



New Nyamakima Company Limited & 6 others v Macharia & 8 others (Civil Case 032 of 2021) [2021] KEHC 165 (KLR) (Commercial and Tax) (7 October 2021) (Ruling)

Neutral citation: [2021] KEHC 165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 032 OF 2021
F TUIYOTT, J
OCTOBER 7, 2021**

BETWEEN

**NEW NYAMAKIMA COMPANY LIMITED 1ST PLAINTIFF
JEREMIAH WAWERUMWANGI 2ND PLAINTIFF
JAMES KABERIA MUCHANGA 3RD PLAINTIFF
STEPHEN NGURE MWANGI 4TH PLAINTIFF
JULIUS MAINA KAHUTU 5TH PLAINTIFF
JOHNSON MUTHOGA MUCHORI 6TH PLAINTIFF
DAVID MUCHORI MACHARIA 7TH PLAINTIFF**

AND

**STEPHEN MAINA MACHARIA 1ST DEFENDANT
PATRICK CHEGE GIKUMA 2ND DEFENDANT
PAUL WAITHAKA MWANGI 3RD DEFENDANT
PETER MWANGI KAHUTU 4TH DEFENDANT
JOHN MUCHORI KAHUNGU 5TH DEFENDANT
DISHON MAINA KAGUNYA 6TH DEFENDANT
SAMUEL KURIA GATHOGO 7TH DEFENDANT
BERNARD KIRAGU KAMAU 8TH DEFENDANT
REGISTRAR OF COMPANIES 9TH DEFENDANT**



RULING

1. These proceedings have met objection on at least two fronts. That the entire suit offends the provisions of sections 238 and 239 of the *Companies Act*, 2015. Second, that it offends the provisions of sections 6 and 7 of the *Civil Procedure Act* because of the existence of Milimani Civil Suit No. E 376 of 2019 - New Nyamakima Company Limited & 4 others vs Jeremiah Waweru Mwangi & 5 others (hereinafter E376 of 2019).
2. By an Amended Complaint dated 5th February 2012, the 3rd to 7th Plaintiffs contend to be bona fide directors of New Nyamakima Company Limited (Nyamakima or the Company or the 1st Plaintiff) and challenge the registration of the 1st to 7th Defendants as directors. The Plaintiffs' case is that sometime in the year 2020 (perhaps 2019), it was brought to the attention of the 2nd – 7th Plaintiffs that some individuals had procured double registration of the company by purporting to register another entity under the same name. This triggered the filing of E 376 of 2019 which pitted the 2nd to 7th Defendants against many of the Plaintiffs here.
3. It is common ground that a consent was entered between the parties in 376 of 2019 directing the 2nd to 7th Plaintiffs to hold an Annual General Meeting under the supervision of the Registrar of Companies (the 9th Defendant). Subsequently, the 2nd Plaintiff wrote to the Registrar requesting the Registrar to appoint an officer to attend and supervise proceedings at the AGM. However, on 21st October 2020, the Registrar gave reasons why his office could not comply with the orders of the Court. In paragraph 13 of the Amended Complaint, the Plaintiffs aver:-

“(13) Among the reasons the 9th Respondent gave for declining to appoint an officer to supervise proceedings was that the Director General guidelines on the conduct of hybrid and virtual general meetings by companies pursuant to Section 876 of the *Companies Act* 2015, provide that private companies whose membership exceeds the prohibited numbers (Government Directors of public gathering to curb spread of COVID 19) can pass resolutions in lieu of meetings of members save where resolutions are being passed to remove a director or an auditor before the expiry of their term of office.”
4. That in a turn of events, the 1st to 7th Defendants colluded with the 8th Defendant who allegedly held himself out to be the company secretary of the Nyamakima and purported to conduct an extraordinary general meeting on 24th October 2020 in which the impugned directors were appointed. The Plaintiffs aver that the meeting was an illegality as it did not comply with the orders of Court in HCCC No. 376 of 2019 as it was called by strangers to the Company. Cited are the 1st, 2nd, 6th and 8th Defendants.
5. In this suit, the Plaintiffs seek Judgment as follows:-
 - a. A declaration that the meeting held by the 1st to 8th Defendants held on 24th October 2020 to remove and elect new members of the board was illegal and therefore null and void.
 - b. A declaration that any actions that flowed from the meeting held by the 1st to 8th Defendants after 24th October 2020 is illegal and therefore null and void.
 - c. A declaration that the actions of the 9th Defendant in effecting changes in the 1st Plaintiff's CR12/List of Directors was illegal and therefore null and void.



- d. A declaration that the 2nd to 7th Plaintiffs are the bonafide Directors of the 1st Plaintiff.
 - e. Costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to grant.
 - f. Such other or further relief as this Honourable Court may deem appropriate.
6. Simultaneously with filing the Plaint, the Defendants filed an application dated 12th January 2021 seeking certain injunctive relief.
7. Regarding the first objection, the plaintiffs, in their submissions, concede that the action by the company is an action brought under the auspices of sections 238 and 239 of the Companies Act. The provisions are:-

“ 238. Interpretation: Part XI

- (1) In this Part, "derivative claim" means proceedings by a member of a company—
 - (a) in respect of a cause of action vested in the company; and
 - (b) seeking relief on behalf of the company.
- (2) A derivative claim may be brought only—
 - (a) under this Part; or
 - (b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
- (3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
- (4) A derivative claim may be brought against the director or another person, or both.
- (5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.
- (6) For the purposes of this Part—
 - (a) "director" includes a former director;
 - (b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

239. Application for permission to continue derivative claim

- (1) In order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.
- (2) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—



- (a) shall dismiss the application; and
- (b) may make any consequential order it considers appropriate.
- (3) If the application is not dismissed under subsection (2), the Court—
 - (a) may give directions as to the evidence to be provided by the company; and
 - (b) may adjourn the proceedings to enable the evidence to be obtained.
- (4) On hearing the application, the Court may—
 - (a) give permission to continue the claim on such terms as it considers appropriate;
 - (b) refuse permission and dismiss the claim; or
 - (c) adjourn the proceedings on the application and give such directions as it considers appropriate.”

8. The trouble is, however, that the Plaintiffs have not sought the permission of Court to commence or continue with these proceedings and they obviously run afoul statute. Indeed, the Plaintiffs have surrendered to that fate but urge this Court to allow the rest of the Plaintiffs (save the company) to proceed with the action as a personal rights claim.

9. The second objection is that these proceedings are res judicata E 376/2019. I have understood the objection by the Defendants to be that the issues here are those in E 376 of 2019 which is still pending. The objection is therefore under the provisions of section 6 of the *Civil Procedure Act*.

10. The provisions of section 6 are similar to those of section 7 which are a codification of the doctrine of Res judicata only that in the latter, the previous suit will have been heard and determined. The principles to be applied in considering pleas under both provisions are similar only that under section 7, the Court will have to be satisfied that the previous suit has been heard and determined. In addition, on finding a contravention of section 6, a Court stays the suit while under section 7 the latter suit will be struck out.

11. The Court agrees with the Applicants’ counsel that the Court of Appeal decision in *Independent Electoral and Boundaries Commission vs Maina Kiai & Others Civil Appeal No. 105 of 2012* on res judicata is a restatement of the requirements under that doctrine. The Court held:-

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are tendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit
- b) That the former suit was between the same parties or parties under whom they or any of them claim
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.



- e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”

12. So does this suit breach the provisions of section 6?
13. The Applicants submits that the issue arising in E 376 is the infrequency of the AGMs of the Company while that in this suit is the legality of the meeting held on 24th October 2020 and a subsequent change of the list of Directors by the Registrar (the 9th Defendant.)
14. The Court has familiarized itself with the proceedings in E 376 so as to discover the real issues that arise there. Although the complaint raised in the plaint in E 376 is about the infrequency of AGMs convened by the Board of Directors of the company (then comprised of the Defendants in E 376), the true controversy is those proceedings is about the control and management of the affairs of the company. This is readily revealed by no less the Defendants there. In an affidavit of Jeremiah Waweru Mwangi sworn on 15th September 2020, he deposes:-

“The Plaintiffs/Applicants as a section of the membership of New Nyamakima Company Limited instituted this suit on the 15th of November 2019 seeking orders to principally compel the said Company’s Board of Directors to convene a General Meeting for purposes of holding elections of the Company.”

15. This affidavit was a response to a Motion of 13th August 2020 brought by the Plaintiffs in that case. In that application the Plaintiffs sought that the Company and other parties to the suit be directed to hold an AGM on 26th September 2020. A ground in support of the Motion is that:-

“It is critical that the 1st Plaintiff holds the Annual General Meeting not only to comply with the Court’s earlier order but to elect new office bearers to get end of the wrangles that presently hinder the smooth running of the affairs of the 1st Plaintiff.”

16. Clearly then the parties in E 376 recognize and acknowledge that those proceedings are about who, through the election of a Board of Directors, should control the affairs of the company. The issue culminated in a consent of 29th September 2020 entered in the following terms:-

1. THAT the 1st Plaintiff, New Nyamakima Company Limited, be and is hereby ordered to hold its Annual General Meeting in the next 45 days.
2. THAT the said Annual General Meeting be convened and held at Kihoya Primary School in Kangema Division.
3. THAT the Registrar of Companies be and is hereby directed to appoint an Officer from his office to attend and supervise the proceedings at the said Annual General Meeting.”

17. This suit is about the legality of the meeting of 24th October 2020 which was carried out ostensibly in compliance with the consent order of 29th September 2020 and whether, therefore, the election of the 1st to 7th Defendants as directors is valid.
18. This Court takes a view that in so far as both suits are about the control of the affairs and management of the company and the election of the directors of the Company, the issues raised in the two suits are directly and substantially in issue in both suits. The test in discovering the issues is by examining the pleadings and what the parties themselves agree to be the underlying controversy.



19. Are the parties the same? Without doubt the 8th and 9th Defendants were not parties to the former suit. Similarly, John Muthoga and Peter Mwangi Waweru who were Defendants in the former suit are not in this suit. Again, Stephen Maina Macharia, Paul Waithaka Mwangi and John Muchori Kahungu who are Defendants here are not parties in the other suit.
20. Yet it is not lost on this Court that the main protagonist in the two matters are shareholders or at least lay a claim to shareholding of the company. The issue in this matter is whether or not there was compliance with the Court orders of 29th September 2020. All shareholders of the company would have an interest in the compliance of that order because the AGM belongs to all members. Any member either supporting or opposing the AGM and its outcome would, in the view of this Court, be entitled to join the proceedings in E 376. It would be inefficient use of judicial time and resources if each shareholder was allowed to raise questions around the implementation of the consent order in separate suits. A multiplicity of suits aside, there could be a real danger that the courts entertaining the numerous suits could issue conflicting orders. I think that any of the litigants here who are not already litigants in the previous suit need to first demonstrate inability to join the proceedings in the suit in which the consent that is so central to this dispute was entered. Only then should they be allowed to proceed with this action.
21. It is the Plaintiffs' case that the 8th Defendant has held himself out as the Company secretary to the Plaintiff Company, while the 9th Defendant is the Registrar of Companies. To be noted is that the 9th Defendant was a subject of the consent as he was directed to implement its terms. As for the 8th Defendant, I agree with counsel for the Defendants that his role was that of an agent in lodging the statutory returns with the Registrar. I do not perceive that these two Defendants would have any difficulty joining Civil Suit E 376 if their role in the implementation of the consent was brought to question.
22. As to whether the parties were litigating under the same title, I am unable to agree with counsel for the Plaintiff that the phrase "litigating under the same title" in sections 6 and 7 refers to titles in a suit, that is whether, Plaintiff, Defendant or Interested Party. Rather it refers to the legal title or capacity upon which a party litigates (See *George W M Omondi & another v National Bank of Kenya Ltd & 2 others* [2001] eKLR). In this instance the main protagonist in both proceedings approach the Court as shareholders of Nyamakima.
23. Last, the competence of the Court in E 376 to hear and determine the common issue has not been doubted.
24. In the end, the Court has little difficulty holding that the proper forum for litigating all issues raised in this suit is E 376. And while this suit may not offend the provisions of section 6 of the *Civil Procedure Act* because of lack of an exact convergence of parties, still this Court has given reasons why it may serve the interests of justice if the parties who are not in E 376 should first attempt joinder to those proceedings.
25. For now, the name of the 1st Defendant is struck out from these proceedings. Second, the suit is hereby stayed pending the hearing and determination of E 376. Any party is at liberty to apply in respect of the stay order. Each party to bear its own costs of the proceedings regarding the Notice of Motion dated 12th January 2021.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE



DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT:

