REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT NO. 173 OF 2014

In the matter of Gatundu Holdings Limited

AND

In the matter of the Companies Act Chapter 486 laws of Kenya

AND

In the matter of an Application by Gachango Njuguna Munyambu, 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

GACHANGO NJUGUNA MUNYAMBU…… 1ST APPLICANT/RESPONDENT

DOMINIC STEPHEN KARANJA..…..…… 2ND APPLICANT/RESPONDENT

KANYANGO KIMANI KAMAU...….....… 3RD APPLICANT/RESPONDENT

AND

GATUNDU HOLDINGS LIMITED…..…… 1ST RESPONDENT/APPLICANT

DANIEL KAMITA GICHUHI..….....…… 2ND RESPONDENT/APPLICANT

MOSES NGANG MUIHIA…..…….…..….3RD RESPONDENT/APPLICANT

MUTUA KIHU ……..……4TH RESPONDENT/APPLICANT

PATRICK KABUBU NJUGUNA.....…...5TH RESPONDENT/APPLICANT

RULING

Amendment of Pleadings

[1] I have before me an application dated 25th August 2014 for amendment of pleadings in the

manner shown in the application. The application is supported by the Affidavit of Gachango Njuguna Munyambu and is expressed to be brought under sections 3A and 100 of the Civil Procedure Act. Section 100 of the Act gives the Court wide discretion to allow amendments in any proceeding in a suit. The purpose of amendments is to allow parties to bring forth their entire case before court thereby enabling the Court to determine the real question or issue in controversy completely and effectually. The Applicant submitted that the proposed amendment raises a real issue for determination by the Court. The issues being introduced by the proposed amendment are two:

> ***1) Whether the AGM held by the Respondents on 20th April 2014 should be declared unlawful, null and void" and***
>
> ***2) W**hether the decisions made during that meeting should be equally declared as null and void"***

[2] According to the Applicant, these amendments will enable the court to determine the real issues in controversy. They also submitted that the Respondents have not filed a Replying Affidavit to challenge the averments in the Supporting Affidavit. Therefore the averments in the Supporting Affidavit are true and correct i.e. there are new facts that have arisen since 17th April 2014 when this suit was filed. The most important change of fact is that after the filing of this suit, the Respondents held an AGM on 20th April 2014 in which meeting decisions were made and resolutions were passed – s***ee paragraphs 10, 18, 27, 30, 33, 34, 35 and 36 of the Replying Affidavit of Daniel Kamita Gichuhi sworn on 27th May 2014 and filed on 29th May 2014***. This is in the Replying Affidavit to the main suit. As a result of the above submissions, grounds 1, 2, 3 and 5 of the Grounds of opposition in relation thereto do not hold. Ground 1 of the said Grounds of Opposition is superfluous as the Application for amendment is supported by an Affidavit.

[3] The Applicant also addressed the issue whether the Notice of Motion dated 17th April 2014 a suit or pleading. They submitted the Notice of Motion dated 17th April 2014 is a suit and a Pleading within the meaning of the Companies (High court) Rules and the Civil Procedure Rules 2010. Rule 3 of the Companies (High Court) Rules provides that any proceedings commenced under the rules shall be deemed to be a suit within the meaning of the Civil Procedure Act and the Civil Procedure Rules. The general practice of Court shall apply. The Application dated 17th April 2014 was made pursuant to rule 8(c) of the Companies (High Court) Rules. Therefore the objection by the Respondents in ground 4 is a misdirection of the law. See the decision of Mabeya J in **High Court Miscellaneous Cause No. 462 of 2011: Salama Mahmound Saad vs: Kikas Investments Limited and Another** held that since rule 3 of the Companies (High Court) Rules import the Application of the Civil Procedure Act and rules to matters brought under the Companies (High Court) Rules, the Notice of Motion and the Affidavit in support thereof under rule 8 of the Companies (High Court) Rules is a suit and a Pleading. The Judge was dealing with a similar matter as what is before me. The Applicant is, therefore, convinced that the application for amendment is merited and should be allowed with costs.

The Respondent returned fire

[4] The Respondent submitted that the court should determine whether it should grant leave to the Applicants to amend their Notice of Motion application dated 17/04/2014; and who bears the costs of the application? They are convinced that the Applicants are not entitled to leave to amend because the Notice of Motion Application dated 25/08/2014 was served without a supporting affidavit. As such, the Respondents did not file a replying affidavit in response to the application. This is a fact that was brought to the court's attention on 23/01/2015 when the parties appeared in Court for mention of the suit. Applicants' counsel served the supporting affidavit on 28/01/2015. Therefore, ground no. 1 of the grounds of opposition was a valid ground for opposing the Applicant's application. The Respondents did not advertently neglect to file a response to the Applicant's application and do not endorse the averments on the Applicants' supporting affidavit

to be true. Secondly, there are no new facts which have emerged and which were not available at the time of filing suit as stated in the supporting affidavit specifically at paragraph 2. The Applicants have not even stated the specific new facts they are alleging. The Applicants' counsel cannot purport to give evidence of the alleged new facts through submissions on behalf of the Applicants. The Court should therefore disregard the submission set out at paragraph 4 of the Applicant's submissions since considering the submission would be abrogating the rule of natural justice to "hear the other side" before making a decision. There was nothing to rebut in the supporting affidavit. The Respondents relied on the case of **Pashito Holdings Limited & Another vs. Paul Nderitu Ndungu & 2 Others [1997] eKLR** where the Court of Appeal held that there is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right.

[5] Be that as it may and without prejudice to the foregoing, the Applicants filed a Supplementary Affidavit dated 25/08/2014 responding to the averments in the Replying Affidavit dated 27/05/2014. But the Respondent quipped: How could the Applicants respond to matters they knew nothing about? Therefore, the Respondents submitted that the proposed amendments to the Notice of motion Application dated 27/04/2014 amount to nothing more than a surreptitious manner of introducing new prayers in the application with the aim of prejudicing the Respondents' response to the application. The Applicants have not shown this Court why the proposed amendments are necessary, if at all, in determining the dispute between the parties. The Respondents urged the Court to reject the Applicants' application for leave to amend.

[6] The Respondents pressed further and submitted that the Notice of Motion Application not a pleading within the definition of ''Pleading'' in Section 2 of the Civil Procedure Act that 'pleading' includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant. They cited the case of **Fredrick Mwangi Nyaga vs Garam Investments & Another [2013] eKLR** where Havelock J. held that:

> ***"First of all, let me state that I do not consider a Notice of Motion to be a pleading. As pointed out by Counsel, section 2 of the Civil Procedure Act defines "pleading" as including "a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant. On my part, I consider this definition to be absolutely clear as to what amounts to a pleading and that is the process of instituting and defending a suit as provided for under the Rules. In my opinion, it does not include what may be termed interlocutory applications including Chamber Summonses and Notices of Motion."***

[7] According to the Respondents, the Companies (High Court) Rules do not require all proceedings to be instituted by way of a Notice of Motion. Indeed in some instances, proceedings may be brought by way of a petition as is the case under rule 5 of the Rules. A document cannot be called a pleading if it does not fall within the meaning ascribed to pleadings under Section 2 of the Civil Procedure Act. Therefore, the Applicants' Notice of Motion application is not a pleading for purposes of the application for seeking leave to amend. On the basis of these reasons, the Respondent concluded that the application lacks merit and should be dismissed with costs. In any event, the Applicants brought this application five months after they filed the application dated 17/04/2014. There is inordinate delay in bringing the application. On costs see **Leroka v Middle Africa Finance Company Ltd [1990] KLR** where this Honourable Court held that:

> ***"I find that the usual practice on such applications (for amendment) is for the defendant to be paid as the plaintiff is deemed to be the author of the inconveniences. I see no reason to depart from this usual practice. The fact that the defendant opposed the application is not in my view sufficient to enable this court to depart from its usual practice. In fact in my view, the defendant would have failed in his duty if he had***

allowed the matter to proceed by default. In any case, he only exercised his rights as given by the Civil Procedure Rules."

THE DETERMINATION

[8] The application before me is one for leave to amend. Under section 100 of the Civil Procedure Rules the Court has unfettered discretion to allow amendment of pleadings at any stage of the proceedings on such terms as to costs or otherwise as it may deem fit and just, and in such manner, as it may direct. Order 8 of the Civil Procedure Rules provides reinforcement and mechanism of invocation of this jurisdiction of the Court on amendment. The law on amendment of pleadings is now settled and cannot be called upon to justify itself. There is ample judicial authority on it but I am content to echo the words of Gicheru JA in the case of **Central Kenya Limited vs. Trust Bank Limited and 5 Others, Civil Appeal NO. 222 OF 1998**:-

"…that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side".

Court have said time and again that amendments should be freely allowed as long as they are necessary for determining the real issue in controversy or to avoid multiplicity of suit provided that the amendments; are not introducing new and inconsistent causes of action which cannot even be determined in the same cause; or will not prejudice the other party or have the effect of taking away a defence or vested interest or accrued right of the other party. But before I apply this test to the facts of this case, one issue emerges as being of profound preliminary significance. This issue is that the Notice of Motion herein is not a pleading. My view is as here below:

Notice of Motion: is it a pleading?

[9] These proceedings were commenced by way of a Notice of Motion dated 17th April 2014 which is expressed to have been brought under rules 3, 4 and 8(c) of the Companies (High Court) Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 2 of the Civil Procedure Rules. Sections 165 and 166 of the Companies Act provide for relief of investigation of company's affairs on application of members of the company or by order of the court. The relief is to be applied for through an application supported by such evidence as the court may require for the purpose of showing that the applicants have good reason for requiring the investigation. Section 344 of the Companies Act provides for making of rules to govern acts or matters required under the Act. Pursuant to section 344 of the Companies Act, the Companies (High Court) Rules, were made. And section 8(c) of those rules, provides that the application envisaged in section 165 and 166 of the Companies Act shall be made by way of a Notice of Motion. And importantly, rule 3 of the Companies (High Court) Rules**,** provides *as* follows:-

Any proceedings brought under Rules shall be deemed to be a suit within the meaning of the Civil Procedure Act (Cap. 21) and any Rules made thereunder, and the general practice of the Court, including the course of procedure and practice in chambers, shall apply so far as may be practicable, except if and so far as the Act Rules otherwise provide.

By dint of rule 3 quoted above, any proceeding brought under the Companies (High Court) Rules shall be deemed to be a suit within the meaning of the Civil Procedure Act and any rules made thereunder. The correct approach would be to look at the definition of suit in the Civil Procedure Act first. According to the Civil Procedure Rules:-

'***Suit' means all civil proceedings commenced in any manner prescribed''.***

When one reads the definition of suit in the CPA in relation to rule 8(c) of the Companies (High Court) Rules, will find no difficult at all to see that a proceeding commenced by way of a Notice of Motion under section 165 and 166 of the Companies Act and rule 8(c) of the Companies (High Court) Rules, is a suit for all purposes and intents. Such proceeding is not interlocutory application. And, therefore, importing the definition of ''pleading'' as is in the Civil Procedure Act without reference to definition of suit and the relevant rules under the Companies Act is not only wrong approach but one which can easily mislead a person who is not vigilant; but for judicial mind and wit, it is always alert to unravel and make bare such attempt to confuse the law. The way I understand the law is that, where there is special procedure provided for under a particular statute, the special procedure applies. See section 3 of the Civil Procedure Act. And where the rules governing the particular proceedings incorporates the provisions of the Civil Procedure Act and Rules made thereunder, as is the case here, the CPA and Rules will apply only as permitted and with such restriction as provided for in the special rules. In this case, CPR will not apply ***if and so far as the Act Rules otherwise provide.*** Therefore, a Notice of Motion, in so far as the Companies Act and rules made thereunder are concerned is a pleading that commences proceedings under section 165 and 166 of the Companies Act and Rule 8(c) of the Act Rules. On that basis, I reject the contrary opinion expressed by the Respondent in that behalf. Similar arguments were proffered before me in the **Kikas Case Supra** and the court rendered itself thus:

Arguments on Defective proceeding

> ***This court has a terse rendition on the claim that the proceeding herein is fatally defective for having been commenced by way of a Notice of Motion. Rule 8 (c) of the Companies (High Court) Rules provides that... application for appointment of inspectors under section 165 and 166 of the Companies Act, shall be made by notice of motion. The prescribed procedure is the correct procedure for initiating proceedings under sections 165 and 166 of the Companies Act and any proceeding so commenced is not defective in any way. See a work of the court in SADIA KARIMBUX v SAAIDA KARIMBUX [2014] eKLR that:***
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> > ***''...I find comfort in the fact that the proceedings before me have been commenced by way of an Originating Notice of Motion which is permitted way of commencing substantive proceedings''. The issue was even succinctly dealt with by Mabeya J in his ruling delivered on 20th April, 2012 and I wish counsels for the Applicant had taken care to peruse the record. Perhaps they would not have applied on the basis of that argument. I reject Prayer 1 of the application in toto.***

[10] I have found that the Notice of Motion herein is a pleading having been filed under a special procedure provided under the Companies Act and Rules made thereunder. It can, therefore, be amended like any other pleading. I now move to the substantive issues in order to determine whether the amendment is merited. I have perused the supporting affidavit. In its paragraph 3 it is averred that facts have changed from the situation as at 17th April 2014 when the suit was filed. They have annexed a draft of the amended Notice of Motion which is properly sealed and secured as an exhibit to the affidavit as required by the Oaths and Statutory Declarations Act. The amended draft Notice of Motion is part of the application and it provides the nature of the amendments which are being proposed in order to reflect the changed circumstances. It is, therefore, not correct for the Respondent to totally ignore that averment in paragraph 3 of the Supporting affidavit on and the exhibit marked MNG2. The Respondents' conclusion that the new and changed facts were not stated in the affidavit is therefore wrong and contrary to the material before the Court. I now move on to the next hurdle. Given the nature of the application before the court, the proposed amendments are necessary for the court to decide the real issue in controversy in these proceedings. The case is about investigations of affairs of the company. After careful consideration, the proposed amendments are not prejudicial to the Respondents whatsoever. Accordingly, I grant the Applicants the leave to amend the Notice of Motion dated 25th August 2014. They shall file and serve an amended Notice of Motion within 7

days of today. The Respondents have 14 days to file their responses thereto. The other timelines on subsequent pleadings shall abide by the Civil Procedure Rules.

Costs

[11] Although it is normally the practice to award costs on such applications for amendment essentially on the presumption that the application was occasioned by the Applicant's omission or default, but, in the instant case, circumstances are different; do not suggest the Applicant was in default or was the author of the inconvenience. The later occurrences would justify amendment of the plaint. Even the statement by the Court in the case of **Leroka v Middle Africa Finance Company Ltd [1990] KLR** anticipated departure from the general rule on costs when it stated that:

> ***"…on such applications (for amendment) is for the defendant to be paid as the plaintiff is deemed to be the author of the inconveniences. I see no reason to depart from this usual practice. The fact that the defendant opposed the application is not in my view sufficient to enable this court to depart from its usual practice. In fact in my view, the defendant would have failed in his duty if he had allowed the matter to proceed by default. In any case, he only exercised his rights as given by the Civil Procedure Rules."[Underlining mine]***
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> Consequently, each party shall bear own costs. It is so ordered.

Dated, signed and delivered in Court at Nairobi this 16th day of April 2015

F. GIKONYO

JUDGE