



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**PETITION NO.E105 OF 2018**

**IN THE MATTER OF KHINGO VILLAGE (WARIDI GARDENS) MANAGEMENT LIMITED**

**AND**

**IN THE MATTER OF THE COMPANIES ACT, NO. 17 OF 2015, PART XXIX PROTECTION OF MEMBERS AGAINST OPPRESSIVE AND PREJUDICIAL CONDUCT**

**AND**

**IN THE MATTER OF THE COMPANIES ACT, NO. 17 OF 2015, SECTIONS 780, 782, 783 AND 784**

**BETWEEN**

**GITAHI GETHENJI.....1<sup>ST</sup> PETITIONER**

**AMME CHALSHAZAR.....2<sup>ND</sup> PETITIONER**

**SHEETAL KHAMNA.....3<sup>RD</sup> PETITIONER**

**NARESH MEHTA.....4<sup>TH</sup> PETITIONER**

**VERSUS**

**JAMES NDUNGU GETHENJI.....1<sup>ST</sup> RESPONDENT**

**ERIC GOVANI.....2<sup>ND</sup> RESPONDENT**

**CHACHA MABANGA KHINGO VILLAGE (WARIDI GARDENS).....3<sup>RD</sup> RESPONDENT**

**MANAGEMENT LIMITED.....NOMINAL RESPONDENT**

**RULING**

1. The petitioners through a Notice of Motion dated 3<sup>rd</sup> October 2018 pursuant to section 780 and 782 of the Companies Act, 2015, section 1A, 1B and 3A of the Civil Procedure Act and order 1 Rule 8, order 40 Rules 2,4 and 8 of Civil Procedure Rules seek the following orders:-

1. The application herein be certified as urgent, heard exparte in the first instance and set down for inter partes hearing on priority basis.

2. Pending the hearing and determination of this application, an interlocutory injunction be issued restraining the Respondents, their servants, agents, employees or other parties through whom they may act from in any way interfering with, the intended general meeting on the 27<sup>th</sup> October 2018.

3. Pending the general meeting of 27<sup>th</sup> October 2018 and appointment of new directors, the Nominal Respondent's account with Nic Bank Limited Account Number 1000158287 be and is hereby frozen.

4. An order be and is hereby issued compelling the 1<sup>st</sup> to 3<sup>rd</sup> Respondents to produce the minutes of the meeting and resolutions appointing Messrs Wambua Musyoka & Katiku Advocates to act for the Nominal Respondent in ELC 1225 of 2013 Kifaru Investments Limited and 6 others Vs. Kihingo Village (Waridi Gardens) Limited and Kihingo Village (Waridi Gardens) Management Limited and all instructions issued to said advocates pursuant thereto.

5. Pending the hearing and determination of the Petition herein, an interlocutory injunction be issued restraining the Respondents, their servants, agents, employees or other parties through whom they may act from in any way interfering with, the intended general meeting on the 27<sup>th</sup> October 2018.

6. Costs of this application and interest thereon.

7. Any other orders that this Honourable Court may deem fit in the interests of justice.

2. The application is premised on several grounds on the face of the application and particulars of oppressive and prejudicial conduct set out on the face of the application. It is further supported by affidavit of Gitahi Githenji & 3 other deponents in the petition and on the grounds of oppressive and prejudicial conduct set out in the affidavit sworn on 3<sup>rd</sup> October 2018.

3. The application is opposed by the Respondents through grounds of opposition by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed on 16<sup>th</sup> October 2018 and by Replying affidavit dated 18<sup>th</sup> October 2018.

4. On 17<sup>th</sup> October the court upon hearing both sides granted prayers Nos. 1, 2, 3 and 4 of the petitioners' application on interim basis. The only prayer that is pending for hearing is prayer No.5, seeking injunctive orders to restrain the Respondents, their servants, agents, employees or other parties through whom they may act from in anyway interfering with the intended meeting on the 27<sup>th</sup> October 2018.

5. Before hearing of the application the parties were directed to file and exchange submissions by or before 22<sup>nd</sup> October 2018 limited to 6 pages. Petitioners filed skeleton submissions on 22<sup>nd</sup> October 2018 whereas the Respondent filed their submissions dated 19<sup>th</sup> October 2018.

6. I have very carefully perused the pleadings; the written submissions by both counsel and considered the oral submissions advanced in support of parties rival positions and from the above the following issues have arisen:-

a. Whether the 1<sup>st</sup> – 3<sup>rd</sup> Respondents produced the minutes of the meeting and resolutions appointing Messrs Wambua Musyoka & Katiku Advocates to act for the Nominal Respondent in Elc No. 1225 of 2013 **Kifaru Investments Limited and 6 others Vs. Kihingo Village (Waridi Gardens Limited & another)** and all instructions issued to the said advocates pursuant thereto?

b. Whether the petitioners have met the threshold for granting of orders of injunction?

c. Whether these proceedings are sub-judice?

d. Whether these proceedings should be stayed pending arbitration between the parties and referral to arbitration?

e. Whether the court should discharge the interim orders issued?

f. Whether the Nominal Respondent's account with Nic Bank Limited account No. 1000158287 should be frozen?

**A. Whether the 1<sup>st</sup> – 3<sup>rd</sup> Respondents produced the minutes of the meeting and resolutions appointing Messrs Wambua Musyoka & Katiku Advocates to act for the Nominal Respondent in Elc No. 1225 of 2013 Kifaru Investments Limited and 6 others Vs. Kihingo Village (Waridi Gardens Limited & another) and all instructions issued to the said advocates pursuant thereto?**

7. When this matter came up for hearing on 17<sup>th</sup> October 2018, orders sought under prayer No.4 were granted. The petitioners through a letter of 17<sup>th</sup> October 2018 copied to the court called for compliance with the said order. The Respondent in compliance produced **JNG-8**, being a letter dated 3<sup>rd</sup> March 2016 appointing the firm of M/s Wambua Musyoka & Katiku Advocates to act for Nominal Respondent but did not produce the relevant Board minutes of the meeting and resolutions appointing M/s Wambua Musyoka & Katiku Advocates to act for the Nominal Respondent. This was in fact a partial compliance. The Respondents did not give explanation for failure to fully comply with the court's order. It is either they have refused to comply fully or there were no Board minutes of the meeting and resolutions to appoint such firm of Advocates.

8. There is undisputed assertion by the Respondents that the issue of their appointment is belated having not been raised in the relevant case **No. Hc Elc No. 1225 of 2013** and in which they have been appearing since 2016 for Nominal Respondent. That the Directors of the Nominal Respondent have always been aware of the respondents being the same firm and the firm has been receiving legal fees.

9. I have considered the issue of representation of the Nominal Respondent and I am satisfied that the issue ought to have been raised without undue delay and not before this court but before the Elc Court which is seized with **Elc No. 1225 of 2013** and not in this matter. I find the petitioners are by their very own conduct estopped from pursuing the issue before this court but can deal with the same before **Elc Court No. 1225 of 2013**. Secondly in prayer No. 3 except the petitioners seeking information by way of discovery there are no substantive orders sought under that prayer.

10. I shall however proceed to reflect on the relevant law as regard this issue. In the case of **East Africa Safari Air Limited Vs Anthony Ambaka Kegode [2011] eKLR** where an advocate has commenced proceedings without the requisite authority, the proceedings should be stayed and the issue referred to a general meeting for ratification.

**"If an individual shareholder, without authority to do so, initiate litigation in the name of the company, the normal practice upon a motion to strike out the company's name is for the court to adjourn, whilst ordering that a meeting of the shareholder's be held to see if the company supports the litigation. If it does not, the motion will succeed and the solicitor who commenced the proceedings without authority of the company will be personally liable for the defendant's costs."**

11. In **Grace Wanjiru Munyinyi & another Vs. Gedion Waweru Githunguri & 5 others [2011]** the court stated:

**"The law is very clear that a company has its own legal personality and is capable of regulating itself through its internal organs. Ordinarily, a wrong done to the company may be indicated by the company alone, and if the alleged wrong is confirmed by a simple majority in a general meeting then the courts would not interfere. We can therefore understand the reluctance of the learned Judge of the High Court to interfere with events which on the face of it were approved by the majority directors/shareholders in their meetings."**

12. In view of the above, I leave the issue of appointment of the firm in issue to represent the Nominal Respondent to be decided by the directors/shareholders in those meetings but not in contravention of any orders issued in ELC 1225 of 2013 if any.

#### **B. Whether the petitioners have met the threshold for orders of injunction?**

13. The principles for granting an order of injunction are well settled in the case of **Giella Vs Cassman Brown Co. Ltd [1973] EA 358**, where it was held for injunction to be granted the court has to be satisfied that; first the application has established a *prima facie* case with probability of success; secondly the Applicant stand to suffer irreparable loss which could not be compensated by an award of damages if injunction is not granted and lastly if the court is in doubt, the application would be determined on balance of convenience.

14. By a Requisition dated 4<sup>th</sup> September 2018, 72.7% of the ordinary shareholders of the Nominal Respondent demanded a General meeting to deliberate *inter-alia*:

- a. Removal of the 1<sup>st</sup> – 3<sup>rd</sup> Respondents as directors of the company and appointment of other directors in their place;
- b. Removal of the Company's Secretary, Scribes Services Limited and appointment of another in their place;
- c. Issuance of share certificates to all holder of duly paid up share certificates;
- d. Removal of Woodvale Associates as the Nominal Respondent's auditors and appointment of a replacement;
- e. Appointment of a firm other than Messrs Musyoka Wambua & Katiku Advocates to represent the firm in ELC 1225 of 2013; and
- f. Implementation of the Final Award dated 28<sup>th</sup> July 2016.

15. On 7<sup>th</sup> September 2018, the board of Nominal Respondent did not have quorum and proceed to make some resolutions which the petitioner term oppressive and prejudicial conduct. The Respondents are said to have defied the Requisition dated 4<sup>th</sup> September 2018 and failed to call general meeting and communicated that they will not do so because of the pending **ELC 1225 of 2013**. That by a Requisition dated 24<sup>th</sup> September 2018; the requisitioning shareholders of the Nominal Respondent have convened a general meeting for 27<sup>th</sup> September 2018. That the petitioners are apprehensive that the Respondents shall act to scuttle the general meeting scheduled for 27<sup>th</sup> October 2018; if this court does not issue orders as sought and that the intended meeting shall devolve into chaos and acrimony thereby preventing the reasoned and dignified deliberations of the pertinent issues therein to continuing detriment of the shareholders.

16. It is further averred that the affairs of the Nominal Respondent Company are being conducted in a manner prejudicial to the interest of the shareholders of the Nominal Respondent including the petitioners.

17. The application is brought pursuant to order 40 Rule 2, and 4 of Civil Procedure Rules. **Order 40 Rule 1, (a) and (b)** of Civil Procedure Rules provides:-

**"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 [Rev. 2012] Civil Procedure CAP.21 [Subsidiary] C17 - 165.**

**(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."**

18. The petitioners are seeking to have General meeting on 27<sup>th</sup> October 2018. The general meetings are of great importance for shareholders as it is from such a meetings that shareholders get assurance of accountability of directors as was noted in the case of **Agricultural Development Corporation of Kenya Vs Nathaniel K. Tum & another [2014]**, where the court stated as follows on the importance of general meetings of shareholders:

**"It bears repeating, that an Annual General Meeting serves two important purposes: in one sense as a mechanism for accountability to shareholders and the shaping of the business of the company; and in another sense as an act of compliance with the law. Accountability to the shareholders is best described by the activities which take place in an Annual General Meeting sheet; relevant information on the assets and operations of the company; directorship; share dividend and public share issue, if any, is to be undertaken. Compliance with the law is assessed on the company's adherence to the legal requirements set out in the Companies Act especially the making to return on its operations; the general meetings and resolution it has made during the year, tax returns, directorship of the company, shareholding and so on and so forth. If it does not do the things set out in law, the law has prescribed the penalty thereto."**

19. Section 143(1) (f) of the Companies Act provides as follows:-

**"1) A director of a company shall act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole, and in so doing the director shall have regard to—**

**a. ....**

**b. ....**

**c. ....**

**d. ....**

**(e) ....**

**(f) The need to act fairly as between the directors and the members of the company."**

It is therefore clear that the directors have to promote the success of the company and in doing so have to act fairly as the members of the company. The director must therefore be put to task and held accountable which can only be achieved in a general meeting.

20. Section 278 of the Companies Act is couched in mandatory terms and requires the directors of the company to convene a general meeting within 21 days of receiving a valid requisition under section 277 (1) (2) (5) of the Company Act.

21. Section 277 (1) (2) (5) of the Companies Act provides:-

**"(1) The members of a company may require the directors to convene a general meeting of the company.**

**(2) The directors are required to convene a general meeting as soon as practicable after the company has received requests to do so from— (a) members representing at least the required percentage of such of the paid-up capital of the company as carries the right of voting at general meetings of the company; or (b) in the case of a company not having a share capital, members who represent at least the required percentage of the total voting rights of all the members having a right to vote at general meetings.**

**(5) A request for the directors to convene a general meeting is only effective if it states the general nature of the business to be dealt with at the meeting. However, such a request may include the text of a resolution that is proposed to be put to the meeting.**

Section 278 (1) (2) of the Companies Act deals with directors, duty to convene general meeting regarding members.

**"(1) If requested to convene a general meeting of the company, the directors shall —**

**a. Do so within twenty-one days from the date on which request was made; and**

**b. Hold the meeting on a date not more than twenty eight days after the date of the notice convening the meeting.**

**(2) If such a request includes a resolution intended to be moved at the meeting, the directors shall include in the notice of the meeting a copy of the proposed resolution."**

23. The Respondents by a letter dated 18<sup>th</sup> September 2018 before the expiry of 21 days period, in response to requisition of general meeting indicated that they would not hold the requisitioned general meeting. The period given to the Respondents as from 4<sup>th</sup> September 2018 would have expired on 25<sup>th</sup> September 2018. Having communicated to the petitioners that they would not convene general meeting, I find

that there was no justification for the petitioners to wait any longer by virtue the Respondents response. The petitioners' notice of General meeting dated 26<sup>th</sup> September 2018 is in my view valid. **Section 279 of the Companies Act** gives power to members to convene general meeting. **Section 279 (1)** provides:-

**"(1) If, after having been required to convene a general meeting under section 277, the directors fail to do as required by section 278, the members who requested the meeting, or any of them representing more than one half of the total voting rights of all them, may convene a general meeting."**

24. Upon consideration of the petitioners affidavit and annexures thereto and relevant provisions of the law I am satisfied that the requisitioning shareholders have fully complied with the law as set out under **Sections 277, 278 and 279 of the Companies Act**.

25. In view of the above I am satisfied the petitioners have met the threshold for granting orders of injunction in this matter.

26. The Respondents urge that the petitioner do not deserve the equitable order of injunction as they have failed to disclose material facts to this honourable court namely, the fact that there is a pending application in High Court **Elc No. 1225 of 2013 Kifaru Investment Limited & 6 others Vs Kihingo Village (Waridi Gardens Limited and another** to enforce final award issued by Mr. John Ohaga, Arbitrator in an arbitration between other co-members of the Nominal Respondent and that the suit is fixed for mention on 30<sup>th</sup> October 2018 and further by failing to disclose that the Nominal Respondent has consistently held its Annual General meetings and a fact at a Board meeting attended by the Petitioners on 10<sup>th</sup> July 2018, a date for Annual General meeting for 14<sup>th</sup> September 2018 had also been set.

27. In the instant case, the issues raised has nothing to do with issues pending in **Elc No. 1225 of 2013** as the issues sought before this court are dealing with internal company dispute. It is trite that company issues are for sole determination by Commercial division and not Elc Court. I am of the view therefore that the petitioners disclosed relevant issues before this court and left the matters for Elc to be determined by the said court. I therefore do not find it proper for this court to comment or purport to deal with issues before Elc. Let parties ventilate the issues related to Elc No. 1225 of 2013 before the said court.

#### **C. Whether these proceedings are sub-judice?**

28. The Respondents urge that it has been disclosed that there is a pending **Elc No.1225 of 2013** fixed for mention on 30/10/2018 and orders issued by the Arbitrator has been set out in the petitioners paragraph 5 of the affidavit of Gitahi Gathenji. It is urged the issues pending in **Elc 1225 of 2013** in an application for enforcement of Arbitral Award filed by co-members of the Nominal Respondent as well as application to set aside the Arbitral award filed by the Nominal Respondent and another are pending. That the petition is an abuse of the court process as there is another case with similar fact in issue. I have perused the application before this court, which deals with internal affairs of the company. It has nothing to do with what is pending before Elc Court. Whatever is pending before Elc, is for that court and should be dealt with before the said court as issues before this court are pending issues of management of the Nominal Respondent, which is an issue preserved for Commercial Division; in which the petitioners and 1<sup>st</sup> Respondent are shareholders of the Nominal Respondent whereas the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are directors of Nominal Respondent.

#### **D. Whether these proceedings should be stayed pending arbitration between the parties and referral to arbitration?**

29. It is contended by the Respondents that the proceedings should be stayed. It is urged that clause 5 (ii) of the leases provides for dispute resolution mechanism through arbitration. That section 6(1) of the Arbitration Act, 1995 requires court to stay proceedings which are brought in any matter with an Arbitration agreement so long as the arbitration agreement is not null and void or incapable of being performed. The Respondent relies on the arbitral clause in the leases agreement which is not part of the clauses in Memorandum and Articles of Association. The matter before this court is over a dispute on the management of the company and not on issues of Arbitral Award pending in **Elc 1225 of 2013**. This court has nothing to do which arbitral award application pending in the **Elc No.1225** of 2013. The court is not seized with the matter neither is there pending application for arbitration before this court, and I find the best place for seeking stay is before the court seized with the matter.

#### **E. Whether the court should discharge the interim orders issued?**

30. The Respondent contend that the orders of 17<sup>th</sup> October 2018 be discharged as it has been demonstrated that the interim orders may have been issued through deliberate non-disclosure of material facts, thus of existing suit relating to the current suit. The petitioner objected to discharging of the interim orders on grounds that no formal application has been filed to enable them respond. I agree with petitioners by allowing the application without the Respondents having filed a formal application would be prejudicial to the petitioners who will have been denied an opportunity to file a response. The interim orders were not granted *ex-parte* but *inter-partes*. I therefore find no justification to interfere with the interim orders. They shall remain in force.

#### **F. Whether the Nominal Respondent's account with Nic Bank Limited account No. 1000158287 should be frozen?**

31. The Respondent content the petitioners have not shown evidence of misappropriation of the funds held in the name of Nominal Respondent by the Respondents and that the freezing of the account will hamper the operations of the Nominal Respondent, a manager of the Development christened "*Kihingo Village*" with 55 resident units, a club house and common areas to manage. That the services required to be performed by Nominal Respondent include but not limited to provisions of security, lighting and clearing, all which requirements to be made on regular basis. The petitioners rely on affidavit of Gitahi Gatenji under paragraph 12 (f) for causing a cheque dated 28<sup>th</sup> September 2018 for sum of Kshs.327,876 in settlement of employees' salaries, signed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to be rejected due to change in the bank signing mode. The assertion remains uncontroverted by the Respondents. I believe the action of changing the signing mode made without the knowledge of the petitioners was not in good faith. The petitioners have demonstrated good cause for freezing the account of the Nominal Respondent as of now. I find no good reasons for discharging the order freezing the Nominal Respondent Account with **Nic Bank**

**Limited Account No.1000158287.**

32. Having said so much I find the petitioners application is meritorious. I proceed to make the following orders:-

**a. Pending the hearing and determination of the Petition herein, an interlocutory injunction be and is HEREBY issued restraining the Respondents, their servants, agents, employees or other parties through whom they may act from in any way interfering with, the intended general meeting on the 27<sup>th</sup> October 2018.**

**b. Costs of the Application to the Petitioners.**

**Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of October, 2018.**

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**J .A. MAKAU**

**JUDGE**