



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANOUS CIVIL APPLICATION NO. 131 OF 2016

IN THE MATTER OF JOMAX CONSULTANTS LIMITED

IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015

**IN THE MATTER OF AN APPLICATION FOR PROTECTION OF MEMBERS AGAINST
OPPRESSIVE CONDUCT AND APPOINTMENT OF INSPECTORS AND AN
INVESTIGATION UNDER SECTIONS 780,786 AND 787 OF THE COMPANIES ACT NO. 17
OF 2015**

BETWEEN

FREDRICK NTHUMO MAINGI.....1ST APPLICANT

CHRISTINE NZILANI2ND APPLICANT

VERSUS

JONES MAKAU MUTISYA.....1ST RESPONDENT

NAOMI NTHENYA2ND RESPONDENT

JOMAX CONSULTANTS LIMITED3RD RESPONDENT

RULING

The First Application

This ruling is on two applications made by the Applicants and the 1st and 2nd Respondents herein respectively. The first application is by way of a Notice of Motion dated 26th April 2016 in which the Applicants sought the following orders:

1. THAT pending the hearing and determination of the application *inter parties*, the court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents from doing any of the following acts that is to say, further transferring any shares in the company, disposing off, alienating and/or selling any of the company's properties of whatever nature and more specifically the company's vehicles registration numbers KBP 621Z, KAW 966A and KAU 996U , plots numbers Mavoko Town Block 3/23656 and Mavoko Town Block 2/7047 and 7032, and survey instruments and assorted office furniture and equipment.
2. THAT pending the hearing and determination of the application *inter parties*, the Court be

pleased to issue an order restraining the 1st and 2nd Respondents from receiving payment in their names or through their agents or assigns from the County Government of Machakos in respect to Local Service Order Number - 0950392 or any other contract with the company.

3. THAT this Court be pleased to order an investigation into the affairs of Jomax Consultants Limited and to appoint two (2) competent inspectors to do the investigations and report to court within a period to be specified.

4. THAT the Court be further pleased to make any other orders that it will deem fit to grant including but not limited to ordering that the company be forthwith placed in liquidation and wound up.

5. THAT costs of the application be paid by the 1st and 2nd Respondents.

The application is supported by the supporting affidavit of the 1st Applicant sworn on 26th April 2016, and the grounds for the application are that the Applicants hold one half of the issued shares of the 3rd Respondent company (herein referred to as "the company"), and as such qualify within the law to request for an Inspection and Investigation into the affairs of the Company as well as that of the 1st and 2nd Respondents, who are Directors of the Company and who are conducting the affairs of the Company fraudulently. Further, that the Respondents are keen to transfer the Applicants' shares to themselves to completely take control of the company, and have excluded the Applicants in the management of the company and have failed to disclose to them relevant information related to the company. It is also alleged that the 1st and 2nd Respondents have failed and refused to govern the company through the board of directors, and have unilaterally started misappropriating the funds and income of the company and seizing, pilfering and disposing of the assets of the Company with no consideration and due regard to mandatory provisions of the Companies Act and the Memorandum and Articles of Association. Therefore, that the actions of the Respondents have had the effect of defrauding the company's creditors.

The Applicants averred that the shareholding of the company is as follows:

- a. 1st Applicant - 2000 shares
- b. 2nd Applicant - 500 shares
- c. 1st Respondent-2000 shares
- d. 2nd Respondent - 500 shares

The Applicants attached a copy of a certificate of incorporation of the 3rd Respondent given on 2nd February 2010, as well as a form CR 12 issued by the Registrar General of Companies dated 30th September 2015 on the shareholding of the company. They also stated that the Company's assets increased to include:-

- a. A fully equipped office at Garden Plaza, Mombasa Road with computers, copiers, scanners, printers, office chairs, tables and other amenities.
- b. A fully pledged set of surveying and cartography equipment.
- c. Two Plots on Mavoko Town Block 3 numbers 23655 and 23656.
- d. Two Plots on Mavoko Town Block 2 numbers 7032 and 7047.
- e. Motor Vehicle Registration Number KBP 621Z Toyota NE
- f. Motor Vehicle Registration Number KAU 996P Maruti Van

g. Motor Vehicle Registration Number KAW 966A Mitsubishi Pajero

The particulars of the fraudulent actions on the part of the Respondents that the Applicants allege are as follows. That sometimes in early 2014 the company bid and won a tender to provide consultancy services for water resource mapping for Machakos County Government for an all inclusive sum of Kshs. 18,946,106/=. However, that the 1st Respondent caused to be paid into his personal account Kshs. 4,452,240/= by Machakos County Government in respect of the said contract. The Applicants annexed the contract documents and a statement of the 1st Respondent's account at National Bank of Kenya, Harambee Avenue showing the payment.

Further, that the 1st Respondent unilaterally transferred the company's motor vehicle registration number KBP 621Z to himself ,and the Applicants annexed copy of records at the Registrar of motor vehicles to this effect. Lastly, that the 1st and 2nd Respondents hold all the cheque books and frustrate the Applicants in exercising their bank account mandates, and that they also open and operate bank accounts irregularly and take loans, overdrafts and credit facilities without sanction of the company's board of directors and shareholders.

It was contended that it is now critical for the Court to intervene to protect the 1st and 2nd Applicants as shareholders, as the intentions of the Respondents are clear being to defraud and which will have the net effect of causing immense losses to the Applicants as shareholders as well as to creditors of the company. These averments were reiterated in a further affidavit sworn by the 1st Applicant on 25th October 2016.

The application was replied to by a Replying Affidavit of the 1st Respondent sworn on 19th September 2016, in which affidavit the Applicants are equally accused of wrongdoing. It was averred that the initial directors and members of the company were the 1st and 2nd Respondents and not the Applicants, and that the core business and objective of the company was to provide surveying services as is contained in the Memorandum of Articles of Association. That in a bid to strengthen the company, it was resolved that the Applicants be admitted to the company as directors with both holding 50% of the company shares, and that the 1st Applicant was also admitted as a director. Both Respondents remained directors of the company.

According to the Respondents, part of the reason for the admission of the 1st Applicant as a director was that the company required an additional surveyor due to its growing client base, and at the time of the said admission, the 1st Applicant represented himself as a surveyor. Further, that as a company, either one of the directors could get into contracts on behalf of and for the benefit of the company, and one such contract entered into was dated 14.1.2013 between the company and Mavoko Land Development Company Limited for survey work and procurement of deed plans for Land Registration No. 18895/16 Mlolongo Ngwata Phase III at the cost of Kshs. 22,000/= per deed plan. The Respondents attached a copy of the curriculum vitae of the 1st Applicant and of the said contract.

In addition that on 28.8.2013, the company won a tender with the Government of Machakos County for the provision of consultancy on water mapping, a copy of which contract they also attached. The Respondents contend that it was agreed that the 1st Applicant shall proceed with the execution of the contract dated 14.01.2013 while the 1st Respondent shall execute the contract dated 28.08.2013.

However, that unknown to the Respondents, the Applicants changed the terms of the agreement dated 14.01.2013 by lowering the agreed amount and sub-contracted one Stephen O. Ambani to complete the contract by an agreement dated 8.5.2015 without knowledge and consent of Respondents, and that as a result, the Applicants caused the company to lose revenue amounting to millions of shillings contrary to the provisions of the Companies Act. The Respondents attached copies of the altered agreement dated 28.04.2014 and the sub-contract agreement dated 8.5.2015 respectively.

The Respondents averred that they also discovered that there were various other contracts that the applicants had executed by themselves without informing or involving the company yet done in the name of the company and using company materials and as such costing the company serious losses. They attached copies of the said contracts and payments made to the Applicants.

In addition, that the 1st Respondent came to learn that the Mavoko Land Development Company had made payments of over Kshs. 25 million to the Applicants alone, who had not declared the payments to the company. That upon further investigations, it was discovered that the monies were paid to the 1st Applicant and credited to a private account operated in the name of Maingi and Ndunda at Diamond Trust Bank, while other payments were made by cheques. He attached copies of pay in slips and acknowledgement as evidence. The Respondents also stated that the actions of the Applicants prompted them to enquire from the Institute of Surveyors of Kenya through a letter dated 18.1.2016 as to whether the 1st Applicant was indeed a surveyor, which Institute by a letter dated 20.1.2016 confirmed that the 1st Applicant was not a surveyor .Copies of the said letters were attached

The Respondents alleged that when they started making enquiries from the Applicants from as early as mid-2015, the Applicants offered no explanations whatsoever and started calling for the winding up of the company.

On the payment made to the 1st Respondent's account by Machakos County Government, the Respondents averred that the bank signatories to the company account were the 1st Applicant and the 1st Respondent respectively as introduced to the bank by letter dated 13.9.2010 which was attached. However, that since there were existing squabbles between the 2 signatories, it would have been impossible to obtain the signatures of both in order to access the funds for the payment of service providers, and as such the 1st Respondent was paid directly to his account held at National Bank a sum of Kshs. 4,452,240/= on 27.11.2015.

On the allegations of fraudulently transferring the company's motor vehicle to his name, the 1st Respondent contended that on 11.4.2013, the company made a resolution to borrow Kshs. 400,000/= from Equity Bank which loan was to be secured by the motor vehicle registration no. KBP 621Z. A copy of the company's resolution to this effect was attached. Further, that in order for the loan to be secured, the motor vehicle had to be registered in the name of the bank and the 1st Respondent pursuant to the resolution made on 11.4.2013. It was alleged that the company defaulted in repayment of the loan amount ,and the Applicants were not keen on securing the same, and the bank started the process of recovering the motor vehicle .The Respondents claim that they made effort and paid Kshs. 172,000/= by themselves, and Equity Bank thereafter transferred the log book to the name of the 1st Respondent. Documents to attest to the foregoing were attached by the Respondents. The Respondents denied defrauding the company of its vehicle, and stated that they have not been refunded the money spent in rescuing the car from auction, and hence they cannot transfer the logbook to the company.

According to the Respondents this suit was filed as a mechanism by the Applicants to avoid answering queries concerning their dealings with Mavoko Land Development Company Ltd, and that although the Respondents contend that this court process is flawed substantially and materially, they welcome the investigations which should consider the facts set out hereinabove, and other activities of the Applicants in moving the property and items of the company to the premises of Real Time Surveys Limited, which is incorporated with the 1st Applicant and one Margaret Ndunda as directors. The Respondents alleged that these are the same people who converted the funds of the company herein, and that Real Time Surveys Ltd is therefore incorporated with the main aim of defrauding and fleecing Jomax Consultants Ltd.

The Second Application

When the application by the Applicants came for hearing on 27th April 2016, Farah Amin J. gave *ex parte* orders that the parties were forbidden from taking any steps that will put the assets of the company out of the reach of the Court, and that a penal notice be attached to this order. The application by the 1st and 2nd Respondents by way of a Notice of Motion dated 5th October 2016 in part arises from the said *ex parte* orders.

The 1st and 2nd Respondents are seeking the following orders in the said application:

1. THAT this court's orders issued on 29th April 2016 be reviewed, varied and or discharged in

terms that the ends of justice would demand.

2. THAT an order of temporary injunction do issues restraining the Applicants herein from selling, transferring, alienating, disposing or otherwise moving the company properties and more particularly as contained in an inventory dated 31/5/2016 from the reach of the court pending the hearing and determination of this application.

3. THAT an order do issue directing the Applicants herein to return company properties and more particularly as contained in an inventory dated 31/5/2016 to the company premises located at Garden Plaza, 2nd floor Room No. H2 in Mlolongo with immediate effect pending the hearing and determination of the suit herein.

4. THAT an order of injunction do issue restraining the Applicants herein from taking away any company properties from the company premises located at Garden Plaza, 2nd floor Room no. H2 in Mlolongo pending the hearing and determination of the suit herein.

5. THAT this court do issue such other and or further orders as it may deem just and fit to give.

The grounds for the application are that shortly after bringing this suit and obtaining court orders, the Applicants went ahead and moved the company items as contained in the inventory dated 31/5/2016 from the company premises located at Garden Plaza, 2nd floor, room no. H2 leaving it locked and literally shutting down the company offices. The said inventory was attached to the Respondents' supporting affidavit. Further, that the Applicants relocated the items to the offices of Real Time Surveys Limited, a company incorporated with the 1st Applicant and one Margaret Ndunda as directors, which action was in blatant disregard of the court order issued on 29.4.2016.

The 1st Respondent stated that he made a report of the above matter to the police at Mlolongo CID offices concerning conversion of company properties and funds by the Applicants, which matter was assigned to one P.C Raphael Omaha Rhioba to investigate, who obtained search warrants in Mavoko Misc. Criminal Application No. 40 of 2016 on 18.5.2016, and visited the offices of Real Time Surveys Limited and removed there from the properties disclosed in the inventory dated 31/5/2016. Some of the items listed in the inventory included the official company seal of Jomax Consultants Limited, 79 title deeds belonging to the clients of Jomax Consultants Limited, survey equipment of the company, and a motor vehicle of the company among other company properties. Further, that the said properties were taken to Mlolongo Police Station for custody and that the matter is still under investigation to date.

However, that the Applicants subsequently moved the Mavoko Principal Magistrate's Court in Misc. Civil Application No. 20 of 2016, and managed to have the order issued to the police officer on 18.5.2016 set aside. Further, that through a ruling delivered on 16.8.2016, the said court ordered that the items recovered be returned to the place they were taken from. The High Court on 30.8.2017 while hearing an *ex parte* application for leave to apply for judicial review orders granted a stay of the decisions made in Mavoko PMCC Misc. Civil Application No. 20 of 2016, effectively meaning that the items would remain in police custody pending the hearing of the judicial review application.

The 1st and 2nd Respondents averred that this court on 22/9/2016 thereafter set aside that order of stay, which meant that the items would again have to be returned to the place that they were before they were confiscated by the police, and that the Court mistakenly did not know and/or did not realize that the place the items and properties would be returned to was not the registered office of Jomax Consultants Limited, but indeed the offices of Real Time Surveys Limited. Further, that by so doing, the properties of the company herein have been ordered to be given to the hands of the Applicants and a third party to the detriment of the company, and in violation of the provisions of the Companies Act. According to the 1st and 2nd Respondents, it would be prudent and in the interest of justice as between the parties herein if the properties of the company taken away by the Applicants were returned to the registered office of the company situated at Garden Plaza, 2nd Floor room H2, from where no one shall be liable to suffer loss.

The Applicants in a replying affidavit sworn by the 1st Applicant on 3rd November 2016 opposed the

Respondents' application, and averred that the said Respondents in complete and blatant disregard for the rule of law unilaterally compromised police officers by misguiding and misdirecting for a suspect benefit, and in favour of the C.I.D Mlolongo, when they moved to report the assets of the Company, since it is the Respondents herein who reported to the C.I.D offices to have the assets confiscated without any plausible or justifiable cause.

Further, that the Respondents' with ill intent, moved and locked the offices which they shared with the Applicants, thereby making it difficult to access documents and materials belonging to the clients and the company, notwithstanding the fact that both parties had equal right of access to the office. That said acts prompted the Applicants to seek an order from court to have the assets held by the police to be released for the purposes of running the normal company operations, and to add a second padlock in order to ensure that the company documents are safe for the time being pending the due legal process that is now in progress, which is within the landlord's knowledge.

The Applicants also averred that Real time Surveys is totally independent, extraneous, remote and far removed from the Company, and therefore the Respondents' assertions of a relationship, without any documentary proof is malicious, vexatious and intent to include an unknown entity into a serious subject of determination that is in abuse the courts process.

The Issues and Determination

The court directed the parties to file written submissions on the two applications. Onyango & Oyieke Advocates for the Applicants filed submissions dated 25th October 2016 on the first application. They did not file submissions on the second application. The 1st and 2nd Respondents' counsel, O.N. Makau & Mulei Advocates, filed submissions dated 2nd November 2016 on the first application, and submissions dated 16th November 2016 on the second application.

I have read and carefully considered the pleadings and submissions filed. There are two main issues for determination. The first is whether a basis has been established for the appointment of inspectors to investigate the 3rd Respondent company. The second is whether the Court can grant the additional orders sought as regards the company's assets and affairs.

On the first issue, the Applicants submitted that a member of a company be it a director or shareholder who complains that the affairs of the company are being conducted in a manner oppressive to the others, including himself, may make an application to the Court for an order under the relevant section. Further, that the Court is empowered to make such order as it thinks fit to bringing to an end the matters complained of it, if it is the opinion that the company's affairs are being conducted as alleged by the Applicants and to wind up the Company would unfairly prejudice the Applicants, but that the proved facts would have justified the company's winding up on just and equitable grounds. In addition that the Court is also empowered to make an order which regulates the conduct of the company's affairs in future. Reliance was in this respect placed on the decisions in **Re H.R. Harmer Ltd (1958) 3 All E.R 689** and **Scottish Wholesale Cooperative Society vs Meyer (1958) 2 All E.R 66**.

The 1st and 2nd Respondents on their part relied on sections 786 and 787 of the Companies Act, to urge the Court to find that the company has demonstrated through the various pleadings and affidavits that there is urgent need for an inspection of all aspects of its affairs, and not only of the Kshs. 4,452,240/= alleged to have been stolen by the 1st Respondent. They also submitted that the Applicants do deposit Kshs. 25 million in court being the amount of payments obtained through an account named "MAINOI AND NDUNDA" in respect of the terms of the contract between Mavoko Land Development Company and the company dated 14.01.2013.

I note that inspection of a company's affairs on application of a company's members is provided for under section 786 of the Companies Act as follows:

(1) The Court may appoint one or more competent inspectors to investigate the affairs of a

company and to report on those affairs in such manner as the Court directs—

(a) in the case of a company having a share capital — on the application either of—

(i) not fewer than two hundred members; or

(ii) members holding not less than one-tenth of the nominal value of the company's share capital; or

(b) in the case of a company not having a share capital—on the application of not less than one-fifth in number of the members of the company.

(2) The Court may decline to proceed with the application unless the applicants produce such evidence as the Court may require for the purpose of showing that the applicants have good reason for requiring the investigation.

(3) Before appointing an inspector, the Court may require the applicants to give security of an amount not exceeding five hundred thousand shillings as contribution towards meeting the costs of the investigation.”

Accusations and counter accusations have been made by both the Applicants and the 1st and 2nd Respondents as illustrated in the foregoing, who have each provided evidence of payments made and/or property alleged to have been taken by the other parties contrary to applicable law and regulations. In addition, it is not contested that the Applicants, being the parties who have specifically sought the appointment of the inspectors, hold 50% of the shareholding in the 3rd Respondent company. Lastly, both the Applicants and the 1st and 2nd Respondent are desirous of an investigation of the company. It is thus apparent that the 3rd Respondent company may not be properly or fairly run as a corporate separate and distinct from the directors and shareholders, and it would appear that the deteriorating affairs in the company started when it entered into contracts with Mavoko Land Development Company Limited and Machakos County Government in 2013. It is thus my finding for these reasons that both the prerequisites for the appointment of inspectors and evidence of good reason for such appointment has been met by the parties.

As regards the orders of injunction and winding up sought by the Applicants, it is notable that the jurisdiction given to this Court for with respect to liquidation of Companies is under section 424 of the Insolvency Act which provides as follows:

(1) A company may be liquidated by the Court if—

(a) the company has by special resolution resolved that the company be liquidated by the Court;

(b) being a public company that was registered as such on its original incorporation—

(i) the company has not been issued with a trading certificate under the Companies Act, 2015; and

(ii) more than twelve months has elapsed since it was so registered;

(c) the company does not commence its business within twelve months from its incorporation or suspends its business for a whole year;

(d) except in the case of a private company limited by shares or by guarantee, the number of members is reduced below two;

(e) the company is unable to pay its debts;

(f) at the time at which a moratorium for the company ends under section 645—a voluntary arrangement made under Part IX does not have effect in relation to the company; or

(g) the Court is of the opinion that it is just and equitable that the company should be liquidated.

(2) A company may also be liquidated by the Court on an application made by the Attorney General under section 425(6).

it is my view that it would only be fair that the company's affairs be inspected and a report be filed first, for the Court to be able to establish the actual state of affairs of the 3rd Respondent company, and the validity of the allegations made by the Applicants and 1st and 2nd Respondents. It is only at that stage that the Court will be in a position to make a finding as to whether any of the circumstances in the provisions of section 424 of the Insolvency Act apply to the 3rd Respondent company, and what other long term measures need to be taken as to the protection of the members and investors of the company

Lastly, on the injunctions sought by the Applicants and 1st and 2nd Respondents, it is my opinion that the this court has to issue some protective measures as to the assets of the company pending investigation and filing of the inspector's report to safeguard the interest of all members of the company. Sections 1003 and 1004 of the Companies Act gives wide powers to the Court in this regard as to the orders of injunction or that prohibit payment or transfer of money, financial products or other property that t can give. In particular, under section 1004(2) of the Act, the Court may upon application grant an injunction, on such terms as it considers just, restraining a person from engaging in the conduct that constitutes contravention of, or a failure to comply with, the Act and, if in the opinion of the Court it is desirable to do so, requiring the person to do any specified act or thing.

The threshold under the section is whether there has been conduct that constitutes contravention or failure of compliance with the Act, or attempting, aiding, abetting, procuring, inducing, or conspiring such contravention or non-compliance. From the evidence adduced by both the Applicants and 1st and 2nd Respondent grounds have been established, and a *prima facie* case made out, that there has been lack of adherence by the directors of the company to proper corporate governance, in terms of non-compliance with the requirements of the Companies Act as to the management of a company, and possible breaches by the directors of the fiduciary duties they owe the company.

The Applicants' Notice of Motion dated 26th April 2016 and 1st and 2nd Respondents' Notice of Motion dated 5th October 2016 are therefore accordingly allowed only to the extent of the following orders:

1. A competent inspector shall be appointed by the Court to investigate the affairs of the 3rd Respondent company, which investigation shall cover the company's and its director's trading, business and consultancy activities and payments made thereunder from the year 2013 to 2016, and the Inspector shall have the following powers in this regard:

- a. To identify and determine the company's and its directors assets and liabilities
- b. To have access to the company's and its directors' registered office and/or business premises.
- c. To have access to and examine all the officers, staff and agents of the company and of its directors.
- d. To have access to and examine all the returns, books, financial statements, audit reports and bank accounts and other relevant documents of the company and of its directors.
- e. To have access to and review all contractual and relevant documentation relating to the business of the company and of its directors.

2. The Applicants and the 1st and 2nd Respondent shall within 30 days of today's date file and present to the court an affidavit with the names of two qualified and independent financial audit practitioners together with the details of their qualifications and relevant experience, and the Court shall thereafter appoint one inspector from the names so presented .

3. The Applicants and the 1st and 2nd Respondent shall each deposit in Court the sum of Kshs 250,000/= (Kenya shillings Two Hundred and Fifty Thousand) as security for the costs of the inspector within 30 days of today's date, failing which the orders herein shall lapse, and any of the parties who will have complied shall be at liberty to seek further directions.

4. The Inspector shall within 90 days of the date of his or her appointment file and present a report to the court on the findings of the investigation.

5. Pending the investigation of the 3rd Respondent's affairs and/or until further orders, the Applicants and the 1st and 2nd Respondent are hereby restrained from selling, transferring, or in any manner disposing of any property, assets or equipment registered in the company's name or acquired by or through the company's monies and finances, and shall return any property so registered or acquired in their personal or agent's possession to the 3rd Respondent's registered office within 14 days.

6. Each party shall meet their respective costs of the Notices of Motion dated 26th April 2016 and 5th October 2016.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 28th day of April 2017.

P. NYAMWEYA

JUDGE