



REPUBLIC OF KENYA



Embakasi Ranching Company Ltd v Registrar of Companies & 14 others (Commercial Case E096 of 2019) [2023] KEHC 2889 (KLR) (Commercial and Tax) (13 March 2023) (Directions)

Neutral citation: [2023] KEHC 2889 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E096 OF 2019
DO CHEPKWONY, J
MARCH 13, 2023

BETWEEN

EMBAKASI RANCHING COMPANY LTD PLAINTIFF

AND

REGISTRAR F COMPANIES 1ST DEFENDANT
WANJIRU RICHU 2ND DEFENDANT
ANDREW OKUMU 3RD DEFENDANT
GABRIEL GITONGA 4TH DEFENDANT
JAMES MINGI NJOROGE 5TH DEFENDANT
SISTO TUTA MWAMBIA 6TH DEFENDANT
PENINAH NYAIREGI MWANGI 7TH DEFENDANT
JAMES NJEHU MBOCHI NJERU 8TH DEFENDANT
DAVID MWANGI WANDERI 9TH DEFENDANT
PHIDELI WANGARI 10TH DEFENDANT
JANE NJERI MUREGI 11TH DEFENDANT
CHRISTOPHER ELIUD KAKURU NGIGE 12TH DEFENDANT
JOEPH KINYANJUI NJENGA 13TH DEFENDANT
CHALRES KIHAGI THUAH 14TH DEFENDANT
JOSEPH JUAN KANANI 15TH DEFENDANT



DIRECTIONS

1. This matter came up for mention on February 22, 2023 for the parties to confirm compliance of directions issued on November 30, 2022 in respect of an application dated November 23, 2022 and take a date for ruling. There is also another application dated February 21, 2023 which is also scheduled for mention for parties to take directions.
2. Mr Aloo, counsel appearing for the proposed Interested Party indicated to court that he had served the application dated November 22, 2022 upon all parties and or their respective counsel but was yet to receive any responses from them as directed by court. He stated that he filed an Affidavit of Service to confirm this on February 13, 2023. Mr Aloo then stated that they had not filed their submissions as directed because none of the advocates appearing for the various parties in this suit had filed their response. He then sought the court to find that the application was not opposed and allow the same as presented.
3. In response thereto, Mr Muriuki, counsel for the Plaintiff admitted that he had been served with the application by the counsel for the proposed Interested Party. However, he went on to state that the reason he had filed a response is because he believed that the court in giving directions on the application was not appraised of the issue and actual position as pertains the matter. He pointed out that Hon. Justice Nzioka had directed that there would be no more applications to be entertained until this suit is heard and determined. And in that regard, Mr Muriuki pointed out that there were a number of applications which had been filed but had been suspended pending the determination of this suit.
4. Also, Mr Muriuki has pointed out that what is in issue are two sets of Directors, that is, the ones in the office and those who are in the CR-12 at the Registrar of Companies. He went on to point out that the proposed Interested Party is not among the two sets of Directors and that his interest in the matter is unknown/unclear, hence has no locus in the same.
5. He then stated that the matter is a part-heard with the Plaintiff having closed its case and what is left is the defence case. His question then is, why the proposed Interested Party wishes to come into the matter now? Is it to open up the case again. Mr Muriuki has then urged that the matter proceeds for hearing as earlier directed because a further delay in the matter is becoming more prejudicial and unequitable with a number of people coming up with activities and shenanigans to derail the activities of the Plaintiff Company.
6. Mr Muriuki's sentiments were supported by Mr Odhiambo, counsel for the 1st Defendant (The Registrar of Companies) who noted that like any other Company, the Plaintiff Company has a statutory obligation to conduct Annual General Meetings (AGMs) and file returns to that effect, but this has been hampered by the delay in the hearing of this matter. He has then urged that parties stop the filing of any other Miscellaneous Applications and injunction applications to enable an Annual General Meeting to be conducted for proper governance of such a Public Company.
7. Mr Macharia Gakuo, counsel for 3rd Defendant also expressed the desire and willingness to proceed with the case except for the challenges they have encountered from the rest of the Directors in terms of either death, filing applications or recusal by Judges. He joined Mr Muriuki in his sentiments that the matter was indeed coming up for hearing of the defence case but pointed out that they all had had to abandon their numerous applications which are pending before this court, so as to give way for the matter to proceed.



8. He has rebuffed the application for joinder by the proposed Interested Party, who he claims was not even a Director of the Company herein, hence has no interest in the current suit which is about who the legal Directors are and not an interest in the Plaintiff's premises. He even went on to inform court that his witness was elderly and sickly that it was quite inconvenient to keep bringing him to court.
9. On the other hand, Mr Kariuki, counsel for 4th – 15th Defendants on the other hand informed court that they had filed an application seeking to stay the proceedings in the matter so they can proceed to the Court of Appeal as his clients are aggrieved by the Orders of July 31, 2019 since they have caused confusion in the operation of the Company. He pointed out that they had filed a Notice of Appeal and another application before the Court of Appeal vide C.A Case No E049 of 2023.
10. Mr Kariuki, then went on to seek for directions on their application dated February 21, 2023, which they were yet to serve. He also indicated that they had just come on record and so could not comment on the issue of proceedings with the defence case.
11. Mr Kariuki, who was holding brief for Mr B. M. Musyoki, counsel for 4th to 15th Defendants indicated that they had not been served with a Notice of change of Advocates by Mr Kariuki and they sought that they be served first although they had no issue with that. However, Mr Karimi joined Mr Muriuki, counsel for the Plaintiff in his sentiments on the issue of the proposed Interested Party and indicated that they were equally ready to proceed with the hearing of the main suit.
12. Having listened to all the counsel for the parties, I wish to point out that the directions issued in the two applications dated November 23, 2022 and 21st February, 2023 respectively, were issued via the CTS and hence the court would not have had the benefit of the history/background and proceedings of the suit herein except for the material provided by the Applicants.
13. However, I have read the proceedings on record and confirm the history, background and the status of the matter as presented by Mr Muriuki, counsel for the Plaintiff, Mr Macharia-Gakuo, counsel for the 2nd and 3rd Defendants and Mr Odhiambo, counsel for the 1st Defendant.
14. Also, having listened to the counsel for the parties and read through the proceedings herein, the following issues arise for directions:-
 - a. Whether the application dated November 23, 2022 seeking joinder of an Interested Party should be allowed as the same is unopposed.
 - b. Whether directions should issue on the application dated February 21, 2023 in which the Applicant seeks stay of proceedings pending hearing and determination of CA No E049 of 2023.
 - c. Whether the matter should proceed for defence hearing and any other order and directions the court will deem fit to grant in the circumstances of this case.
15. With regard to the application dated November 23, 2022, in which the Applicant is seeking to be enjoined in this suit, I find that to govern the conduct of the parties herein, and so as to enable the suit proceed to hearing and determination, on July 30, 2019 Hon. Justice Nzioka issued several orders to remain in force pending the hearing and determination of this suit. Amongst these orders, was the following order;
 - (10) That in the meantime status quo on the ground being that the Directors in the office to remain in the office and the ones indicated in the CR-12 Form as Directors to remain as such.



16. It was also pointed out that Hon. Justice Nzioka directed that there would be no more applications to be entertained until this suit is heard and determined so that a number of applications filed herein have been suspended pending the determination of this suit. This position has not been rebutted by the other counsel who have filed the two applications that were scheduled for mention today. This being the case, I find that the orders issued by Hon. Nzioka have not been set aside on appeal or by review. The orders were made by a court of competent and concurrent jurisdiction as this court. For this court to allow the application dated November 23, 2022, it would amount to either varying or overturning the orders by Hon. Justice Nzioka when it has not been invited to review the same or sitting on its own appeal.
17. As for the application dated February 21, 2023, it clearly came out, and this was not rebutted by Mr Kariuki, that they have not served the Notice of change of Advocates and the said application upon the other parties and or their respective counsel. Mr Kariuki has also indicated that they have filed a Notice of Appeal and another application before the Court of Appeal being CA No E049 of 2023. In view of all these, I am reluctant to issue any directions on the said application now and direct that the Applicant serves the other parties and or their counsel and pursue the application before the Court of Appeal.
18. On the issue of the matter proceeding for defence hearing, from the sentiments of Mr Muriuki, counsel for the Plaintiff, Mr Macharia Gakuo, counsel for 2nd and 3rd Defendant, Mr Odhiambo counsel for 1st Defendant and Mr Karimi counsel for 4th – 15th Defendants, and the ruling by this court, there is all intention for the matter to proceed for defence hearing so that a determination on the pending dispute is reached. In my humble view, I believe it would be in the in everyone’s interest for this matter to proceed for hearing and a final determination on who are the proper and legal Directors of the Plaintiff Company are so that there can be proper governance mechanisms to enable the Company carry out its statutory obligations as a Public Company. With this happening, all other interests and issues will be put to rest or determined.
19. I therefore beseech all the parties and or their respective counsel herein to hold their emotions and allow the wheels of justice to move so that they can all achieve the long awaited justice and have their interests served.
20. In the resultant, the following directions issue:-
 - a. The application dated November 23, 2023 be and is hereby held in abeyance pending the hearing and determination of the main suit.
 - b. The Firm of Mr T Kariuki & Co Advocates to serve the Notice of change of Advocates and Notice of Motion application dated February 21, 2023 upon the other parties and their respective Advocates but consider pursuing the applications that is before the Court of Appeal vide CA No E049 of 2023.
 - c. In the meantime, the parties to set down the matter for defence hearing on priority basis.
 - d. Mention on March 21, 2023 before Hon. Justice Mabeya, the Presiding Judge, Commercial and Tax Division for re-allocation of the matter before another Judge in the Division since I am now based at Kiambu High Court.
 - e. Notice to issue upon the other parties.

It is so ordered.

DIRECTIONS DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MARCH, 2023.



D. O. CHEPKWONY
JUDGE

