The costs of this application shall be in the main suit.

21. I now invite parties to take pre-trial directions.

DATED and DELIVERED at NAIROBI this 29th day of NOVEMBER 2019.

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.