



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.183 OF 2014

STEPHEN MAINA KIMANGA1ST PLAINTIFF
PATRICK GITHINJI MWANGI 2ND PLAINTIFF
FREDRICK NJORA MWANGI3RD PLAINTIFF
HEZRON ONESMUS MAINA4TH PLAINTIFF
FIG TREE HOTEL LIMITED 5TH PLAINTIFF

VS.

LUCY WAITHIRA MWANGI.....1ST DEFENDANT
JULIUS KARIUKI MWANGI.....2ND DEFENDANT
JOHN IRUNGU GITHINJI3RD DEFENDANT

RULING

1. Before the court are two Notice of Motion applications filed by the Plaintiffs and the Defendants as follows.
2. The Plaintiffs application (hereafter the Plaintiffs application) is a Notice of Motion dated 6th May 2014 and seeks a myriad of reliefs among them injunction to restrain the Defendants from running or interfering with the day to day running of the 5th Plaintiff company. These prayers are;
 - a. That this application be certified urgent, service of the same be dispensed with in the first instance.
 - b. That hearing ex-parte, an order be issued restraining the Defendants/Respondents, their servants and /or agents or anyone acting through them from operating and running the affairs of the 5th Plaintiff Company and/or in any other manner from interfering in the day to day operations of the 5th Plaintiff company.
 - c. That upon hearing *inter parties*, an order be issue restraining the Defendants/Respondents from running, managing or in any other manner interfering with the day to day management of the 5th Plaintiff/Applicant Company pending the hearing and determination of the suit herein.
 - d. That pending hearing and determination of the suit herein, the Defendants/Respondents be

- ordered to hand over officially to the Plaintiffs/Applicants the day to day management of the 5th Plaintiff/Applicant company in an orderly manner.
- e. That the Officer Commanding Parklands Police Division ensure compliance with these orders.
 - f. That costs of this application.
3. The Plaintiffs application is premised on the grounds set out therein and supported by affidavit of Patrick Githinji dated 6th May 2014 and a further affidavit by the same person sworn on 26th May 2014 and an affidavit in reply to the defendants application sworn on 6th June 2014 together with the Grounds of opposition to the Defendant's application filed and dated 6th June 2014.
 4. The Plaintiffs application is opposed by the Defendants who filed a replying affidavit sworn by LUCY WAITHERA MWANGI on 15th May 2014 and a counter-application (herein the Defendants application) also seeking to bar the Plaintiffs from interfering with the day to day running of the 5th Plaintiff company. The Defendants application seeks the following orders namely;
 - a. That this application be certified urgent and the same be heard *ex parte* in the first instance.
 - b. That the 1st, 2nd, 3rd and 4th Plaintiffs by themselves, their servants, agents or employees, be and are hereby restrained by way of an injunction from in any way interfering with the defendants' management and smooth running of the business of the 5th Plaintiff known as Fig Tree Hotel until the hearing and determination of this application.
 - c. That the 1st, 2nd, 3rd and 4th Plaintiffs by themselves, their servants, agents or employees, be and are hereby restrained by an injunction from in any way interfering with the defendants' management and smooth running of the business of the 5th Plaintiff known as Fig Tree Hotel until the hearing and determination of this suit.
 - d. That the Officer Commanding Parklands Police Station do ensure compliance with the Orders of this Court.
 - e. That the costs of this application be to the Defendants in any event.
 5. The Defendants' application is supported by the affidavit sworn on 15th May 2014 by LUCY WAITHERA MWANGI and her affidavit of 27th May 2014 and her supplementary affidavit dated 9th June 2014.
 6. Because those two applications seeks the same end result I will consider them in this ruling simlutenously.
 7. The brief facts about the two applications are as follows:-

The 1st to 4th Plaintiffs are currently the Directors of the 5th Plaintiff company pursuant to an Extra-ordinary General Meeting held on 12th March 2014 and the Registrar of Companies letter dated 9th April 2014 annexed to the affidavit of PATRICK GITHINJI MWANGI as "PGMZIV". However, this fact is disputed by the Defendants who claim to be the bonafide and de facto directors of the 5th Plaintiff company. The 5th Plaintiff Company owns a parcel of land named Fig Tree Hotel L.R.NO.209/9510 along Muranga Road Nairobi. In 2009 differences emerged between the Directors and Shareholders of the company leading to the filing of a suit HCCC No.454 of 2008. The suit was compromised by an arbitration. The differences however persisted between the two warring parties represented by the 1st to 4th Plaintiffs and the Defendants. The 1st Plaintiff was sometime in 2005 elected as the Chairman of the Board of Directors in the 5th Plaintiff company, while the Defendants were also elected the Directors. Due to Boardroom differences, the 1st Plaintiff's reign came to an end in a controversial manner and the defendants took over the running of the company. The matter ended up in court but while the same was pending, it is alleged that the Defendants received Ksh. 48,000,000/= which was paid to the 5th Plaintiff company by the government being compensation for part of the 5th Plaintiff's company land which was

compulsorily acquired by the government. It is alleged that the Defendants misappropriated that money, and hence failed to account for it despite a court order which required the Defendants to deposit the said money in a joint account of then advocates of the parties. (See annexure PGMVIII). It is alleged that the order was never complied with and that the money was released to the Defendants herein personally and they proceeded to use or misuse it for their own benefit. This allegation is now the subject matter of Criminal Proceedings pending against the Defendants. On 12th March 2014, the Plaintiffs as majority shareholders requested for an Extra Ordinary Meeting during which the 1st to 4th Plaintiffs were elected as Directors of the 5th Plaintiff Company. That meeting was not attended by the Defendants, who have actually disputed that there was any meeting at all on that date or that there was an election as alleged by the Plaintiffs. The Defendants instead insist that the alleged meeting by the Plaintiffs was held on 3rd July 2012, and that it was not properly convened and that some of the people who are alleged to have attended the meeting are dead former shareholders. The Defendants assert that despite the improper alleged change of directors, the Registrar of Companies nonetheless despite notice of the impropriety, went ahead to register the new officials. The Defendants mention that the registration of the new Directors is invalid and hence the Defendants application herein.

8. I have very carefully considered the two opposing applications, the grounds of opposition, the opposing affidavits on record and the submissions of the parties. To determine the issue before the court I raise only two issues for consideration.
 - i. Who are the legitimate Directors and holders of the office in the 5th Plaintiff's company?
 - ii. Who, among the warring parties, would the balance of convenience fall on to run the 5th Plaintiff's company pending hearing of the dispute?
9. The above two issues are very weighty issues. This is because it is not the province of courts to interfere with the internal management of Limited Liability Companies. Companies are run by elected and registered officials and any interference by the court must be very restricted and aimed at solving or determining a point of law. Such a point of law could involve, as in the present matter, the validity of elections of company officials. However, even where the issue is the validity of elections, the courts still have a restrictive role. This is because the law gives the Registrar of Companies the final say in determining who are the duly elected Directors of Limited Liability Company. Once the Registrar issues a Certificate affirming who the registered officials of a Limited Liability Company are, the court cannot question that determination unless there is an element of fraud or clear mistake, or where the Registrar of Companies acted in clear contravention of the law, or where the Registrar is mischievous or malicious or for some very good reason in excess of his jurisdiction. Once the Registrar of Companies registered elected officials of the company and issued a Certificate, any allegations denying the process of elections can proceed and be determined without in the meantime impugning the decision of the Registrar of Companies. In my view therefore, the Registrar of Companies authoritatively pronounces the law as to who are the validity elected officials of a Limited Liability Company when he registers the elected officials. That pronouncement cannot be faulted by a Court except after a full trial and determination by the Court that the process leading to the election was illegal and a nullity. It is then that the Court can cancel the registration of officials of a Limited Liability Company.
10. In the matter at hand, the elections took place on 12th March 2014 after which the Plaintiffs informed the Registrar of Companies of the same. The Registrar of Companies then on 9th April 2014 confirmed the elected officials as duly registered. This, then, is the position. This court cannot doubt the records as provided by the Registrar of companies. Of course this position is challenged by the Defendants. However, that challenge must be heard and determined. In the meantime the registered officials of the 5th Plaintiff's Company must remain the Plaintiffs as per the Registrar of Companies Record.
11. The second issue which I raise is the tilting of balance of convenience. As per the decision in **GIELA –VS- CASEMAN BROWN**, if the court is in doubt, the court should decide in the favour of balance of convenience. Pursuant to the foregoing, It is clear that I am not in doubt as to who

are the lawful officials of the 5th Plaintiff's Company. But even if I were in doubt, the balance of convenience still would favour the Plaintiffs.

12. This is so because it has been alleged that the Defendants have misappropriated Kshs.48,000,000/= belonging to the 5th Plaintiff Company. There is indeed a criminal case currently in court against the Defendants. This is a serious allegation. In response to this allegation the Defendants merely submitted at paragraph 24 of their submissions that there are criminal proceedings and that the Plaintiffs shall be compensated in money terms if the Defendants were to be found guilty in the Criminal proceedings. For me, the issue here is not whether or not the defendant would be found guilty. The issue is that of trust. By the time criminal proceedings are being preferred against suspect, the inference is that there is reduced trust in the suspect. I do not know how the criminal proceedings will turn out. But as a court, I am concerned with whom I can trust with the property of the company.

13. Disappearance or misapplication of Kshs. 48,000,000/- is not a small matter. Since the matter is in court, prudent administration would demand that the accused Defendants step aside from the management of the company until the criminal case is determined one way or the other. They are not the kind of officials I would, as of now, entrust with the running of the company. Balance of convenience tilts in favour of the Plaintiffs.

14. Pursuant to the foregoing I have little hesitation making the following orders:

- a. The Plaintiffs' application dated 6th May 2014 is allowed as prayed.
- b. The handing over required under prayer 4 of the Plaintiffs' application shall be done within 10 days from the date of the ruling.
- c. The Defendants' application dated 27th May 2014 is herewith dismissed in its entirety.
- d. Costs of the applications shall be for the Plaintiffs.

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 23rd Day of September 2014.

E.K.O OGOLA

JUDGE

Present:

Njuguna for Plaintiff/Applicant

Jengo for Defendants/Respondents