



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

MISC CAUSE No. 173 OF 2014

IN THE MATTER OF GATUNDU HOLDINGS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION BY MUNYAMBU NJUGUNA GACHAGO,
DOMINIC STEPHEN KARANJA AND KANYONGO KIMANI KAMAU FOR THE
APPOINTMENT OF ONE OR MORE COMPETENT INSPECTORS TO INVESTIGATE THE
AFFAIRS OF GATUNDU HOLDINGS LIMITED AND RELATED MATTERS**

AND

IN THE MATTER OF

MUNYAMBU NJUGUNA GACHANGO.....1ST APPLICANT

DOMINIC STEPHEN KARANJA.....2ND APPLICANT

KANYONGO KIMANI KAMAU.....3RD APPLICANT

VERSUS

GATUNDU HOLDINGS LIMITED.....1ST RESPONDENT

DANIEL KAMITA GICHUHI.....2ND RESPONDENT

MOSES NGANGA MUIHIA.....3RD RESPONDENT

MUTUA KIHU.....4TH RESPONDENT

PAUL KABUBI NJUGUNA.....5TH RESPONDENT

RULING

1. The Court is asked to determine Prayer 4 of the Notice of Motion dated 6th July 2016:-

4. THAT pending the appointment of an arbitrator as ordered by this Honourable Court on 8th April, 2016 and the hearing and determination of the consequent arbitral proceedings between the parties herein, the 2nd – 5th Respondent's be restrained from operating the 1st Respondent's bank accounts, executing any contract, selling, transferring, disposing off any of the 1st Respondent's land in Kitengela, Emali and Kayole.

2. This Application is made against the back drop of a Ruling herein dated 8th April, 2016 in which Kariuki J. ordered as follows:-

- Given that none of the Parties had made an Application Under Section 6(1) of the Arbitration Act, the Court will nonetheless exercise its Inherent Jurisdiction as donated Under Section 3A of the Civil Procedure Act, and further, as provided Under Section 1A and 1B of the aforementioned Act, to stay all proceedings in this matter, pending the referral of the matter to hearing and determination before an Arbitrator.

- The upshot is that the Application is stayed Under Section 6(1) of the Arbitration Act, pending the hearing and determination of the Arbitral proceedings, and the Parties hereby are directed to appoint an Arbitrator(s) within fourteen (14) days of this Ruling. Costs shall be in the course.

- There be liberty to apply.

The effect of that Ruling on the current Application is a matter which the Parties herein are not in agreement and to which I shall have to return to shortly.

3. The Application before Court is supported by the Affidavit of Munyambu Njuguna Gachango sworn on 6th July, 2016. In it he states that the Applicants, who are Shareholders of the 1st Respondent (the Company), commenced the proceedings herein seeking amongst other Prayers in-depth investigations to unearth malpractices and mismanagement of the Company by the 2nd -5th Respondents. Examples of that malpractice were given as failure of the said Respondents to hold a AGM or prepare Books of Account to Shareholders, sale of Company land, illegally called for the AGM that was to be held on 20th April, 2014 and failing to pay Corporation tax for over 20 years thereby exposing the Shareholders to legal sanctions.

4. This Court is asked to intervene to protect and preserve the 1st Respondent's assets and in particular land in Kitengela, Emali and Kayole that may be fraudulently transferred or sold to third parties to the detriment of the Applicant and the Shareholders.

5. The Application is opposed. Daniel Kamita Gichuhi (the 2nd Respondent) has filed a Replying Affidavit sworn on 15th July, 2016. In so far as the Application before Court is concerned, he deposes:-

5. "That the Company has always held annual General Meetings. The Company's books of account were availed to the Applicants and the Directors of the Company have been transparent to all shareholders with respect to the proceeds of land sold by the Company. The Shareholders of the Company are not exposed in any way to legal sanctions for corporation tax;

6. That it is vexing to note that out of the numerous land transactions which the 1st Respondent has concluded the Applicants cannot pin point a single transaction where the Directors of the 1st Respondent have not accounted for the proceeds of Company land sales. They have only made a blanket allegation that the Directors have failed to account to shareholders the sales of company land".

6. An issue that arose as a preliminary point was whether the Application before Court breaches the Order of Court of 8th April, 2016. Related to this is whether the Application is an abuse of Court process

as it mirrors Prayer 3 of the Notice of Motion of 17th April, 2014 (hereafter also called ***The April Application***).

7. So as to understand this Preliminary Objection by the Respondents it is necessary to set out the substantive Prayers of that Motion of 17th April, 2014. They are:-

2. THAT pending the hearing and determination of this Application this Honourable Court do and hereby restrain the 2nd – 5th Respondents or anybody whatsoever acting on behalf from convening and presiding over the purported Annual General Meeting (AGM) of Gatundu Holdings Limited scheduled for 20th April, 2014 at Amboseli National Park or any other subsequent dated.

3. THAT pending the hearing and determination of this Application, this Honourable Court do and hereby restrain the 2nd – 5th Respondents from acting on behalf of the 1st Respondent including operating the 1st Respondent bank accounts, executing any contract, selling, transferring, disposing of any of the 1st Respondent properties or dealing in any manner with the Company's properties particularly the land in Kitengela, Emali and Kayole.

4. THAT pending the hearing and determination of this Application, the 1st Respondents bank accounts be frozen particularly the account at Consolidated bank Koinange Street and any other bank accounts held in the name of the 1st Respondent.

5. THAT this Honourable Court do and hereby appoint one or more competent Inspectors to investigate the affairs of the Gatundu Holdings Limited and table a Report to his Honourable Court.

6. THAT pending the conclusion of the investigations by the Inspectors or further orders of this Honourable Court, the 2nd – 5th Respondents be and are hereby restrained from convening and presiding over any general meeting or any other meeting or operating the affairs of the Company of in any manner howsoever dealing with the properties of Gatundu Holdings Limited.

7. THAT the costs of the Inspectors appointed and proceedings herein be met by the 1st Respondent.

8. It is after hearing that Application that Judge Kariuki made the Orders set out earlier in paragraph 2 of this Decision.

9. Although the nature of the Orders sought in Prayer 3 of the April Application are similar to that of the current Application, the former was sought pending the hearing and determination of the Application of 8th April, 2016. The entire April Application was however stayed by the Order of Judge Kairuki. This Court agrees with Counsel for the Applicant that in so far as the Court stayed the hearing of that Application without making a determination of the Prayers therein, the Application was not determined on merit. But as the Applicant had sought Prayer 3 pending the hearing and determination of the Application, the Stay Order had the effect of rendering Prayer 3 otiose. For all practical purposes the prayer was spent. Looked at in this way the current application by the Plaintiffs is not an abuse of Court process.

10. Were the Applicants in breach of that Order by filing the current Application? I think not. The ultimate Order of the Judge granted liberty to either of the Parties to apply. This is of some significance. The Court in staying the proceedings referred the matters herein to Arbitration. What the Applicants seek are protective Orders pending the hearing and determination of the Arbitration. The Application does not conflict the Court's Orders for stay not only because Parties were granted liberty to apply but also because it is not inconsistent with the Referral Order for a Party to Arbitration proceedings to turn to Court for Interim Measures of Protection. This is what Section 7 of The Arbitration Act No.4 of 1995 provides:-

“(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application”.

The Preliminary Objection is without merit.

11. Whilst the Applicants have no difficulty surmounting the Preliminary Objection, it is doubtful that the Application can go much further. A chief complaint by the Applicants is to be found in paragraph 2 of the Supporting Affidavit of Munyambu Njuguna Gachango in which he states:-

“That the Applicants filed this suit to seek amongst others an in-depth investigation to unearth the malpractices and mismanagement of the 1st Respondent Company by the 2nd - 5th Respondent such as failing to hold an AGM or prepare books of accounts for over 20 years, failing to account to shareholders sale of company land, illegally calling for the AGM that was to be held on 20.4.2014 and purporting to illegally proceed with the same, failing to pay corporation tax for over 20 years thereby exposing the shareholders to legal sanctions e.t.c”.

12. A question that must arise is why it has taken such a long time for the Applicants’ to raise these issues. If the Applicants are to be believed, failure to call for AGMs, to prepare Books of Accounts or to pay Corporation Tax for over 20 years would mean that the Respondents have failed in these annual duties on at least 20 occasions. Why would the Applicants come to Court so late in the day if the malpractices were recurring from year to year? The Applicants have not explained this delay at all and will not get the assistance of a Court of Equity which loathes indolence.

13. As to the specific issue of Company assets, the 1st Applicant depones:-

“THAT this Honourable Court should intervene to protect and preserve the 1st Respondent’s assets and in particular land in Kitengela, Emali and Kayole that may be fraudulently transferred or sold to third parties to the detriment of the Applicants and other Shareholders”.

14. To this, the Respondents reply:-

“That it is vexing to note that out of the numerous land transactions which the 1st Respondent has concluded the Applicants cannot pin point a single transaction where the Directors of the 1st Respondent have not accounted for the proceeds of Company land sales. They have only made a blanket allegation that the Directors have failed to account to shareholders the sales of company land”.

Counsel for the Respondents also submitted that the Application is speculative.

15. The Respondents may be right. He who asserts must prove. There is no evidence before this Court that any past sales were *ultravires* the Law or the Memorandum and Articles of Association of the Company. There is no evidence of any past disposals of assets or that the disposals were fraudulent or in any other manner improper.

16. In addition to the unexplained lateness of setting up the complaints, the allegations in respect to the sale of Company assets are far too imprecise and notional for this Court to act upon.

17. The result, the Notice of Motion dated 21st April, 2016 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 22nd day of September ,2016.

F. TUIYOTT

JUDGE

PRESENT;

Njeri- Mucheru for Plaintiff

Njenga for Respondent

Alex - Court Clerk