



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. 586 OF 2015

TERESIAH KARANJA.....1ST PLAINTIFF
ELIZABETH WAITHIRA MUTHIORA2ND PLAINTIFF
PETER NGANGA MBURU (suing as the personal representative of
MARGARET NJOKI MBURU3RD PLAINTIFF
VERSUS
MUGUGA INVESTMENT COMPANY LTD.....1ST DEFENDANT
DAVID NJANE RUIYI 2ND DEFENDANT
ESROM NGUGI MIRINGA.....3RD DEFENDANT
NICHOLAS KABUCHO MURIMI.....4RD DEFENDANT
JOSEPH KARANJA MBUGUA.....5TH DEFENDANT
JOE GATHU KIMEMIA.....6TH DEFENDANT
PAUL KINUTHIA MBURU.....7TH DEFENDANT
FRANCIS KAGWE MBAYA.....8TH DEFENDANT
ERASTUS GATHAGE GATU9TH DEFENDANT
DAVID MUROKI KAGWE10TH DEFENDANT

RULING

1. Before this Court is the Notice of Motion of 19th January 2016 in which the Applicant seeks the following prayers:-

1. All other proceedings in this matter be stayed pending the hearing and determination on merits of

the instant application.

2. That the suit herein be struck out.

3. In the alternative to prayer (2) the suit herein be stayed pending the hearing and determination on merits of High Court case No.126 of 2015.

4. The costs of the application be borne by the Plaintiffs.

2. The suit that is sought to be struck out was filed on 24th November, 2015. Therein the 1st and 2nd Plaintiff describe themselves as shareholders of the 1st Defendant company while the 3rd Plaintiff is the Personal representative of the Estate of Margaret Njoki Mburu (Deceased). It is alleged that the Deceased was at all material times a shareholder of the 1st Defendant (the Company).

3. Briefly stated there is a dispute as to who are the lawful Directors of the Company. The dispute pits the 2nd and 3rd Defendants on the one hand against the 4th to the 10th Defendants on the other hand.

4. It is alleged by the Plaintiffs that the 2nd and 3rd Defendants convened a meeting after 4.30pm on 19th December 2014 in which the 2nd and 3rd Defendant were purportedly appointed as Directors of the 1st Defendant. The Resolutions passed in that meeting are sought to be declared unlawful.

5. A further grievance by the Plaintiffs is that the 4th to 10th Defendants purported to call for a meeting of the shareholders of the Company which was to be held on 7th December 2015. The Plaintiffs contend that they had not been formally notified of the meeting or its agenda. It reads bad faith, malice and breach of fiduciary duty on the part of the 4th to 10th Defendants.

6. In respect to the 2nd and 3rd Defendants there is a different complaint. That they had orally informed some shareholders of the company about a meeting of the Company that was to be held on 25th November 2015 to discuss, inter alia, the removal of the 4th to 10th Defendants as Directors.

7. Ultimately, the Plaintiffs seek judgement against the Defendants for the following Orders:-

a. An Order of Injunction restraining the defendants themselves, their agents, servants and/or employees from carrying out any works on Plaintiff property L.R 36/499/VII (Original No. no 36/47/6/VII) in Eastleigh and or demolishing the existing developments and or otherwise interfering with the 1st Plaintiff possession thereof.

b. A declaration that the lease granted to 8th defendant is voidable at the instance of the Plaintiffs.

c. An order for the Defendants to deliver up to the Plaintiffs all documents of title of 1st Plaintiff in their custody together with full account of all monies they had received and or expended within 14 days of making of the order.

d. A declaration that the 1st to 7th Defendants are personally liable for any loss the Plaintiffs may incur as result of the said Lease to the 8th Defendant.

8. In an Affidavit sworn herein by David NjaneRuiyi (the 2nd Defendant) on 19th January 2016 on behalf of himself and the 1st and 3rd Defendants he gives reasons in support of his Application.

9. First, he states that the Plaintiffs are not shareholders of the Company and that of the original 34 shareholders, the following are surviving:-

- i. Esrom Ngugi Miringa**
- ii. Henry Mungai Thongote**
- iii. Davis Njane Ruiyi**
- iv James Mung' ai Ng'anga**
- v Simon Karanja Kariuki**
- vi. Peter Gachege Ng'ang'a**
- vii John Muriu Kinuthia**

10. Due to advance age of shareholders they co-opted the 4th to 10th Defendants as Directors. On 19th December, 2014 the Shareholders removed the 4th – 10th Defendants as Directors but they refused to hand over office and the Company commenced Civil Suit No. 126 of 2015 (Muguga Investment Company Limited & 2 Others Vs. Nicholas Kabucho Murimi & 7 others) against them.

11. In an Interlocutory Decision made on 7th October 2015, the Court in Civil Suit No.126 of 2015 restrained the 4th – 10th Defendants from acting as Directors of the Company and the Court directed that the Company holds a Special General Meeting on 25th November 2015 to elect interim Directors of the Company to run the affairs of the Company pending the resolution of the court case.

12. The 1st – 3rd Defendants see the filing of the instant suit on 24th November 2015 as a way of frustrating the Meeting ordered by Court.

13. The 1st – 3rd Defendants also aver that the Plaintiff obtained an order to stop the Meeting scheduled for 25th November 2015 without disclosing the following:-

- a) There was pending proceedings over the same subject matter.**
- b) That the meeting scheduled for 25th November 2015 had been convened through a court order issued in HCC 126 of 2015.**
- c) That they were personally aware of the said suit, orders issued therein and had severally attended court. In fact when the orders were issued the 2nd and 3rd Plaintiffs were personally in court”.**

14. In an Affidavit sworn by Peter Mburu (the 3rd Plaintiff) on 7th April, 2016, the 1st and 2nd Plaintiffs maintain that they are Shareholders of the Company as is the Deceased. Exhibited in that Affidavit are copies of respective Share Certificate.

15. And although they do not deny knowledge of Milimani HCC No.126 of 2015, they maintain that they are not parties thereto and have brought this suit on their own right. They identify the following as main issues for determination in this suit:-

- a. The validity or otherwise of the resolutions passed at the meeting of 19th December, 2014 after the closure of the general meeting at 4.30pm of the same day.**
- b. Whether oral notifications issued by the directors of the 1st Defendant with regard to meetings are valid in light of the Articles of Association.**
- c. Whether the Directors of the 1st Defendant acted within the law in failing to notify the**

Plaintiffs of the intended General Meeting of the Company as required under the Articles of Association. The 4th Defendant has confirmed that they never issued us with notices and I refer the court to paragraph 13 of the Relying Affidavit sworn on 22nd January 2016 by the 4th Defendant”.

They see these issues as different from those in controversy in Hcc. No.126 of 2015.

16. The 4th – 10th Defendants speak together through the Affidavit of Nicholas Kabucho Murimi (the 4th Defendant) sworn on 23rd February 2016. The Deponent loses no time in stating that 2nd and 3rd Defendants are neither the Directors or authorized to speak on behalf of the Company. He then delves into matters in contention in Civil Suit No. 126 of 2015.

17. In respect to the Application before Court, the 4th to 10th Defendants take the position that it does not meet the legal test for striking out and is unmeritorious.

18. The 4th to 10th Defendant deny that they colluded or acted in concert with the Plaintiffs in bringing the present action and point out that the Meeting of 25th November 2015 would not have been held in any event because it had been stayed by the Court of Appeal in Civil Application No. Nairobi 276/2015 on 24th November, 2015.

19. Counsel for the Parties made oral arguments for and against the Application and these shall be considered as I now determine the matter at hand. The issues that arise from the Application and arguments are as follows:-

(i) Do the Plaintiffs have locus to bring this action?

(ii) Are the Plaintiffs guilty of material disclosure?

(iii) If so, should the exparte Orders obtained on 24th November 2015 be set aside and/or the entire suit be struck out or stayed pending the hearing and determination of HCC Case No.126 of 2015?

(iv) Should this suit be consolidated with HCC No.126 of 2015?

20. The Applicants doubted the locus of the Plaintiffs in bringing this action because, as alleged by the Applicants, the 1st and 2nd Plaintiffs and the Deceased were not Shareholders of the Company. However, in the Replying Affidavit, the Plaintiffs displayed Shares Certificates in prove that :-

(i) The 1st Plaintiff held 58 shares.

(ii) The 2nd Plaintiff held 58 shares.

(iii) The Deceased held 73 shares.

In addition a copy of the Grant of Letters of Administration to the Estate of the Estate made in favour of the 3rd Plaintiff in Nakuru Succession case No.184/2014 was shown to Court. These documents were not disputed by the Applicants. And in so far as the suit is an action of Shareholders raising grievances about the affairs of the Company, it cannot be faulted.

21. The Applicants accused the Plaintiffs of failing to make material disclosure to the Court at the Exparte Stage. The particulars of non-disclosure are set out in paragraph 14 of the Affidavit of David Njane Ruiyi as follows:-

“In procuring those Orders the Plaintiffs failed to disclose that:

d) There was pending proceedings over the same subject matter.

e) That the meeting scheduled for 25th November 2015 had been convened through a court order issued in HCC 126 of 2015.

f) That they were personally aware of the said suit, orders issued therein and had severally attended court. In fact when the orders were issued the 2nd and 3rd Plaintiffs was personally in court”.

22. The protagonists in HCC No.126 of 2015 are the 1st – 3rd Defendants herein as Plaintiffs and the 4th – 10th Defendants herein as Defendants. From the Pleadings, the dispute, in the matter is whether or not the 4th – 10th Defendants herein are still lawfully the Directors of the Company. On this the Court agrees with the submissions of the Applicants’ Counsel that there is a commonality of issues in the two Suits.

23. It is not also contested that vide a Ruling of 30th September, 2015 Gikonyo J. made the following orders:-

c. An order of Injunction restraining the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendant from representing themselves as directors and or agents of 1st Plaintiff, and or interfering with the smooth running and management of the 1st Plaintiff and its properties, pending the hearing and determination of this suit on merits.

d. However, order (c) above is suspended for 30 days to enable the shareholders of the company to constitute a special general meeting and appoint 5 directors to run the affairs of the Company during the period this suit is pending. For avoidance of doubt, the 1st to 7th Defendants shall convene a special meeting within 7 days of today which failing the shareholders shall constitute a special general meeting on 5th of November 2015 to appoint the 5 directors.

e. Upon the appointment of the directors in accordance with (d) above, I order the 1st to 7th Defendant shall deliver up to the directors so appointed all documents of title of 1st Plaintiff in their custody together with full account of all monies they had received and or expended within 14 days of appointment of directors in (d) above.

24. Further it is a fact that on 3rd November 2015, Judge Kariuki made the following orders:-

a) The defendants no 1 to 7 to convene a special meeting within 7 days from today for shareholders to appoint directors failure to do so the shareholders to constitute a special general meeting on 25th November 2015 to appoint the 5 directors.

b) Order (e) of Gikonyo J. on ruling of 30/9/2015 to be complied with thereafter as decreed thereof.

25. Emerging from the Pleadings and Orders made by the Honorable Judges is that at the heart of the dispute in HCC 126 of 2015 is the question of Directorship of the Company. Emerging as well is that an Order had been made requiring the 4th – 10th Defendant herein to convene a special meeting within 7 days of the Ruling of Justice Kariuki made on 3rd November 2015 to appoint Directors failing which the Shareholders were to constitute a Special General Meeting on 25th November, 2015.

26. The Applicants’ case is that the Plaintiffs were well aware of these and the entire scheme in bringing this suit was to defeat the Court convened meeting scheduled for 25th November 2015.

27. Were the Plaintiffs aware of the proceedings in HCC No.126 of 2015? What was the Plaintiffs’

reaction to allegations that,

'The matter was canvassed at length with knowledge of all the shareholders and their beneficiaries whose representatives used to attend court. The plaintiffs herein personally used to attend court and were aligned with the former directors throughout'.

There was an allegation that the Plaintiffs were personally aware of the said suit and Orders issued therein. In addition that the 2nd and 3rd Plaintiffs were in Court when the Orders were made. The 3rd Plaintiff replies as follows in paragraph 6 of his Affidavit,

'Paragraph 9 is based on conjective and allegations which are not supported by any evidence. I am aware that attending Court is not a bar to filing of any suit.

Clearly, the 3rd Plaintiff does not confront the allegations headon. He does not deny that he was aware of the nature of proceedings in HCC No. 126 of 2015 and the Orders made therein. And since he swears this Affidavit on his own behalf and that of his Co-Plaintiffs, I find that, on a balance of probabilities, the Plaintiffs were fully aware of the existence of HCC No. 126 of 2015 and the proceedings and Orders made therein.

28. The plaintiffs Notice of Motion dated 24th November 2015 sought the following orders:-

1. For reasons of the urgency disclosed, this application be certified urgent, service be dispensed with and be heard ex parte in the first instance.

2. Pending the hearing and determination of this application interpartes, an order of Injunction do issue to restrain the Defendants, their agents, servants and/or any other person acting under the instructions of the Defendants from convening the meetings to be held on 25th November, 2015, 7th December, 2015 or any other meeting to be convened by the Defendants pursuant to the oral notification by the 2nd and the 3rd Defendants.

3. Pending the hearing and determination of this suit, an order of injunction do issue to restrain the Defendants, their agents, servants and/or any other person acting under the instruction of the Defendants from convening the meetings to be held on 25th November, 2015, 7th December 2015 or any other meeting to be convened by the Defendants pursuant to the oral notification by the 2nd and the 3rd Defendants.

4. The costs of this application.

29. Evidently, one of the meetings that the Plaintiffs sought to stop was the Court convened meeting of 25th November 2015. And indeed Judge Ogola granted restraining Orders in respect of that meeting at the Exparte stage. Curious from that Application and the Affidavit in support is that it was completely silent about the existence of HCC No.126 of 2015 and Orders made therein. These would be material facts because the Plaintiffs were asking the Judge to stop a Meeting that had been convened by the Court in that matter. Even if the Plaintiffs doubted its materiality, unlikely as it is, they nevertheless had a duty to make a full and frank disclosure of issues that were closely connected to the Orders they were seeking. Once disclosed it was for the Judge, not the Applicant or his Counsel, to decide materially (See R vs.Kensington Income Tax Commissioners,Exparte Princess Edmond de Polignac[1917] IKB 486.

30. There was however an argument made by Mr. Mude for the Company and the 4th – 10th Respondents that his clients did not need the help of the Plaintiffs as the ruling of Judge Gikonyo in Hcc No.126 of 2015 was stayed by the Court of Appeal in Nrb Civil Application No. Nai 276 of 2015 and the meeting of 25th November 2015 would not have proceeded anyway. That may be so but it would not lost on anyone that the Court of Appeal Order was obtained on the very same day the Plaintiffs were before Judge Ogola. Had these parties decided to cast their nets on two different fronts with the luck that they were

successful on both? I would think that the failure of the Plaintiffs to disclose the existence of the Court Orders in HCC No. 126 of 2015 says something of their bonafides.

31. It is true as noted by Counsel for the Plaintiffs' that the Applicants have not sought the setting aside of the impugned Orders. But what would be the efficacy of setting aside when the Exparte Orders had already served their purpose? The meeting had been successfully stopped. What the Applicants have sought is the more drastic order of striking out of the entire suit or Stay as an alternative. Are they entitled to these Orders?

32. When Counsel for the Plaintiffs argued that the two matters could be consolidated for purposes of hearing and determination he was making an important concession. That the issues in the instant suit are substantially similar to those in HCC No. 126 of 2015. Counsel for the Applicants himself had indeed said as much in his arguments to Court. Counsel had submitted that the substantive issues here revolve around the Convening and Resolutions of the meeting of 11th December 2014 and that was the main issue in HCC No. 126 of 2015. That is confirmed by a comparison of Pleadings in the two matters.

33. Yet there is an issue in HCC NO.126 of 2015, which although stemming from the issue of control of company, is different from those arising here. It is alleged by the 2nd and 3rd Defendants here that 4th to 10th Defendants, in breach of their fiduciary duty as Directors of the Company, unlawfully granted a long term lease of the Company's Principle Asset to one Nuni General Trading Company which is sued as the 8th Defendant.

34. Ultimately the Orders sought in HCC No. 126 of 2015 are for:-

a. An order of injunction restraining the defendants themselves, their agents, servants and /or employees from carrying out any works on plaintiff property L.R 36/499/VII (Original no.36/47/6/VII) in Eastleigh and or demolishing the existing developments and or otherwise interfering with the 1st Plaintiff possession thereof.

b. A declaration that the lease granted to 8th defendant is voidable at the instance of the plaintiffs.

c. An order for the defendants to deliver up to the Plaintiffs all documents of title of 1st Plaintiff in their custody together with full account of all monies they had received and or expended within 14 days of making of the order.

d. A declaration that the 1st to 7th defendants are personally liable for any loss the plaintiffs may incur as result of the said Lease to the 8th Defendant.

e. An order to the 1st to 7th defendants to deliver an account of the 1st Plaintiff's assets;

f. Special and general damages;

g. Costs of the Suit.

35. A comparison of the issues in the two matters are made, so that the Court can decide on the appropriate Order to make against the Plaintiffs who, I have found, are guilty of failing to make a full and frank disclosure of material facts when they appeared before Judge Ogola for exparte Orders.

36. The Plaintiffs complaint in respect to the meetings to be held on 25th November, 2015 and that of 7th December 2015 were substantially resolved when they obtained the Exparte Orders stopping the meetings. But this Court has found that the Plaintiffs obtained those orders by stealing a match on the Applicants by failing to make material non-disclosure. This must be frowned upon and the Plaintiffs must be penalized for their conduct. For that reason this Court strikes out with costs the Plaintiffs' claim

in the main Suit against the Applicants in respect to the meeting of 25th November 2015.

37. It is accepted, I think, that as shareholders the Plaintiffs are entitled to question the manner in which the affairs of the company are conducted. It is within the Plaintiffs' rights to question the legality of the resolution passed in '*the purported meeting of 19th December, 2014 after the closure of the actual Annual General Meeting at 4.30pm*'. But as this is a central issue in HCC. No. 126 of 2015 it may have been more sensible for the Plaintiffs to await the outcome of those proceedings or to seek Joinder instead of mounting separate proceedings. Moreso so because there is evidence that the Plaintiffs have been following the progress of the proceedings.

38. But as things stand, the Plaintiffs here are not parties in HCC No. 126 of 2015 and may not have control of the Prosecution or Defence of those proceedings. For this reason and notwithstanding their misconduct at the exparte proceedings, they may have been justified in bringing up this issue on their own behalf and through separate proceedings. There may be no justification in curtailing the progress of this action by a Stay Order.

39. At to the prospects of consolidation of the two matters, this will have to wait another day when all parties in the two matters(including the 5th Defendant in HCC No. 126/2015) can give their views.

40. The outcome:-

(1) The Notice of Motion of 19th January 2016 partially succeeds as in 2 and 3 below.

(2) The Plaintiffs entire claim in respect to the Meeting of 25th November 2015 is hereby struck out with costs.

(3) The Applicants shall have costs of the Notice of Motion of 19th January 2016.

Dated, Signed and Delivered in Court at Nairobi this 13th day of October ,2016.

F. TUIYOTT

JUDGE

PRESENT;

Mude h/b for Plaintiffs

Mude for 4th – 10th Defendant

Njuguna for 1st Defendant

Alex - Court Clerk