



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 625 of 2009

NYAKINYUA INVESTMENTS LTD & ANR.....PLAINTIFF

VERSUS

NDUTA NDIRANGU CHEGE & 13 OTHERS..... DEFENDANT

RULING

Coram: Mwera J.

P. K. Njoroge for Plaintiffs

Mr Githongo for 1st – 13th Defendants

Ms Kabaria for Ms Langat for the 14th Defendant

The two plaintiffs, limited liability companies, filed a chambers summons dated 17.11.09 under Order 39 Rule 1, 2, 3, 9 Civil Procedure Rules for the orders:

- 1) That the defendants be restrained from dealing with any issuing of clearances involving all the properties of the plaintiff companies and their shareholders; and

- 2) That the defendants also be restrained from conducting the business of the plaintiffs.

The grounds put forth stated that the defendants were former officials and directors of the plaintiff companies until they were ousted in the elections. Mr Njoroge told the court that the elections were held on 4.9.07. One who claimed to be the chairman and director of the 2 plaintiff companies, Isaac Nderitu, swore an affidavit to the effect that he and 6 others were the bona fide directors of the plaintiff companies – a thing the Assistant Registrar of Companies certified on 20.3.08. That inspite of that change of the guard, the defendants had continued to run in a parallel way the affairs of the plaintiffs ie selling plots of lands, issuing clearance certificates over the shareholders' parcels of land and using a company secretary unknown to the members. That since 1998, the defendants have misused sh. 1. billion of the plaintiffs' money without accounting. The defendants were not officials of the plaintiff companies and have engaged in such acts and activities prejudicial to the shareholders and the 2 plaintiff companies.

Mr Githongo opposed the application as per the filed replying affidavit with annextures.

Mr Njoroge told the court that the 2 plaintiff companies were formed in 1971 and 1976 (the 1st and 2nd plaintiffs, respectively) to buy land and allocate portions thereof to their members. In a state of things that seemed also to surprise Mr Njoroge, the 2nd defendant (Gatundu) was formed to take care of the investments of the 1st plaintiff (Nyakinyua) even as both were limited liability companies! And that the 2 companies always had the same board of directors.

Elections were held on 4.9.07 and returns made to the Registrar of Companies. That office acknowledged on 20.3.08 that Isaac Nderitu, Hannah Muritu, Joseph Matheri, Njeri Gitee,

Wanjiku Kariuki, Henry Kinyua and Veronica Kimani were the 1st plaintiff's directors. And that since they replaced the 13 defendants, ie excluding the 14th defendant, the Land Registrar (Thika), they alone had the mandate to run the affairs of the plaintiff companies and not the defendants.

Counsel remarked that if the defendants did not accept that there were elections on 4.9.07 putting the seven (above) into office of directors, there had been no court challenge to that effect. Asked what specific acts eg selling of plots since they were "ousted" from office on 4.9.07 to demonstrate that they were acting without authority and thereby causing loss to the 2 plaintiffs, no material/evidence was produced but the court was referred to the supporting affidavit which claimed that plots were being sold illegally and the poor shareholders were being defrauded and shortchanged.

Referring to the grounds of opposition and the preliminary objection that the court directed ought to be argued along with other aspects of this chamber summons, Mr Njoroge seemed not quite informed about several cases that the defendants put forth claiming that the plaintiffs and the defendants were the same there, arguing over the same issues or substantially so. However, he told the court that HCCC 802/07 was withdrawn. But there was no evidence of notice to withdraw or an order to that effect exhibited. This particular case stood out because the court heard that its pendency had resulted in the letter by the Assistant Registrar of Companies dated 15.4.08 by which that office withdrew its acknowledgement on 20.3.08 that the 7 directors suing here on behalf of the 2 plaintiff companies, were in fact the bona fide directors of the plaintiffs.

Mr Githongo's position was that the letter of 20/3/08 did certify that the people stated therein were the plaintiff companies' directors. But on 15.4.08 that acknowledgement/certification was withdrawn because the plaintiffs had filed HCCC

802/07, seeking to bar the defendants from acting as their directors. So they were not directors at all and the defendants, former officials, were thus properly transacting the affairs of the plaintiff companies.

Reference was made to THIKA CMCC 336/08 which the plaintiffs filed while HCCC 802/07 was still pending – the court was told, with same parties and same prayers. That the Thika court declined to grant the injunction because of the pending HCCC 802/07.

Mr Githongo further argued that in essence those 7 people claiming to be the directors of the 2 plaintiffs were ordinary shareholders who had not shown why and how they were litigating this case in absence of the rest of the 5000 shareholders of the plaintiffs. It was claimed that with such concealment/non-disclosure, the plaintiffs were coming to court with “unclean hands”. And that there was no evidence of the defendants interfering with the plaintiffs affairs except to transact them as the bona fide directors.

On her part Ms Kabaria for the 14th defendant, the land registrar, told the court that in accordance with S. 16 of the Government Proceedings Act, no injunction can issue against the Government and here the land registrar was a government officer. Two cases were cited: MBA HCCC 14/05 Gabriel Mghendi Vs Registrar of Societies and NRI HCCC 133/06, Chogi’s Garage Ltd Vs Attorney General.

In this court’s view, the seven “directors” elected on 4.9.07 including Isaac Nderitu who swore the supporting affidavit to this chamber summons are not directors or officials of the plaintiff companies with the capacity to sue or litigate on behalf of the 2 companies at all. These are limited liability companies, though not clear in law how the 2nd plaintiff exists to take care of the investments of the 1st plaintiff, have their affairs run by appointed directors and other officials. Those form the human agency to run affairs of non – human

bodies like the 2 plaintiff companies. There is no evidence that the 7 directors ought to be in office. Initially they were recognized by the registrar of companies on 20.3.08 but when that office came to know that the plaintiffs had HCCC 802/07 pending on the aspect of who Vs who as directors, on 15.4.08 that acknowledgement/recognition was withdrawn, on condition that until HCCC 802/07 was determined. Mr Njoroge claimed that that suit was withdrawn. Mr Githongo did not agree. The court was not shown the notice and/or order withdrawing that suit as Mr Njoroge intimated. So HCCC 802/07 is deemed to be still pending and with that the directors through whom the 2 plaintiffs purport to bring this suit do not exist. And because the plaintiffs cannot exist in a vacuum of directors those in office before the elections of 4.9.07, and these are said to be the defendants, are still in office transacting the affairs of the plaintiffs.

Assuming that the defendants were in law not still in office ie following their “ouster” on 4.9.07, a claim that they were running the affairs of the plaintiffs in a parallel manner including selling plots of land was not proved. No evidence was placed before court that the actions and activities by the defendants since 4.9.07 were prejudicial to the plaintiffs and its shareholders. Accordingly, an injunction could not issue against them without laying a basis for it – executing prejudicial actions against the interests of the plaintiffs.

As for the 4th defendant, the land registrar, he is a government servant who executes government duties. And in the light of S. 16 Government Proceedings Act (Cap 40) as per the proviso therein, no injunction shall be granted by a court against the Government.

So all in all this application is dismissed with costs. Parties do well to fast track the suit for trial.

Orders made on 16/2/10

J. W. MWERA
J U D G E