REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 711 OF 2012

SAMUEL M. W'NJUGUNA ……. PLAINTIFF/APPLICANT

VERSUS

BENJAMIN ACHODE …… 1ST DEFENDANT/RESPONDENT

ANNE WAMBUI MURAYA ……. 2ND DEFENDANT/RESPONDENT

JANE WANGARI MURAYA …… 3RD DEFENDANT/RESPONDENT

FRANCIS MARIRU KAMANDE …… 4TH DEFENDANT/RESPONDENT

BENSON MWANGI KIGO ……... 5TH DEFENDANT/RESPONDENT

MICHAEL RUKUNGA MOWESLEY…. 6TH DEFENDANT/RESPONDENT

GITHENDU GACHANJA ……. 7TH DEFENDANT/RESPONDENT

FREDRICK MUNGAI WAINAINA ….. 8TH DEFENDANT/RESPONDENT

THATHI-IN DEVELOPMENT

COMPANY LTD. …… 9TH DEFENDANT/RESPONDENT

R U L I N G

1. By a Plaint dated 14th November 2012, the Plaintiff herein sought various prayers as against the Defendants jointly and severally as follows:

> **"i. A Permanent Injunction to restrain the Defendants whether by themselves, their agents, servants, employees or howsoever from holding the Annual General Meeting set for 17th November 2012.**
>
> **ii. A Permanent Injunction to restrain the 1st Defendant whether by himself, his agents, servants, employees or howsoever from holding himself out and passing off as the Secretary of the Company;**

iii. A declaration that the purported elections of the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Defendants as directors of the Company on 22nd October 2010 was invalid, null and void ab ignition;

iv. A declaration that the purported election of the 7th and 8th Defendants as the Chairman and Secretary respectively of the Company was invalid, null and void ab initio;

v. A Permanent Injunction to restrain the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Defendants whether by themselves, their agents, servants, employees or howsoever from holding themselves out or passing themselves off as directors of the Company;

iv. A Permanent Injunction to restrain the 7th and 8th Defendants whether by themselves, their agents, servants, employees or howsoever from holding themselves out of passing themselves off as the Chairman and Secretary respectively of the Company;

vii. Cost of and incidental to this suit".

2. Simultaneously with the filing of the Plaint, the Plaintiff herein filed a Notice of Motion in which the prayers were substantially the same as were sought in the Plaint. The matter came before this Court on 15th November 2012 when temporary injunctions were granted restraining the Defendants from proceeding with the proposed Annual General Meeting of the 9th Defendant company (hereinafter "the Company"). Further, the 1st Defendant was restrained from acting as the Secretary of the Company as well as the 2nd to 8th Defendants being restrained from acting as directors of the Company. Finally, the 7th and 8th Defendants were restrained temporarily from passing themselves off as the Chairman and Secretary of the Company respectively. *Inter-partes* hearing was to come before the Court on 3rd December 2012. However, before that hearing could proceed, the advocates for the Defendants filed a Notice of Preliminary Objection on 20th November 2012. That Preliminary Objection put forward the proposition that this Court has no territorial jurisdiction to hear, entertain and determine this matter. It is that Preliminary Objection which the Court directed should be heard first, prior to it considering the Plaintiff's Notice of Motion dated 14th November 2012. It should also be noted that the Defendants filed a Notice of Motion dated 20th November 2012 seeking to set-aside the *ex-parte* Orders made by this Court on 15th November 2012 and praying for the Plaintiff to deposit with the Court all documentation that he was holding in respect of the Company including the Certificate of Incorporation, the Register of Shareholders, Title Deeds etc. The Defendants also filed an Application dated 27th November 2012 seeking to enjoin the Registrar of Companies as a third party to these proceedings and that a Third Party Notice be deemed as a statement of claim as against the proposed third party. The Court on 3rd December 2012 determined that the said Preliminary Objection should be heard in priority to all other Applications as aforesaid, before Court.
3. Mr. Mwaniki for the Defendant submitted to Court that this matter arose in Mombasa where 90% of the Defendants resided and where the offices of the Company were situated. He asked the Court to take into account the logistics of the Company's officials coming to and fro from Nairobi for the purposes of this suit. All the exhibits that had been filed by the Plaintiff showed that the matters related to Mombasa. He referred the Court to *Gazette Notices Nos. 299 and 300 of 2007* being declarations by the Chief Justice that all matters involving the Coast Province should be filed in Mombasa. The Plaintiff had deliberately and mischievously omitted the venue of the Annual General Meeting of the Company at paragraph 5 of the Plaint. Counsel submitted that *Article 48* of the *Constitution* deals with access to justice and such should be exercised reasonably and fairly. Counsel asked the Court to take into consideration the cost of travelling and the distance involved. He also drew the attention of the Court to **section 15 (a), (b)** and **(c)** of the *Civil Procedure Act* which provisions were clear and specific as to where matters before the High Court should be filed. He noted that *Article 59 (e)* of the *Constitution* deals with Judicial Authority

which maintains that the principles of the Constitution should be protected. This Court was under a duty to protect litigants and respect together with good intentions must be promoted. Counsel was firmly of the view that this Court should not assume jurisdiction merely because it has unlimited universal jurisdiction in Kenya. He referred to the Ruling of **Kimaru J.** in the *Busia HCCC No. 185 of 2011* **Olaka v Olaka** in which the learned Judge had highlighted:

> **"Furthermore, Section 15 of the Act requires any other suit to be filed where either the defendant resides or the cause of action arose. This court will therefore not assume jurisdiction merely because it has unlimited territorial and pecuniary jurisdiction to hear any case."**

In counsel's view, the principles of justice must be upheld but not by individuals bending them to suit particular circumstances. Could there really be an excuse for filing a matter in the wrong Court (or Registry)?

4. Continuing with his submissions, Mr. Mwaniki refer the Court to the **Nakuru HCCC No. 396 of 2011 – Ndungu v Esther Muthoni** as per **Omondi J**. In that matter, because the suit was filed in the wrong Court, it was dismissed and counsel urged this Court to do the same. The time had come for advocates to shoulder the consequences of their negligent acts. Counsel also referred to the case of **R. v Nakitau & Ors (2007) eKLR** as per **Ibrahim J**. The learned judge had found that the Court ought to respect the Schedule of Areas for each High Court District Registry in light of the provisions of *Gazette Notice No. 299 of 2007*. Similarly in the case of **Marigat Group Ranch & Ors v Chepkoimet & Ors (2012) eKLR** as per **Wendoh J**. who had found that a case was filed in Nakuru although it related to Eldoret. The learned Judge struck out the case saying that it ought to have been filed in the High Court at Eldoret. Finally, counsel referred the Court to the Ruling of **Mugo J**. in **Gachege v Evans & 2 Ors** in which the Judge, rather than striking out the suit, directed that it should be transferred to Nakuru under the inherent power and jurisdiction of the Court as per **section 3A** of the *Civil Procedure Act*.
5. In response, Mr. Kamere for the Plaintiff submitted that the issues being raised by counsel for the Defendant were not new and had been dealt with before. It was his opinion that the Preliminary Objection was brought *mala fides* to prevent the hearing of the suit. He noted that the Defendant had come before Court on 20th November 2012 seeking to set-aside the interim orders granted on 15th November 2012. The Defendant had been unsuccessful and it was at that time, that it raised the issue of jurisdiction. Having once appeared, it was Mr. Kamere's view that counsel could not come before Court to argue that it had no jurisdiction. He noted that at paragraph 2 of the Defence filed on 20th November 2012, the Defendant admitted the contents of paragraphs 1, 2 and 3 of the Plaint. At paragraph 2 of the Plaint, it read that the first to the eighth defendants were all adult males living and working for gain within Nairobi City County. He was of the view that the first to eighth defendants had submitted to the jurisdiction of this Court and could not now come before Court to deny the same. Counsel observed that the cases cited by the Defendants involved suits instituted in subordinate Courts not the High Court. *Article 165* of the *Constitution* clearly gave the High Court jurisdiction countrywide.
6. In a brief response, Mr. Mwaniki stated that a Preliminary Objection could be filed at any time before Judgement. As regards the jurisdiction of the Court, the Defendants referred to paragraph 9 of the Defence which clearly disputed the jurisdiction of this Court. All the cases to which he had referred the Court were High Court matters. This case was not about advertisement in the Daily Nation but about an Annual General Meeting of the Company held in Mombasa. He urged the Court to allow the Preliminary Objection.
7. With respect to Mr. Kamere's submissions, I would agree that the **Olaka, Wamigwa, Kirobi** and **Marigat Group Ranch** cases as put before Court by Mr. Mwaniki all involved transfers of suits from subordinate Courts and were generally brought under the provisions of **sections 12 to 15** of the *Civil Procedure Act*. However, the Ruling of **Ibrahim J**. in **Republic v Davis Nakitare & Anor** as well as the case of **Christine Gachege** (both supra) involved matters brought before the High Court in Kitale in the former case and Nairobi in the latter case. Mr. Kamere was quite right to point out to the Court that the reason why the **Davis Nakitare** case came before the High Court at Nakuru was that there was no Judge stationed at Kitale at the time. However, **Ibrahim J**. noted

in his Ruling, that as a Judge was about to be appointed to Kitale, that case should be referred there for determination. Further, the distinguishing feature as regards the **Christine Gachege** case is that it involved the assets of a deceased's Estate including a petrol station at Nakuru and it was filed as an *Environmental & Land case as No. 84 of 2008*. The learned Judge found that given the facts of the suit, the Plaintiff had the option under **sections 12 (d)** and **15 (c)** to file the suit either in Nairobi or Nakuru. However, she observed that:

"The facts of the suit herein militate against the filing of the same in Nairobi."

8. Having examined as above the authorities put before this Court by the Defendants, it is necessary to consider those authorities cited by the Plaintiff which included **Daniel Moseka v Japheth A.M. Kiurire (2012) eKLR, Atta (Kenya) Ltd v Nesfood Industries Ltd (2012) eKLR, Francis Gathogo v Evans Ondansa & Anor. (2007) eKLR, Heinz Isbrecht v Charles Ndiga (1997) eKLR** and **Crossley Holdings Ltd v Saxena & 3 Ors (2008) eKLR**. Of these authorities, I did not consider the **Isbrecht** case to be relevant in that it involved a suit initially filed in the Chief Magistrate's Court and there was no doubt about the ability of the High Court to transfer the same under the provisions of the **section 18 (1) and (2)** of the *Civil Procedure Act*. Further, the Ruling of **Judge Kimaru** in the **Crossley Holdings** case was delivered in 2008 and the learned Judge specifically referred to the position of this Court under the old Constitution quite apart from referring to the old *Civil Procedure Rules*. Since the coming into operation of the *Constitution, 2010* and the *Civil Procedure Rules 2010*, much has changed as regards the administration of Courts. **Judge Ngugi** in the **Daniel Moseka** case, while sitting at Machakos at paragraph 8 of the Ruling had this to say:

> **"8. Suffice it to say that I agree with the holding and reasoning of Justice Waweru in *Kenya Tea Development Agency v Thomas Mboya Oguttu T/A Ms Oguttu Mboya & Co. Advocates & Another* (Nairobi High Court Case No. 6 of 2004) (unreported). In that case, Justice Waweru said that there is only one High Court in Kenya which sits at various locations as the Chief Justice might appoint. That one High Court (established under section … of the Constitution) has a Central Office in Nairobi and various District registries. Machakos is one such registry. It is the same High Court that sits in Nairobi and all the various registries. It is not different High Courts. As such, a High Court Judge may, in good faith, direct that a case be heard at a different registry if it would be more convenient for the parties or the court or for some other just cause. This is not a *"transfer"* from one High Court to another High Court but a transfer from one registry to another. I am therefore of the opinion that in an appropriate case, a High Court Judge can invoke its inherent jurisdiction or the powers donated in Order 47 Rule 6 to transfer a case from one registry to another even if those registries are manned by different judges".**

Similarly, **Mutava J**. in the **Atta (Kenya)** case as above found at paragraph 10 of his Ruling as follows:

> **"10. Be that as it may, given that the Constitution of Kenya Act, 2010 gives this court unlimited original jurisdiction in civil and criminal matters, and given the supremacy of the Constitution over the Civil Procedure Act, and given further that article 159 (2) (d) of the Constitution vouches for substantive justice even in the face of procedural technicalities, a party seeking to oust the jurisdiction of one station of the High Court in favour of another, must, in my view go beyond the face value of the tenets of convenience stipulated in Section 15 of the Civil Procedure Act. At the minimum, the applying party must demonstrate that the right of access to justice under Article 48 of the Constitution is at threat. This should be advanced by placing befor the court material showing that beyond the pillars**

of convenience stipulated in Section 15 of the Civil Procedure Act, there is a verifiable motive on the part of the Plaintiff to use geographical inconvenience to defeat the substantive ends of justice. A mere apprehension of such a possibility may not suffice. Further, the Applicant should demonstrate that it has come to court at the earliest opportunity with its request".

9. From the finding of the Court of Appeal in the case of **Riddlesbarger & Anor v Robson & Ors (1958) EA 375** as quoted in the **Francis Gathogo** case (supra), it is quite clear that **section 15** are subject to the provisions contained in **sections 11, 12, 13, 14 and 15** thereof. **Section 15** only deal with matters in relation to subordinate courts. However, the Court of Appeal in the **Francis Gathogo** case pointed to the provisions of **Order 46 Rule 5 (2)** of the old *Civil Procedure Rules* which provided:

> **"The court may of its own motion or on the application of any party to a suit and for cause shown order that the case be tried in a particular place to be appointed by the court:**
>
> **Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case."**

The above provision has now found its way into the *Civil Procedure Rules 2010*, as **Order 47 rule 6 (2)**.

10. As a result of the foregoing authorities, I have little or no doubt that this Court can, in an appropriate case, invoke its inherent jurisdiction or the power as donated to it by **Order 47 rule 6 (2)** to transfer a case from one High Court Registry to another. In this case, the advocates for the Defendants have submitted through the Preliminary Objection, that this Court has no territorial jurisdiction to hear, entertain and determine this matter. That cannot be the case as it is quite clear from *Article 165 (3) (a)* of the *Constitution* that the High Court has unlimited original jurisdiction in all criminal and civil matters. As a result, upon the strict interpretation of the wording of the Preliminary Objection, the same must fail. However, the provisions of **Order 47 rule 6 (2)** clearly allow the Court of its own motion or on the application of any party to order that the case be tried in a particular place to be appointed by the Court. From the authorities put before this Court by the parties and, more particularly, taking into account the proviso to **Order 47 rule 6 (2)**, it falls to this Court to determine the place of trial which should be to the convenience of the parties and their witnesses and all other circumstances of the case.
11. I have perused the exhibits to the Supporting Affidavit sworn by the Plaintiff on 14th November 2012 more particularly Exhibits "SMW-2" and "SMW-3" thereof. I have also perused the Replying Affidavit sworn by the 1st Defendant on 27th November 2012 more particularly Exhibits "BA-3", "BA-4", "BA-6A", "BA-7", "BA-8", "BA-9", "BA-10", "BA-11" and "BA-12". It is plainly obvious to this Court that the large majority of the shareholders of the Company are based in Mombasa. The Company uses a Mombasa postal address – P. O. Box 83261, Mombasa. The Sale Agreement dated 22nd December 2007 annexed to the Replying Affidavit as exhibit "BA-11" relates to the sale of two acres of land within plot no. F 210 in what it terms "Mombasa Municipality". That Agreement would seem to imply that there is more land owned by the Company in Mombasa. Finally, and perhaps more telling, I note from the Notice of Annual General Meeting for the year 2010 as sent out by the Assistant Registrar of Companies that the same was to be held at Lasco Hall, Kenyatta Avenue, Mombasa on 22nd October 2010. That Notice was pursuant to a Ruling and Orders issued by the Office of the Registrar of Companies on 16th September 2010. Unfortunately neither the Plaintiff nor the 1st Defendant annexed a copy of that said Ruling to their Affidavits before Court. However, what the Court gathers from the said Notice, is that for whatever reason, the Registrar of Companies determined that the proper and convenient place for a General Meeting of the Company to be held would be in Mombasa. Further, the minutes of the Second Annual General Meeting of the Company held on the 22nd October 2011 detailed that the same was held at the Coast Car Park, Mombasa. Finally, I note that

the Memorandum and Articles of Association of the Company were drawn and filed by A. B. Patel & Patel, Advocates of P. O. Box 80274, Mombasa. From this, I have no doubt that a search of the Company at the Companies Registry would reveal that the Registered Officer thereof is situate in Mombasa. As a result, I accept the point made by the Defendants herein that for the convenience of all the parties, with the possible exception of the Plaintiff, this Court's District Registry at Mombasa is the appropriate forum for this case to be transferred to.

12. Accordingly, this Court directs, of its own motion, that this file be transferred to the District Registry at Mombasa initially for the hearing of the Plaintiff's Notice of Motion dated 14th November 2012 but also for the hearing of this suit in due course. As I have found that the Preliminary Objection of the Defendants does not stand, I make no Order as to costs.

DATED and delivered at Nairobi this 19th day of November, 2013.

J. B. HAVELOCK

JUDGE