



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL CASE NO. 8 OF 2016

JAMES WAWERU GACHIBIRI.....1ST PLAINTIFF/APPLICANT
NICANOR M. KING'ARA.....2ND PLAINTIFF/APPLICANT
LUCY W. KIARIE.....3RD PLAINTIFF/APPLICANT
DIANA WANJAGICHIAYA.....4TH PLAINTIFF/APPLICANT
ANDREW M. MATE.....5TH PLAINTIFF/APPLICANT
OBADIAH K. KIBURI.....6TH PLAINTIFF/APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KIRINYAGA.....1ST RESPONDENT
KIRINYAGA WATER & SANITATION COMPANY LIMITED..2ND RESPONDENT

RULING

The plaintiffs filed this suit against the defendants The County Government of Kirinyaga, Kirinyaga Water and Sanitation Company Limited. They also filed a Notice of Motion seeking orders that:

- a. **THAT** the application be certified urgent and service to the dispensed with in the first instance.
- b. **THAT** a temporary order of injunction do issue against the defendants by themselves, their agents, employees or any other person or persons authorized or instructed by them from proceeding or carrying out the elections of the 2nd Defendant Company on 9th December 2016 as contained in the notice issued and dated 17th November 2016 or the Public notification contained in the Nation Daily Newspaper on 14th November 2016 until the hearing of this application inter-parties.
- c. **THAT** the defendants by themselves their servants, agent employees or any other person or persons directed or authorized by themselves be stopped by an order of injunction from this Honourable court from conducting the elections of any board member at the Annual General Meeting of the 2nd Defendant Company on 9th December 2016 until the issues of whether its seven members or two members are to be elected.
- d. **THAT** an order of injunction to be issued to the defendants stopping them from usurping the powers and the role of board of directors of the 2nd Defendant Company.
- e. **THAT** this honourable court to be pleased to issue any other orders that if may deem fit and just for ends of justice.
- f. **THAT** costs of this application to be provided for.

The application was based on the following grounds:-

1. **THAT** the 1st, 2nd, 3rd, 4th, 5th and 6th plaintiffs are legally and validity elected directors of the 2nd Defendants Company.

2. **THAT** the management, running and the operations of the 2nd defendant company are informed, and guided by the provisions of the Companies Act number 7 of 2015 and the memorandum, and Articles of Association of the 2nd Defendants Company.

3. **THAT** the 2nd Defendants Company provides water in the County of Kirinyaga and it's Company Limited by guarantee.

4. **THAT** according to the Memorandum and Articles of Association of the 2nd Defendant Company the 6 directors are elected by the stakeholders with 1/3 retiring annually and eligible for re-election.

5. **THAT** the governing and decision making of the 2nd Defendant is entirely vested with the board of directors and implementable by the management which is headed by the Managing Director.

6. **THAT** the secretary cannot issue any directive or make any decision without the approval and authority of the board of director of the 2nd Defendant Company.

7. **THAT** on 17th November 2016 the company secretary to the 2nd Defendant at the instance, direction and authority of the County Executive Committee Member (CEC) in charge of water, Environment and Natural Resources Kirinyaga County issued a notice for an Annual General Meeting to replace the entire board of directors contrary to the memorandum and articles of association and further advertised in a Daily Nation newspaper of 14th November 2016.

8. **THAT** the action of the County Executive Committee Member (CEC) in charge of Water, Environment and Natural Resources is more politically guided than public interest and particularly with the intention of influencing the people of the county of Kirinyaga.

The application is also supported by the affidavit of James Waweru Gachibiriri.

Plaintiff's Case

They state that the 2nd defendant has 9 members of board of directors whereby 6 are elected by stakeholders (the plaintiffs herein), 3 are appointed by County Government of Kirinyaga and 1 appointed by Tana Water Service Board. That the elected directors are to serve with 1/3 retiring annually and eligible for re-election. In addition, the 1st defendant is represented in the board by Chief Executive Officer (CEO) in charge of Water, Environment & Natural Resources and County director of water.

During stakeholders meeting on 4/11/2016, the CEC expressed the desire of the 1st defendant to replace the entire board of director but the proceedings ended without the suggestion being discussed. That it is only the 3rd and 6th plaintiffs who were retiring and eligible for re-elections. Therefore the plaintiffs were surprised to see paid advertisement for 7 individuals to apply for membership of board of directors. In addition, they received a notice from 2nd defendant's company secretary dated 17/11/2016 convening annual general meeting whose item no. 7 was election of board of directors.

That the CEC is interfering with the management and running of the affairs of the 2nd defendant by purporting to dismiss the entire board members notwithstanding the laws applicable, the procedure and rules to be followed in replacing board of directors of the 2nd defendant's company.

The 1st respondent County Government of Kirinyaga opposed the application and filed a replying affidavit sworn by Alice Mwangi who is a member of the County Executive Committee in charge of Water, Environment and Natural Resources in the County Government of Kirinyaga. She avers that the applicants misrepresented and concealed material facts to obtain the injunction.

1st defendant's case

They responded by stating that the AGM on 09/12/2016 was scheduled at the instance of board of directors. The purposes of regularizing membership in the board of directors to bring it in line with the new Memorandum and Articles of Association since the current membership was based on the old Memorandum and Articles of Association. That the process of regularizing membership of the board of directors was not abrupt and had commenced long before the impugned meeting was scheduled and with the knowledge of the plaintiffs. They pray that the application be dismissed.

The 2nd respondent Kirinyaga Water and Sanitation Company Limited filed a reply to the application and an affidavit was sworn by Njoka Muturi

2nd Defendant's Case

In their response, they claim that the 1st defendant is not mandated by law or article of association to interfere with the 2nd defendant's elections or internal mechanisms and functions. That the 1st defendant being a member of the CEC purported to exercise veto powers and influence the contents of the 2nd defendant's advertisements through coercion of the company secretary.

The 1st defendant without authority illegally and forcibly pressured the 2nd defendant to advertise all the posts instead of 2 which was not according to the articles of association. That it was never resolved to remove the entire board of directors.

I have considered the application.

The counsel for the applicants in his submissions filed in court on 23.3.2017 stated that prayers 1 & 2 in the application have been spent and the 3rd prayer has been overtaken by events. He stated that they will concentrate on prayer No. 4. This prayer seeks an order of injunction restraining the 1st defendant from usurping the powers and the role of the board of directors of the 2nd defendant's company.

The issue which arises is the granting of a temporary injunction.

It is the plaintiff's contention that the 1st defendant is a stakeholder and being represented in the board of the 2nd respondent company and therefore does not have any authority to interfere with its management.

That by purporting to dissolve the water board, annexure JWG 3 the 1st respondent acted ultra –vires as it does not have authority or mandate to dissolve the board of directors 1st respondent and to terminate the services of the directors duly appointed by other stake holders pursuant to water Act and Articles of Association of the Respondents Company. It is deponed by the managing director that the 1st defendant is not mandated by any law or Articles of Association to interfere with 2nd defendant's elections or internal mechanisms and functions.

In the replying affidavit the 1st respondent has not cited any provision of the law of any Article in the Articles of Association that mandates it to interfere with the internal affairs of the 2nd defendant. The 1st respondent is stating that the current membership of the 2nd respondent is flawed.

The 2nd defendant is a company limited by guarantee. It is an independent organization with proper structures of governance and management.

It should be left to run its affairs as established by the law.

The 1st defendant has no mandate to interfere with the affairs of the 2nd respondent.

An independent entity which has structures of governance and management should be left to conduct its affairs free from any interference and intimidation in the affairs by the 1st defendant.

The 2nd respondent has its articles of association. There are the instruments which guides the internal affairs of the 2nd respondent including the structures of governance and management as provided under the companies Act.

In the case of *Okuya Omtatah Okoiti & 3 Others – V – Nairobi City County and 5 Others (2014) eKLR*

The Court held;

The Articles of Association of a company constitute the constitution of any company and play a vital role in defining and distributing powers and functions, and regulate the functioning of the company. It may thus be argued that the articles of association of the 5th respondent prevail over the provisions of the Water Act in relation to the appointment of directors of the 5th respondent.

The 1st defendant is contending that the Annual General Meeting conducted on 9.12.16 was at the instance of the board. Annexure J.W.G 3 shows that it is the 1st defendant who dissolved the board.

As held in the above decision and as I have stated above, it is the Articles of Association of the 2nd defendant which should apply in appointment and removal of directors. It was a violation of the Articles for the 1st defendant to purport to dissolve the board.

The applicants are seeking an order to restrain the 1st respondent. The principles on which the court will grant an injunction are well settled.

The Court of Appeal in the case of *Nguruman Limited – V Jan Bonde Nielson & 2 others (2014) eKLR* restated the principles and the mode of application as follows:-

The Court held;

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, and,**
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.**

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent.

The applicant annexed a notice JWG 6 showing that the shortlisting of the names was by advertisement in the Daily Nation of 14.11.16 calling for qualified nominees wishing to be considered as the seven (7) directors nominated from the stakeholders organization institution in accordance with stakeholder participation procedure of the company. The Company had issued a notice of Annual General meeting dated 17.11.2016. The agenda no. 7 was to elect the seven directors in order to align the board composition with the amended Article 32 (iii) of the Memorandum and Articles of Association.

The 2nd defendants through its managing director claims that the company did not sanction the notice and advertisement calling for nominees for all board of directors posts.

He has also deponed that the 2nd defendant's company secretary was coerced to advertise for all the seven posts instead of the two posts by the

1st defendant notwithstanding the fact that there is law applicable and the rules and procedures to be followed in replacing the board of directors. Article 50 of the Articles of Association was not followed in view of the averment by 2nd respondent that they did not sanction the notice and advertisement.

The applicants have made out a prima facie case. In the case of **Giella – V – Cassman Brown (1973) E.A 358** it was held:-

“The conditions for the grant of an interlocutory injunction are now, I think, wesettled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will be granted where the applicant court will suffer irreparable damages and injury.....which cannot be adequately compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on a balance of convenience”.

This was further adopted and appended by the Court of Appeal in the case of **Mrao Limited – V – First American bank of Kenya Ltd. & 2 Others(2003) eKLR**

Where it was stated that ***“A prima facie case in a civil application is not certified to a “genuine and arguable case”.***

It is case which on the material presented to the court, tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter”

The principles were further settled in the case of Ngurumani (supra).

The applicants have shown that the 1st defendant through its County Executive Committee member and County Director of Water interfered with the management and running of the affairs of the second defendant. They have a prima facie case with chances of success.

Conclusion:

I allow prayer (d) of the application and order that the 1st defendant be restrained by way of injunction from usurping the powers and role of the board of directors of the 2nd defendant company pending the hearing and determination of this suit.

Costs to the applicant.

Dated and delivered at Kerugoya this 30th day of April, 2018

L.W. GITARI

JUDGE

The Ruling has been read out in open court,

Mr. Magee holding brief for Mr. Gitonga for Applicant.

Respondent – Absent, though duly notified of the date.

C/A – Naomi .

On this 30/4/2018.

L.W. GITARI

JUDGE