



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Case 270 of 2012

JAMES NJENGA GITHENDU.....PLAINTIFF

- VERSUS -

KAMAU GAKUNGA.....1ST DEFENDANT

STEPHEN KINYANJUI..... 2ND DEFENDANT

STEPHEN NGACHA 3RD DEFENDANT

KIBERETHI ESTATE CO. LTD.....4TH DEFENDANT

RULING

1. This is a Ruling on the **Notice of Motion** application **26th April 2012** filed under **Order 40 Rules 1, 2, 3, and 9** of the **Civil Procedure Rules** and **Section 3 and 3A** of the **Civil Procedure Act**. The application now seeks the following orders namely:-

- a)** That this application be certified urgent and service of the same be dispensed with in the first instance.
- b)** That there be an interim order of injunction restraining the Defendants/Respondents from performing their duties as Directors of the 4th Defendant, calling its Annual General meeting, Special General Meeting, or operating the 4th Defendant Company Accounts pending hearing and determination of this application.
- c)** That there be an interim order of injunction restraining the Defendants/Respondents from performing their duties as Directors of the 4th Defendant, calling its Annual General Meeting, Special General Meeting, or operating the 4th Defendant Company Accounts pending hearing and determination of this suit
- d)** That the costs of this application be in the cause.

2. The application is premised on 17 grounds namely:-

- i.** The 1st to 3rd Defendants have filed a notice of change of Directors and in the said notice they

have excluded the other directors.

ii. The 2nd and 3rd Defendants were elected from specific zones by shareholders of the same zones – a system not known to the Memorandum and Articles of the Company or the Companies Act.

iii. The zoning pattern did not consider the number of shareholders in the particular zone and if they qualify for a director.

iv. The pattern did not take into account the total number of shares in the zone and if it qualifies.

v. The pattern was designed to favour some individual and zones which is contrary to the spirit and letter of the Articles of Association of the Company and the Companies Act.

vi. The rules of the Articles and Companies Act need to be followed to the letter for smooth operation of the company.

vii. That all directors are not involved in crucial decision making and running the company despite the express provision of the Companies Act.

viii. The Plaintiff is a majority shareholder with 470 shares in the 4th Defendant Company and stands to suffer greatly in case the company is mismanaged.

3. In support of the application are supporting affidavit sworn by the Plaintiff **JAMES NJENGA GITHENDU** dated **26th April 2012** and a further affidavit by the same person dated **5th June 2012**. Additionally there are two affidavits sworn by **DAVID BORO MATHERI** and **PAUL NDICHU NJUGUNA** both dated **5th June 2012** in support of the application.

4. The application is opposed through a replying affidavit by 1st Defendant **KAMAU GAKUNGA** dated **24th May 2012** and a further replying affidavit dated **26th June 2012** together with their annexure.

5. The brief history of the application as determined from the Plaintiff's statement of facts is as follows. The Plaintiff James Njenga Githendu is one of the directors of Kiberethi Estate Company Limited. Up to the **24th March 2011** the company has been conducting its affairs legally and in compliance with Articles of Association and Companies Act. That the 1st to 3rd Defendants are directors and shareholders of the 4th Defendant's Company Limited.

The Company's Memorandum and Articles of Association expressly states that where the articles are silent on an issue, the provisions of the companies act do apply. Under the Articles of Association, Directors are to be elected by the Shareholder on the floor.

On the **24th March 2012**, the 1st Defendant herein being the Chairman of the said Kiberethi Estate Company Limited and a Director convened an Annual General Meeting during which meeting he introduced a new mode of electing director – based on the particular zone where the retiring directors comes from and in the process the 2nd and 3rd Defendants were elected as directors of the company.

It is now alleged by the Applicant that the mode of election passed by the 1st Defendant is illegal, baseless, unjustified and does not serve or further the interest of the company, for the reasons that the zoning pattern did not consider the number of shareholders, if they are qualified, the total number of shares in the zone and it was to favour some individual zones which is contrary to the spirit and letter of the Articles of Association of the company and the Companies Act.

After the meeting on **24th March 2012** the Defendants have proceeded to file returns with the Registrar of Companies indicating themselves as the only directors. It cannot be argued that the notice of change

relates to the retiring and re-elected directors as the 1st Defendant was not retiring neither was he re-elected on that meeting. It is further alleged that the Plaintiff is a majority shareholder with **470 shares** in the said company and stand to suffer greatly in case the company is mismanaged as shown by these instances:-

(i) On **21st January 2011**, during a board meeting, the manager applied to be paid part of his retirement dues in advance and the request was allowed by majority director despite objection.

(ii) On the meeting of **21st January 2011**, the treasurer requested the board to give the chairman **Kshs.20,000/=** for medication and the request was allowed despite objection.

(iii) That the company's manager's salary is not taxed.

(iv) The company manager having attained the retirement age has not been summoned to retire.

(v) That the repairs for the Nairobi house were allocated **Kshs.120,000/=** which by all standards is on the higher side.

(vi) That any director holding a view contrary to that to the chairman is normally treated as an enemy to the company.

(vii) That all directors are not involved in crucial decision making and running of the company even though the Act requires so.

(viii) The 1st Defendant manages the 4th Defendant Company as his property and has refused a poll (1 vote one share) on the election of chairman as he fears losing; and prefers one director one vote system of election.

(ix) The 1st Defendant has been targeting the Plaintiff - on **12th March 2011** he introduced retirement by rotation but luckily the Plaintiff was re-elected on the floor. That system was suspended in subsequent elections and in return prefer the zone patterns.

The Applicant now wants that the Memorandum and Articles of Association Rules and Companies Act need to be followed to the letter for smooth operation of the company and the 1st to 3rd Defendants should be restrained from performing the duties as director of the said company by virtue of their illegal election or void returns.

6. I have considered the application and the opposing affidavits. I have also considered the submissions of the parties in the matter. The issue for this court to determine is only one. ***Can this court, on the grounds given interfere with the operations of a limited company which is an ongoing concern?*** Having considered the pleadings in the application I find no grievances grave enough to convince me to allow the application. It is clear from the pleadings that the Plaintiff/Applicant was prior to the Annual General meeting held on **24th March 2012** part and parcel of the management team of the 4th Defendant Company. His complaints reek of that of a dissatisfied person, who having offered himself for the position of Chairman, failed to secure it and is unhappy. In my view these are internal company politics which need not find their way into a court of law. I will address each allegation of impropriety alleged by the Applicant.

In paragraph 8 of his affidavit the Plaintiff refers to **Min 7/2012 Annexure KG 2** and alleges that the 1st Defendant dictated and introduced a voting process he called "**Zoning**". However a practical reading of the said minute does not show either the alleged dictation or the introduction of the so called "**zoning**" as a voting process.

Secondly in paragraph 9 of the Plaintiffs further affidavit he refers to **Min 8/2012 Annexure KG 2** and

alleges that the 1st Defendant had suspended the Companies Act (Cap 486). This fact is not borne out in the Minutes. There is no evidence at all that the 1st Defendant had suspended the Companies Act. Even if such suspension was made verbally, it would not have taken the Plaintiff more than one month to react to it. The allegations of financial impropriety and mismanagement of the Company may be genuine. However, the Plaintiff prior to **24th March 2012** was part of that management structure. If there are indeed any financial impropriety and mis-management, the company has internal mechanisms of dealing with the same. The company has appointed auditors who are mandated to oversee the financial management of the company.

I have also looked at the Affidavits sworn by **Paul Ndichu** and **David Boro Matheri** in support of the Plaintiffs application. These affidavits appear choreographed and closely mirror the Plaintiff's affidavit. They add little value to the Plaintiffs' cause.

On the allegation that the 1st to the 3rd Defendants are in the office illegally, the Plaintiff has not given an example of someone who offered himself and was denied the opportunity. I have perused the minutes of the Annual General Meeting of **24th March 2012**. They are clear and procedural. The Plaintiff has not alleged that the said minutes are incorrect or that they have been doctored or interfered with. There are no recorded objections from either the Plaintiff or from any other member of the Company.

I have also considered the allegations of mis or non filling of the returns and other statutory records with the Registrar of Companies. If any such allegations are true, then that is not the basis upon which the orders sought herein can be granted.

Having considered the entire application, I am satisfied that the Plaintiff's suit is an afterthought and is actuated by malice and that he is merely disgruntled because he lost his bid for an executive position and in particular the Chairmanship – a position he had offered himself for election during the director's meeting and is now trying to drag internal board politics to the court. One would ask, if the Applicant was not happy with what took place on the **24th March 2012** why did he have to offer himself for election for Chairman during the director's meeting. Supposing he had won the Chair's position would he have filed this suit? In my view this suit is an abuse of the process of this court. The company is compromised of **117 members**. Out of these only **3** are complaining about the elections. An election result does not have to please everybody.

It has been submitted that the company is carrying out large agricultural business in over **150 acres** of land in Riuru and employs over **40 people** on a daily basis some of whom are permanently employed while others work on casual basis. For this court to interfere with the operations of such a company more serious and convincing grounds need to be advanced.

The upshot of all these is that the Notice of Motion application dated **26th April 2012** is dismissed with costs to the Respondents. I further direct that the company files a fresh notice of change of directors which clearly show the full names and particulars of all the seven directors, all of whom must be involved in the crucial decision making and running of the company in accordance with the Memorandum & Articles of Association of the Company and the Companies Act.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 28TH DAY OF SEPTEMBER 2012

E. K. O. OGOLA

JUDGE
PRESENT:

Ngala for the Plaintiff

Mwangi for the Defendants

Teresia – Court Clerk