



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 91 OF 2014

NANGA KIHOTO NAIVASHA LIMITED.....PLAINTIFF

VERSUS

PHARIS MBURU NGUGI.....1ST DEFENDANT

BENJAMIN NDUNGU.....2ND DEFENDANT

DANIEL MWANGI KANGETHE.....3RD DEFENDANT

KAMAU KARIUKI4TH DEFENDANT

HARON KIMANI.....5TH DEFENDANT

NDUNGU GITHIGA.....6TH DEFENDANT

RULING

1. The Plaintiff/Applicant, Nanga Kihoto Naivasha Limited, approached the Court under certificate of urgency on **11th March, 2014** vide the Notice of Motion dated **6th March, 2014** for orders that:
 1. The application be certified urgent and heard *ex parte* in the first instance;
 2. The Court do grant an injunction restraining the Defendants jointly and severally from holding themselves out as Directors of the Plaintiff or otherwise purporting to act on behalf of the Plaintiff or in any event dealing, interfering and or otherwise transacting business of the Plaintiff and in particular operating its bank accounts or dealing in its properties pending the hearing and determination of this application.
 3. The Court do grant an injunction restraining the Defendants jointly and severally from holding themselves out as Directors of the Plaintiff or otherwise purporting to act on behalf of the Plaintiff or in any event dealing, interfering and or otherwise transacting business of the Plaintiff and in particular operating its bank accounts or dealing in its properties pending the hearing and determination of this suit.
 4. That the Court be pleased to issue a mandatory injunction to compel the Defendants/Respondents to forthwith release and handover to the Plaintiff through their Advocates on record, the property, documents, instruments and items listed in Paragraph 4 at pages 6 and 7 of the Notice of Motion.
 5. That the Defendants be condemned to bear the costs of the application. The application is based on the grounds set out therein at pages 7-9 as well as the Supporting Affidavit sworn by **SAMUEL**

MONYO sworn on **6th March, 2014.**

2. In that Supporting Affidavit, Samuel Monyo, who is the current Chairman of the Plaintiff Company deponed that the Plaintiff/Applicant is a public land buying company with over 2000 members. That due to leadership wrangles, the company had not held its Annual General Meeting since 2007. Out of concern over this state of affairs the shareholders moved to Court under Section 135 of the Companies Act, Chapter 486 of the Laws of Kenya, for an order for an Annual General Meeting to be held. Consequently, in **High Court Miscellaneous Application No. 49 of 2013** an Order was made by Hon. Mr. Justice Havelock dated 17th September, 2013 requiring the Registrar of Companies to convene an Annual General Meeting of the Applicant Company within 60 days to address the Company's problems.

Pursuant to the order aforesaid, the Registrar of Companies convened an Annual General Meeting of the Applicant on 11th December, 2013 at Kirwara Community Hall in Gatanga in which election of new Board Members conducted, among other things.

3. Mr. Monyo further deponed that notwithstanding that successful Annual General Meeting and the election of a new Board of Directors, the Respondents have continued to hold themselves out as Directors of the Applicant Company and have declined to hand over the essential items, documents and instruments to enable the new Board of Directors discharge their mandate. It was further averred that the Defendants/Respondents have exacerbated the situation by continuing to withdraw monies from the Plaintiff's accounts without authority or any colour of right and that unless the orders sought are granted, the operations of the Plaintiff will grind to a halt much to the detriment of the Plaintiff and its vast membership.
4. The application was duly served on the Defendants, whereupon the firm of Karanja – Mbugua & Company Advocates came on record on their behalf. In the meantime Prayer (2) having been granted, efforts were employed towards an amicable out of Court settlement with particular reference to Prayer 4 of the Notice of Motion. It is evident that no such settlement is forthcoming for, on the 9th December, 2014 the Court ordered thus in the presence of Counsel for both parties:-

“The Court has given several mentions to the Plaintiff and in the latter days, to the Defendant with a view to recording a consent. On 24th September, 2014 the Court indicated that it would not give any further mentions. In the circumstances foregoing, I hereby decline to grant a further mention and direct that parties file a consent once they arrive at a settlement and thereafter fix the matter for mention with a view to endorsing and adopting the said consent as an order of the Court. Interim orders to be extended till then. Either party is at liberty to apply to Court for further orders...”

5. It was thus that the matter was kept in abeyance till 13th October, 2015 when, at the instance of Counsel for the Plaintiff, the application dated 6th March, 2014 was scheduled for hearing on 2nd November, 2015. The Affidavit of service sworn on 29th October, 2015 shows that a Hearing Notice dated 7th October, 2015 for 2nd November, 2015 was duly served on Karanja – Mbugua & Company Advocates. There being no explanation for their non-attendance on the 2nd November, 2015 the Court directed that the hearing of the said application proceeds *ex parte* whereupon Mr. Nyangayo, Counsel for the Plaintiff urged for the granting of Orders 3, 4 & 5 in the Notice of Motion dated 6th March, 2014. He pointed out that todate, the Defendants/Respondents have not filed any Replying Affidavit in response thereto. In essence therefore, the instant application is unopposed.
6. Having carefully considered the Notice of Motion dated 6th March, 2014 as well as its Supporting Affidavit and the documents annexed thereto, the Court is satisfied that pursuant to a Court order issued in Nairobi High Court Miscellaneous Case No. 49 of 2013 by Havelock, J the Plaintiff Company held an Annual General Meeting on 11th December, 2013. The meeting was convened by the Registrar of Companies pursuant to Section 135 of the Companies Act.
7. An attempt was made by the Defendants to stop that meeting by seeking the setting aside of the

- Court order of 17th September 2014 vide an application dated 5th December, 2013 but the same was dismissed by the Court on 10th December, 2013. Accordingly the Annual General Meeting was held and new Directors elected. The Directors then elected the office bearers who included Samuel Monyo Njoroge, the Chairman. It was a resolution of the Shareholders at the said meeting that the former Directors be ordered by the Registrar of Companies to immediately hand over to the new Board of Directors all the Company assets and documents.
8. Pursuant to this resolution the Registrar of Companies wrote the letter dated 11th December, 2013 (Marked Annex SM 7 to the Supporting Affidavit). To date the handover has not been effected and no explanation is forthcoming from the Defendants in justification of this state of affairs. In the premises the Court is satisfied that not only has a prima facie case been made out by the Plaintiff/Applicant, but also that there is a real risk of the Plaintiff/Applicant suffering irreparable harm if the Defendants are not restrained as is sought. What is more, the balance of convenience favours the granting of a temporary injunction as prayed in Prayer 3 of the Notice of Motion dated 6th March, 2014. In effect, the principles for the grant of temporary injunction as set out in the case of **Giella Vs Cassman Brown (1973) EA 358** have been established herein by the Plaintiff/Applicant.
9. I note that Prayer 4 of the Notice of Motion is for mandatory injunction. It is trite that at the interlocutory stage, a mandatory injunction can only be granted in absolutely clear cases or where special circumstances exist to warrant such intervention, and the rationale for this was well stated by Meggery, J in the case of **Shepherd Homes & Limited Vs Shandahn (1971) I ch. 34** thus:
- “It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than prohibitory injunction. At the trial of the action, the Court will of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted...”***
10. The case before the Court is one in which an Annual General Meeting was held pursuant to a Court order under the superintendence of the Registrar of Companies. A resolution was made, in the said meeting, for the Defendants as previous Directors/Office bearers to handover the assets and instruments of the Company to the new Directions. It has been shown that not only have the Defendants defied the Shareholders and the Registrar of Companies in this regard, but have also proceeded to withdraw funds from the Company’s accounts without requisite authority.
11. It is manifest therefore that the Defendants are intent on **“stealing a match”** against the Plaintiff/Applicant. Hence the Court is satisfied that this is one of the special circumstances in which the interests of justice would warrant the granting of a mandatory injunction at this stage of the proceedings, noting that its target is a **“simple and summary act”** on the part of the Defendants to even out the scales of justice. (**Kenya Breweries Limited Vs Okeyo (2002) EA 109**).
12. In the result, it is my finding that the application dated 6th April, 2014 is meritorious. The same is hereby allowed and orders granted as prayed in Paragraphs 3, 4 and 5 thereof.

It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF NOVEMBER 2015

OLGA SEWE

JUDGE