REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

JUDICIAL REVIEW NO. 6 OF 2015

(Formerly Nakuru High Court J.R. No. 99 of 2009)

IN THE MATTER OF AN APPLICATION BY WAIRIMU NGIGI & OTHERS FOR

JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SUBDIVISION OF LAND ARISING FROM

THE DECREE ISSED IN NAIROBI HCCC NO. 2286 OF 1993

BETWEEN

WAIRIMU NGIGI & 30 OTHERS...APPLICANTS

-VERSUS-

DIRECTOR OF SURVEY OF KENYA...................................1ST RESPONDENT

DISTRICT LAND REGISTRAR...2ND RESPONDENT

COMMISSIONER OF LANDS...3RD RESPONDENT

AND

KIAMBU NYAKINYUA FARMERS CO. LTD.......................INTERESTED PARTY

R U L I N G

1. These proceedings were brought for the enforcement of a decree by **Ransley J** (as he then was) in **Nairobi HCCC No. 2286 of 1993** wherein certain orders in favour of the Applicants were made as against **Kiambu Nyakinyua Farmers Company Limited** (the Interested Party). The dispute therein concerned membership and allocation of shares (land parcels) to members of the said land buying company. **Ransley J** ordered that:

> **"1. THAT it is hereby declared that the said resolution of the 16th November 1983 purporting to limit the number of its members to 950 is null and void and of no legal effect.**

2. THAT it is hereby declared that there are a total of 1403 members of the Defendant Company.

3. THAT it is hereby declared that the Plaintiffs are lawful members of the Defendant Company are entitled to share the Defendant's assets equally with the other shareholders hereof.

4. THAT the Defendants do pay to the Plaintiffs costs of this suit to be taxed and certified by taxing officer of this court."

2. On 15th February, 2011 **Ouko J** having considered the Substantive Motion filed herein on 9th December, 2009, issued the following orders:

"1) THAT the Respondents are compelled by an order of Mandamus to consider the Decree issued on 31st March 2003 in Nairobi HCC No. 2286 of 1993 in the discharge of their respective statutory duties and the Respondents are prohibited from continuing to issue any titles in disregard of the said decree

2) THAT there shall be no orders as to costs."

At the time, the Applicants were a group of members of the Interested Party suing the Director of Survey; the District Land Registrar and the Commissioner of Lands (the 1st – 3rd Respondents respectively).

3. Subsequently, **Kiambu Nyakinyua Farmers Company Limited** was enjoined as an Interested Party vide its application filed on 19/4/2011. By its further application filed on 28/9/2011 and compromised in the presence of counsel for the Applicants herein (Ms Wambugu) and Mr. Oriaro for the Interested Party, the decree issued by **Ouko J** on 15/2/2011 was by consent clarified on 15/10/2011 in the following terms:

"1. THAT Order (a) of the decree dated 15th February 2011 is hereby clarified by adopting the following interpretive opinion:

a) the responsibility of complying with decree issued on 31st March 2003 in HCCC 2286 of 1993 lies with Kiambu Nyakinyua Company Limited.

b) that Kiambu Nyakinyua Company Limited will have complied with the decree when it acknowledges that it has 1403 members and determines membership based on the register presented in evidence in HCCC No. 2286 of 1993

c) that Kiambu Nyakinyua Company Limited will have complied with the decree when it allocates each of the 1403 members an equal share of land available for distribution.

d) that District Land Registrar of Nakuru is under statutory obligation to continue to issue titles in respect of subdivisions of Longonot/Kijabe/Block 6 (Kiambu Nyakinyua) and that this is not disregarding the decree.

e) that Kiambu Nyakinyua Company Limited will present a register of 1403 members to the Nakuru District Land Registrar to serve as basis for confirming that titles are issued to genuine members except where third parties have purchased shares form genuine members in which case the third parties will be deemed as the member upon production of letter from company acknowledging transfer of shares.

f) By taking into account (a) to (e) the Respondents will have considered the decree issued on 31st March 2003 in Nairobi HCCC No. 2286 of 1993."

4. There is on record an application brought by **Wambugu J** on 22/4/2014 for leave to institute contempt

proceedings which does not seem to have been prosecuted. Nevertheless on 13/8/2014 Mr. P. K. Njuguna who henceforth took over the suit on behalf of the present Applicants brought an application under certificate of urgency. Prayers 4, 5, 6, and 7 therein seek:

> **"4. THAT this honourable court be pleased to call to this court and to quash all tittles issued so far in respect of the parcel of land known as LR No. LONGONOT/KIJABE BLOCK 6 (KIAMBU NYAKINYUA) belonging to KIAMBU NYAKINYUA FARMERS COMPANY LIMITED**
>
> **5. THAT this honourable court be pleased to order the 1st Respondent to account to this court and produce before this court the entire list of persons issued with titles in the parcel fo land known as LONGONOT/KIJABE BLOCK 6 (KIAMBU NYAKINYUA) belonging to KIAMBU NYAKINYUA FARMERS COMPANY LIMITED**
>
> **6. THAT this honourable court be pleased to order the 2nd Respondent to produce before this court the Registered Index map being used to issue titles in respect of the parcel of land known as LONGONOT/KIJABE BLOCK 6 (KIAMBU NYAKINYUA) belonging to KIAMBU NYAKINYUA FARMERS COMPANY LIMITED**
>
> **7. THAT this honourable court be pleased to make orders that the title issuance process should be undertaken by duly elected and appointed directors of the Company and only after the subdivision of the land taking into account all the 1403 members of the Company as earlier ordered by the court."**

5. The application is expressed to be brought under Section 3, 3A and 3B of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. As can be seen, prayers 4 and 7 directly target the Interested party while prayers 5 and 6 are directed against the 1st and 2nd Respondent. The Respondents herein participated in these proceedings in respect of the initial application before **Ouko J** that culminated in his orders of 15/2/2011 and 15/10/2011. Subsequently, the matter has proceeded mainly between the Applicant(s) and the Interested Party.

6. Back to the application filed on 13/8/2014, the same is supported by the affidavit of **Lucy Frances Gathoni Mwituria aka Lucy Gathoni** who describes herself as a member of the Interested Party. Her main grouse on behalf of the decree holders in Nairobi HCCC 2286 of 1993 is that despite the court's order therein, the Interested Party through persons purporting to be directors therein have proceeded to issue land titles based on the "old maps" in respect of 972 members, which excludes the Applicant and others who constitute a global total of 1403 members recognised in the decision of the court. That these actions will defeat the judgment of **Ransley J**.

7. Interim orders given by **Wendoh J** on 27/8/2014 have remained in place. The Interested Party filed two affidavits in opposition to the application, sworn by **Michael Kigotho Kamore** who describes himself as a Director of the Interested Party, with authority to swear on behalf of the Board of Directors. He takes issue with the locus of the deponent to the supporting affidavit of the Application, stating that she was not a party to the initial suit before **Ransley J**. He asserts that the Interested Party was the registered proprietor of the Land Parcel **LONGONOT/KIJABE BLOCK 6 (KIAMBU NYAKINYUA)** which has now been closed. He asserts that the said parcel has been subdivided in compliance with the court's orders and allocated to the 1403 members who paid the requisite "allocation fees" amounting to Shs 115,000/= per person.

8. That the sum in question caters for processing of titles, demarcation, survey and identification of beacons but that some members are reluctant to pay up. Regarding **Lucy Gathoni**, he states that she and others having failed to pay fees have "forfeited" their due shares in the land. He refers to the consent interpretative orders before **Ouko J** and states that the members' register presented to the Land Registrar is the basis of issuance of titles upon payment of "allocation fees".

9. Regarding the *bonafides* of the current directors he states that elections are conducted in the Annual

General Meeting and can only be questioned under the relevant company law. Other depositions read more like arguments than factual averments. Ditto for the Applicant's further affidavit filed on 16/10/2015 in response to the demand for "allocation fees". **Lucy Gathoni** disputes the 'hefty' sum and the failure by the Interested Party to notify members of the demand, which she counters does not emanate from a valid company resolution. She equally disputes the alleged forfeiture in default of payment of the "allocation fees" asserting that she is fully paid-up member of the Interested Party. Further, that other members in her situation have not received titles despite payment of the so-called "allocation fees".

10. According to her, the said fees are a mere ruse as strangers and directors are assigned members' land even while paid up members are relegated. She disputes that a survey has ever been carried out and contends that the last failed attempt to hold an Annual General Meeting was in 2011.

11. Reiterating his previous affidavit the Director of the Interested Party in his Supplementary affidavit emphasises that the 'allocation fee' must be paid by members and that because of the court's order of 15th February 2011 no titles have been processed. That the Directors' offer to allocate 8 acres to the exparte Applicant and 31 others was made in a bid to accommodate them but was conditional upon payment of the allotment fee Shs 130,000/=. He accused the Applicant of approaching the court in bad faith and asks that the application be dismissed.

12. The parties disposed of the application by way of written submissions, which by and large were taken up with material in the respective affidavits filed.

13. The Interested Party challenges the *locus standi* of **Lucy Gathoni** as a member of the Interested Party. Referring to the orders in **Nairobi HCCC 2286 of 1993** the Interested Party asserts its full compliance and blames the Applicant for failure to pay "allocation fees". On the *bonafides* of directors of the Interested Party, Mr. Akoto submitted that due redress is found under Company Law and not the current proceedings. The case of **Grace Wanjiru Munyinyi –Vs- Gedion Waweru Githunguri & 5 Others [2005] eKLR** was relied on.

14. Regarding the prayers in the Notice of Motion, Mr. Akoto submitted that the prayer for quashing titles issued to third parties is drastic and cannot be granted without hearing such parties, who hold indefeasible title under Section 26 (1) of the Registration of Land Act. The decision of the Court of Appeal in **Nicholas Njeru –Vs- Attorney General & 8 Others [2013] eKLR** was cited to support the proposition.

15. The Applicant's submissions rehash factual material containeed in the affidavits. In their view, the levying of an allocation fee and the alleged penalty of forfeiture of shares against the members is a ploy to deny the members their equal shares to the suit land. They argue that the Respondents ought to be compelled to give an account of the subdivisions and process of issue of the title in respect of the suit land. Further the Applicant challenges the *bonafides* of Directors of the Interested Party currently in office.

16. This court has considered the affidavit material herein and argument canvassed in respect of the instant application. Evidently, the Interested Party's challenge of *locus standi* of the Applicant Lucy Gathoni, to bring the present application is made on two fronts: her membership of the Interested Party and participation in the initial suit and also the law regarding suits against companies by shareholders. Regarding the first limb, the Applicant herein is admittedly a member of the Interested Party. There is no evidence that she was not one of the members represented in the parent suit brought against the Interested Party [**HCC 2286 of 1993**].

17. Besides, the decision in the said suit affected all the 1,403 members found to belong to the Interested Party by the court. As such any questions concerning whether aggrieved shareholders had capacity to bring the said suit against the Interested Party ought to have been raised in the parent suit. The Interested Party conceded before **Ouko J** on the 5th October, inter alia, that:

> **"b THAT Kiambu Nyakinyua Company Limited will have complied with the decree when it acknowledges that it has 1403 members and determines membership based on the register**

presented in evidence in HCCC No. 2286 of 1993."

18. This consent order was entered into by the Interested Party and the shareholders who brought this suit to enforce the decree issued in the parent suit in 2003. As a beneficiary of the decree, the Applicant herein and others are well suited to bring the present application. I understood the Interested Party's second argument to be that as a limited liability company the Interested Party is a juristic person capable of suing in its own name. It is true that a limited liability company has a separate legal identity, which is distinct from its shareholders, directors etc. Shareholders wishing to bring a suit on behalf of or against the company would require leave of the court to present a derivative action on the basis of exceptions to the rule in **Foss –Vs- Harbottle (1843) 67 ER 189**.

19. The Court of Appeal has delivered itself exhaustively on this matter in the case of **Amin Akberali Manji & 2 Others -Vs- Altaf Abdularasul Dadani & Another [2015] eKLR**. The court affirmed that a derivative action can only be brought upon leave of the court whether obtained prior to or after the commencement of an action.

20. The court stated interalia that:

> "**There is no divergence of opinion from both counsel on the legal personality of a limited liability company which acquires its own property, rights and liabilities separate from it s members upon incorporation. The centuries-old case of Salomon -Vs- Salomon Company Limited [1895-99] AII ER 33 laid that principle to rest. There is also no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to the company, is the company itself. Again that was established over 160 years ago in Foss -Vs- Harbottle (1843) 67 ER 189 (the Foss case), popularly referred to in company law as "the rule in Foss -Vs- Harbottle" (the rule). The rule was restated by Jenkins L. J. in the case of Edwards -Vs- Halliwell (1950) AII ER 1064**
>
> **This Court and others in this county have indeed cited and followed the Foss case and others which came after it, as good law. The cases of Rai and Others -Vs- Rai and Others [2002] 2 EA 537 and Grace Wanjiru Munyinyi & Another -Vs- Gedion Waweru Githunguri & 5 Others [2011] eKLR were cited before us to confirm that the rule in Foss case still stands in Kenya. In a recent case, Arthi Highway Developers Ltd -Vs- Westend Butchery Ltd & 6 Others Civil Appeal No. 246 of 2013 this Court followed the summing up of the rule by Lord Denning M.R. in Moir -Vs- Wallerstainer [1975] 1 AII 849 at Pg 857, thus:**
>
>> ***"It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in Foss -Vs- Harbottle (1843) 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue."***
>
> **The divergence of view in this matter centres on the exceptions to the rule which were stated in the Foss case itself and in other cases that came after it, especially Edward -Vs- Halliwell (supra) which is regarded as the *locus classicus* that laid out the exceptions and were Jenkins L. J. emphasized that:-**
>
>> ***"…the rule (in Foss –Vs- Harbottle) is not an inflexible rule and it will be relaxed where necessary in the interests of justice."***
>
> **Lord Denning in the Moir case (supra) posed the appropriate question:-**
>
>> ***"……But suppose (the company) is defrauded by insiders who control its affairs – by***

directors who hold a majority of the shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorize the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue themselves. Yet, the company is the one person who is indemnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress…….”

Some of the exceptions to the rule may be taken from this court's decision in the Rai case (supra), citing the House of Lords in Prudential Assurance Company Limited –Vs- Newman Industries Limited and others [1982] 1 AII ALLER 364 at page 357 thus:-

"(a) These is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority shareholders cannot the transaction:

(b) There is no room for the operation of the rule if the transaction complained of could be validly sanctioned only by special resolution or the like because a simple majority cannot confront a transaction which requires which requires the concurrence of a greater majority; and

(c) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company."

L.C.B Gower, in his textbook, The Principles of Modern Company Law, 3rd Edition, has referred to those exceptions and added two more as follows:

"where it is alleged that the personal rights of the plaintiff shareholder have been or are about to be infringed.

Such individual rights include the right to attend meetings the right to receive dividends; the right to insist in strict observance of the legal rules; statutory provisions in the memorandum and articles. If such a right is in question, a single shareholder can on principle, defy a majority consisting of all other shareholders.

Any other case where the interests of justice require that the general rule, requiring suit by the company, should be disregarded."

21. Thus the Interested Party's submissions on the *locus standi* of the Applicant vis-à-vis the Interested Party as a separate legal entity are accurate, but the challenge has been raised at the wrong forum. The parent suit was finalized in 2003. As far as I can tell, the decree was not appealed. It is too late now, particularly after the Interested Party enjoined themselves and entered a consent to take responsibility for the execution of the parent decree, to reverse gears by mounting legal obstacles based on the *locus standi* of decree holders such as the Applicant herein.

22. Concerning the live prayers in the Notice of Motion I agree with the Interested Party that prayer 4 has no factual or legal basis. Firstly, there is no legal provision invoked in the Notice of Motion as would vest this court with the jurisdiction to quash titles in respect of the suit property that have been issued to third parties. The third parties are neither identified, nor are they parties to this suit. The prayer is based on speculation despite being of a drastic nature.

23. In the case of **Nicholas Njeru –Vs- Attorney General** (supra) which was cited by the Interested Party the Court of Appeal stated:

"……Be that as it may, this matter is further compounded by the fact that the persons whose titles were cancelled were not named and worse still the parties who were allegedly issued

with the over 200 titles that the court is asked to cancel were also not named. It is a cardinal principle of law that a court of law is supposed to hear parties before making orders that affect them…….”

24. Indeed, that is also true in this case. Parties who have allegedly benefited from titles in respect of the suit property herein are unknown. Also unknown is the manner in which they received the said titles from the Interested Party. They are not named, nor their respective titles. They are not parties herein.

25. Conceding this, point the Applicant stated in submissions that:

“The point here is that at this point, it is not possible to tell who exactly has benefitted from the vast parcel of land owned by the Interested Party for its members. It is also not possible to tell which subdivision plan has been used to issue such titles.

……It is also not possible to tell how many members or non members have been recognised by the company as having a right to the land…….”

This court cannot grant prayer 4 of the Notice of Motion in the circumstances, and further in view of the fact that the parties consent order recorded on 5/10/2011 allowed the issuance of titles in respect of the suit property.

26. Prayers 4 and 5 were principally against the 1st and 2nd Respondent who did not attend the proceedings or file any material despite being served severally on the court’s direction. In asserting full compliance with orders in the parent suit, the Interested Party has stated that members who have paid a “allocation fees” have been allocated plots but that those in default have ‘forfeited’ their right to plots. For her part, the Applicant contends that the “allocation fee” is a ploy to exclude certain deserving members in order to enrich some members and non-members.

27. The Interested Party did not tender any records to confirm its alleged compliance with the consent order of 5/10/2011, which *inter alia* stated:

“a) That responsibility of complying with decree issued on 31st March 2003 in HCCC 2286 of 1993 lies with Kiambu Nyakinyua Company Limited.

b) That Kiambu Nyakinyua Company Limited will have complied with the decree when it acknowledges that it has 1403 members and determines membership based on the register presented in evidence in HCCC No. 2286 of 1993.

c) That Kiambu Nyakinyua Company Limited will have complied with the decree <u>when it allocates each of the 1403 members an equal share of land available for distribution</u>.

d) … …

e) Kiambu Nyakinyua Company Limited will present a register of 1403 members to Nakuru District Land Registrar to serve as basis for confirming that titles are issued to genuine members except where third parties have purchased shares from genuine members in which case the third party will be deemed as the member upon production of letter from the company acknowledging transfer of shares.”

28. The question of allocation of shares was clearly not tied to an allocation fee in the consent order. The Interested Party undertook to allocate each of the 1403 members with equal shares of the available land. There is no evidence tendered here that the members who have been shown or allocated land parcels as stated by the Interested Party’s director have paid the alleged allocation fee to qualify for allotment. The alleged resolution authorising the imposition of this charge on members as a condition for the allocation was not tendered.

29. Thus in my view, the Interested Party by raising the issue of allocation fee and forfeiture at this stage is merely attempting to wriggle away from its unequivocal commitment under term (c) of the consent order made on 5/10/2011 before this court to allocate each of the 1403 members with an equal share of "land available for distribution". Undeniably, the land in question is Title No. **LONGONOT/KIJABE BLOCK 6/KIAMBU NYAKINYUA** which **Michael Kigotho Kamore** in his affidavit states has been closed after subdivision, and "title deeds issued to individual members." (**See paragraph 10 of Replying Affidavit**).

30. Thus in my considered view and on the available material, the Interested Party cannot plead full compliance of the decree in accordance with term (c) of the consent order recorded in 5/10/2011 before this court. It is true that the question of the management of a Limited Liability Company is not amenable to judicial review as we know it, and that the provisions of the Companies Act would apply. However, in this case the Interested Party submitted before this court and undertook to perform certain obligations in the satisfaction of the decree in HCC 2286 of 1993. They cannot be allowed to blow hot and cold. The consent order has not been set aside or varied and the Interested Party must comply fully rather than introduce excuses and red herrings.

31. The 1st and 2nd Respondents unlike the Interested Party hold public offices. The 1st Respondent's mandate includes the maintenance of land records such as survey maps. The 2nd Respondent also maintains records of land ownership and transactions. It seems to me that these proceedings initially targeted the 1st to 3rd Respondents all of them public officers.

32. However it appears that the said Respondents lost interest in the matter upon the Interested Party taking its obligations vide the consent order of 5/10/2011 to satisfy the decree in the parent suit. There is no way for the Interested Party to process title without the involvement of the 1st to the 3rd Respondent. Indeed under term (a) & (e) of the consent order, the 2nd Respondent took upon itself obligations. Terms (d) stated:

> **"(d) That the District Land Registrar Nakuru is under statutory obligation to continue to issue titles in respect of the subdivisions of Longonot/Kijabe Block 6 (Kiambu Nyakinyua and that is not disregarding the decree."**

33. Under the term (e) the issuance of titles would be based on the members' register presented to the Nakuru Land Registrar by the Interested Party. Thus the 1st and 2nd Respondents are key parties for the execution of the decree in HCCC No. 2286 of 1993.

34. It is a scandal in my opinion that a decree of the court issued in 2003 remains unsatisfied todate, and that instead, the decree holders have been given the run around by concerned public officials and the Interested Party. Without the advantage of records held by the 1st, 2nd and 3rd Respondents, the Applicant and indeed all other aggrieved members will continue to wallow in frustration as they cannot prove to any court whether or not the Interested Part has fully complied with the decree herein. An unexecutable decree amounts to a pyrrhic victory for the decree holder and is a travesty of justice.

35. In the face of obduracy by the Interested Party the aggrieved parties are entitled to all information necessary to give meaning to their decree. Indeed under Article 35 (1) a every citizen has the right to access information held by the state, including state officers. In light of the foregoing, I will grant prayers 5 and 6 of the Notice of Motion filed on 13/8/2014.

36. But for reasons earlier given, I do not consider it necessary, or even appropriate for this court to direct how the Interested Party should go about satisfying the decree in HCCC No. 2286 of 1993 or consent order herein. Besides, the Applicant herein and any aggrieved party who takes issues with the *bonafides* of the directors currently in the office or their activities has a remedy under company law. The Interested Party will bear the costs of the Application.

Delivered and signed at Naivasha this **25th** day of **November**, **2016.**

In the presence of:-

Miss Kithinji holding brief for Mr. P. K. Njuguna for the Applicant

N/A for the 1st, 2nd and 3rd Respondents

Mr. Adoli holding brief for Mr. Oriaro for the Interested Party

Court Assistant : Barasa

C. W. MEOLI

JUDGE