



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE No. 282 of 2013

DUNCAN K. WACHIRA PLAINTIFF

VERSUS

MURINGA HOLDINGS LIMITED DEFENDANT

R U L I N G

1. What is before this Court is an Application by the Plaintiff dated 4th July 2013 seeking various orders in relation to the Defendant company. The most urgent order sought is for a temporary injunction to issue to restrain the Defendant through the Company Secretary or any other authorised official of the Defendant from convening a meeting for tomorrow 12th July 2013 for the purposes of conducting the election of Directors of the Defendant Company pending the hearing and determination of the Application before Court. Thereafter, the Application seeks an order for Arbitration proceedings to be convened as between the Defendant and the members of the Defendant Company for the purpose of putting into place regulations for the election of directors and their rotation. Finally, the Application seeks an Order from this Court to direct that the current directors of the Defendant Company do continue in office pending the determination of the said arbitration proceedings.
2. Without going into details as regards the Affidavit in support of the Application as well as the Replying Affidavit filed in Court on behalf of the Defendant Company dated today, the Defendant company has filed a Notice of Preliminary Objection, also dated today, which raises two points:

“1. The application and the entire suit is defective and wanting, premature and an abuse of the process of court as it offends the provisions of the Memorandum and Articles of Association of the Respondent company.

2. That the entire suit is defective and an abuse of the process of court as it offends mandatory provisions of Order 4 Rule 1 (1) (f) of the Civil Procedure Rules 2010.”

It seems sensible to this court that the Preliminary Objection of the Defendant herein be determined first, for if the same should be successful, this suit would automatically fall away and the Application would stand dismissed.

3. The first point to note as regards prayer b) of the Application before Court is a matter of the

convening of the meeting scheduled for tomorrow. The Notice and Agenda for the Extraordinary General Meeting was issued by the Company Secretary Florence Mungai on 19th June 2013. To my mind, the prayer as sought by the Applicant cannot be granted as it has been overcome by prior events. The Notice convening the said meeting has already been issued by the Company Secretary and consequently I don't see how this Court can stop something that has already happened. With respect to the Plaintiff herein, he has sought the wrong prayer. What he should have done was to seek an order of this court to halt the said meeting from progressing.

4. Turning to the Preliminary Objection, it is apparent that the Articles of Association, as annexed to the Affidavit in support of the Application, have been amended in terms of the dispute resolution clause on page 14. As per the Replying Affidavit, Clause 31 of the Articles of Association of the Defendant company was amended in 2010 by a composite Dispute Resolution clause set out on page 5 of Exhibit "GSB 1" thereto. To my mind the last sentence of clause 31 (c) thereof is very clear:

"No party may commence any court proceedings or arbitration in relation to such dispute until the parties have attempted to settle by mediation and that mediation has terminated."

Quite clearly from the contents of both the Affidavit in support of the Application and the Replying Affidavit, no attempt has been made by the Plaintiff herein or indeed any other party to have the matters in dispute resolved by way of mediation. In my view, this is a compulsory step as per the Articles of Association and by failing to take the same, the Application before this Court is premature and, in my opinion, should be disallowed.

5. The second limb of the Preliminary Objection is as regards the entire suit being defective and an abuse of the process of this Court as it offends the mandatory provisions of **Order 4 Rule 1 (1) (f)** of the *Civil Procedure Rules, 2010*. That Rule reads as follows:

"1. (1) The plaint shall contain the following particulars –

(f) an averment that there is no other suit pending, and that there had been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint."

I have perused the Plaint and supporting documents annexed to the Replying Affidavit as Exhibit "GSB 3" involving *HCCC No. 612 of 2010*. I note that the Defendant herein is listed as the 3rd Plaintiff in that suit and that the Plaintiff herein is listed as the 4th Defendant therein. Leaving aside the prayers sought in that suit, I am satisfied that the issues raised therein cover the same subject matter as this case before Court. They involve the operation of the Defendant Company and the Management thereof. In my opinion, the Plaintiff in this suit should have brought the attention of this Court to the matters as detailed in that suit. There is an obvious history of dispute as between the Plaintiff herein and other shareholders of the Defendant Company. In my opinion, this is of great relevance to the matter currently before this Court. In any event, the provision as set out above is mandatory and where a party has failed to comply with such mandatory provision, it must expect to be penalised therefore. I do not consider that this is a mere technicality as envisaged by **Order 51 Rule 10 (2)** of the *Civil Procedure Rules, 2010*. I believe that it goes to the whole root of the matter and such breach must have its consequences.

6. The outcome of the above is that I dismiss the Plaintiff's Application dated 4th July 2013, as well as this suit, with costs to the Defendant. The Plaintiff herein would do well to take cognizance of the provisions of the Articles of Association of the Defendant Company and abide what is detailed therein as to procedure for dispute resolution.

DATED and delivered at Nairobi this 11th day of July, 2013.

J. B. HAVELOCK

JUDGE