



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 196 OF 2015

MOSES NJOROGE THARA.....1ST PLAINTIFF

WINFRED MWENDIA.....2ND PLAINTIFF

VERSUS

ACTAE DEVELOPMENT LIMITED.....1ST DEFENDANT

SIX SIXTY ONE GALU BEACH MGT LTD.....2ND DEFENDANT

MANJIT SINGH BRAR (in his own right pleading/acting

On behalf of SURINDER KAUR BRAR).....3RD DEFENDANT

NGINYA MUNGAI LENNEIYE

(in his own right and pleading/acting on behalf of

GUGU NOLWANDLE MAHLANGU).....4TH DEFENDANT

MOUNT KENYA ACADEMY LTD.....5TH DEFENDANT

KAPAN KUMAR K. PATEL &

SHREETI KALPAN PATEL.....6TH DEFENDANT

JAYANY KUMAR K. PATEL.....7TH DEFENDANT

JAGAJI HOLDINGS LIMITED.....8TH DEFENDANT

RICHARD JOHN BUCKLEY &

ALLISON JANE BUCKLELY.....9TH DEFENDANT

MEHBOOB MANSURALI H. TEJPAN.....10TH DEFENDANT

PIUSH R. PATEL.....11TH DEFENDANT

JULIO GARRIDO-MIRAPEIX (CERADES LTD.....12TH DEFENDANT

RULING

1. The 1st and 2nd defendants/applicants have moved this court by way of a Notice of Motion dated 11th November, 2019 premised upon

Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking the following orders:

1. That this Honourable Court be pleased to clarify its ruling dated 24th September 2019 and/or order made pursuant thereto on the same date by the Honourable C. Yano J, particularly;

a. Whether the said ruling and/or order issued pursuant thereto restrains a specific Extraordinary General Meeting that was meant to be held on 2nd March 2019 (which was already a past event as at the point of delivery of the Ruling) or whether the same applies to future extra ordinary general meeting(s) to be convened by the 2nd defendant;

b. Whether the said ruling and/or order issued pursuant thereto restrains future meetings, including annual general meetings, to be convened by the 2nd defendant; and

c. Whether, in light of the Order issued on 27th February 2019 by Honourable C. Yano J, the 2nd defendant is allowed to proceed to hold another extra ordinary meeting so long as it does not deliberate on the user of the suit property.

2. That the costs of this application be in the cause.

2. This application emanates from the decision of this court by a ruling delivered on 24th September, 2019. In that ruling the court allowed the plaintiffs' notice of motion application dated 20th February, 2019. The court specifically allowed the said application in terms of prayer 3 thereof which was an order to restrain the 2nd defendant, through itself or through its agents, workers, servants, employees, from convening the Extra Ordinary General Meeting of Six Sixty One Galu Beach Management Limited to be held on Saturday, 2nd March 2019 at 10.00 a.m. to deliberate on the agenda business set out in the notice convening the said meeting pending the hearing and determination of the main suit. It is the applicants contention that the said ruling is ambiguous and have invoked the inherent jurisdiction of the court to clarify the ambiguity in the court's ruling and/or order, where the meaning and intention of the court is not clearly expressed in the ruling and/or order.

3. Mr. Karega, counsel for the applicants submitted that the order restrained the Extra Ordinary General Meeting of the 2nd defendant which was to be held on a date which as at the date of the order had already passed. That the order was made on 28th October, 2019 seeking to restrain an EGM that was to be held on 2nd March 2019. Secondly, that the order restrained the 2nd defendant from deliberating on the agenda business set out in the notice convening the EGM of 2nd March 2019. The applicants are seeking a clarification as to whether the 2nd defendant is restrained from convening another EGM, especially in view of an earlier order made by the court on 27th February 2019 allowing the 2nd defendant to hold another EGM, but restraining the deliberations of any matters touching on the user of the suit property. This is because the notice which convened the EGM of 2nd March 2019 contained other matters which did not touch on the user of the suit properties.

4. The 3rd, 4th and 5th defendants are in support of the application.

5. In opposing the application, the plaintiffs filed a replying affidavit sworn by the 1st plaintiff on 1st February, 2021 in which they state that the basis of their suit is primarily based upon the permitted user of the development on the property known as KWALE/GALU KINONDO/661. It is the plaintiffs' contention that the order issued by this court on 24th September, 2019 is clear in its terms and requires no clarification as it was directed at the discussing of specific agenda items and not the holding of future general meetings. That the holding of general meetings is a statutory obligation and what the court restrained in the order of 24th September, 2019 is discussion of specific agenda items. The plaintiffs aver that the application is an abuse of the process of this court and yet another attempt to delay the hearing and determination of this suit. Ms. Kadima, learned counsel for the plaintiffs submitted that the ruling of 24th September, 2019 and the order of 28th October, 2019 are very clear and must be read in the context of the application dated 20th February, 2019 from which the said ruling stemmed from. That the application sought to restrain discussion of specific matters which touch on the substratum of the suit before court. It was submitted that at no time did that application seek to restrain further convening of extraordinary general meetings or other meetings which is a statutory requirement.

6. I have considered the application and the submissions made. Pursuant to the notice of motion dated 20th February, 2019 brought by the plaintiffs, this court in its ruling dated 24th September, 2019 allowed the said application in terms of prayer 3 thereof. In paragraph 17 of the said ruling, the court found that the dispute before court relates to the permitted user of the suit property. The injunctive relief sought by the plaintiffs and which were granted by the court in the ruling dated 24th September, 2019 was to restrain the 2nd defendant from deliberating on agenda that are sub judice to these proceedings and whose resolutions if passed may destroy the substratum of this suit. Having found so, I now turn to the two questions as framed in the notice of motion.

7. The applicants poses the first question thus:

“Whether the said ruling and/or order issued pursuant thereto restrains a specific Extraordinary General Meeting that was meant to be held on 2nd March 2019 (which was already a past event as at the point of delivery of the ruling) or whether the same also applies to future extra ordinary general meeting(s) to be convened by the 2nd defendant.”

8. While appreciating that the notice of motion dated 21st February, 2019 may not be heard and determined before the meeting scheduled for 2nd March 2019, this court on 27th February, 2019, ordered as follows:

“Considering that the application dated 21.2.2019 seeks to stop a meeting scheduled for 2.3.2019 and in view of the timelines given hereinabove, the application may not be heard and determined before the said meeting. Consequently, and to avoid the application being overtaken by events and be rendered nugatory, it is necessary that interim orders are granted. Accordingly, the meeting may take place but no deliberations on the subject matter of this suit may be made in the said meeting. For avoidance of doubt, there should be no discussion regarding the user of the subject matter of the suit property.”

9. Considering that the above order was made on 27.2.19 in the presence of all the parties in this suit, with due respect, I find the questions as framed in the motion herein mischievous. I say so because it is clear from the court record, and the ruling that this court did not restrain the 2nd defendant from convening any meetings, including general meetings or extraordinary general meetings. Nonetheless, since a need to clarify the pronouncement by this court has been sought, I reiterate that the ruling dated 24th September, 2019 and/or order made pursuant thereto did not restrain the 2nd defendant from convening any meetings so long as the deliberations did not touch on the user of the suit property. This position represents my understanding and answer to the questions posed before his court by the 1st and 2nd defendants in their notice of motion application dated 11th November, 2019.

10. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 24th day of May, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE