



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HCCC NO. E376 OF 2019

NEW NYAMAKIMA COMPANY LIMITED.....1ST PLAINTIFF/APPLICANT

SAMUEL KURIA GATHOGO.....2ND PLAINTIFF/APPLICANT

PETER MWANGI KAHUTU.....3RD PLAINTIFF/APPLICANT

DISHON MAINA KAGUNYA.....4TH PLAINTIFF/APPLICANT

PATRICK CHEGE GIKUMA.....5TH PLAINTIFF/APPLICANT

VERSUS

JEREMIAH WAWERU MWANGI.....1ST DEFENDANT/RESPONDENT

JOHN MUTHOGA MUCHORI.....2ND DEFENDANT/RESPONDENT

STEPHEN NGURE MWANGI.....3RD DEFENDANT/RESPONDENT

PETER MWANGI WAWERU.....4TH DEFENDANT/RESPONDENT

JULIUS MAINA KAHUTU.....5TH DEFENDANT/RESPONDENT

DAVID MUCHORI MACHARIA.....6TH DEFENDANT/RESPONDENT

RULING

1. The ruling relates to a preliminary objection raised following the filing of a notice of motion application dated 22nd October 2019, by the plaintiffs (herein “applicants”). It is stated to be brought under the provisions of; “Order 40 rule 1 & 2, Order 20, Companies Act and all enabling provisions of law.

2. The Applicants are seeking for orders that as herein below reproduced:-

a) That a temporary injunction do issue restraining the respondents, whether by themselves, their agents and/or servants from interfering with the applicants’ running of affairs of the company known as New Nyamakima Company Limited till further orders of the court;

b) That pending hearing and determination of this suit, the respondents whether by themselves, their agents and/or servants be restrained from interfering with the plaintiff’s running of affairs of the New Nyamakima company Limited;

c) That Officer Commanding Station (OCS) Kamukunji police station do ensure compliance of the order;

d) That an audit report be done on financial affairs of the New Nyamakima company Limited; and

e) *Any other relief the county may find fair and just to grant.*

3. The applicants filed the subject application alongside a plaint of the even date; praying for judgment against the defendants (herein “the respondents”) and seeking for orders as here below reproduced;

a) *An injunction restraining the Defendant, whether by themselves, servants and/or agents from interfering with the 2nd 3rd and 4th 1st plaintiffs running of the 1st plaintiff that is, New Nyamakima Company Limited.*

b) *That an order that accounts be taken forthwith of all financial affairs of the New Nyamakima Company Limited..*

c) *That the defendantS do refund whatever amounts they have unlawfully taken from the New Nyamakima Company Limited*

d) *Costs.*

4. It also suffices to note that, before the hearing of the subject notice of motion application. The Applicants filed another notice of motion application dated 15th November 2019, brought under the provisions of; Order 40 rules 1, 2, 3 & 7 Order 51 of the Civil Procedure Rules, 2010, section 1A & 3A of the Civil Procedure Rules, High Court Commercial Division Practice Rules and all enabling provisions of the law

5. The Applicants are seeking for orders that:

a) *After ex parte hearing, a temporary injunction be granted to restrain respondents from obtaining or causing withdrawal of funds from the 1st applicant’s agents Messrs Masterways Properties Limited pending hearing of the application inter parties.*

b) *That after ex parte hearing, a temporary injunction be granted to restrain respondents from obtaining or causing withdrawal of funds from the 1st applicant’s agents; Messrs Masterways Properties Limited pending hearing and determination of the application and suit herein and/or until further orders of the court.*

c) *That the court be inclined to stop the unlawful Annual General Meeting pending hearing of the application or until further orders of the court.*

d) *That in the alternative, the court to order the 1st Applicant’s agent; Messrs Masterways Properties Limited to deposit all monies it holds for the 1st Applicant in court or in an interest earning account pending the hearing and determination of the suit.*

e) *That costs of the application be provided for.*

f) *That the Honourable Court do grant further or any orders that it may deem fit to grant in the interests of justice.*

6. In addition a document described as “a replying affidavit” dated 19th November 2019, sworn by Jeremiah Waweru Mwangi, the Chairman and Director of the “plaintiffs/applicants” was filed. It is deposed therein that; one Peter Mwangi Waweru; the 4th Respondent herein is deceased.

7. However the defendants/respondents filed a notice of preliminary objection dated 19th November 2019, based on the grounds that:

a) *That 2nd to 5th plaintiff/applicants have no capacity to sue on behalf of the 1st plaintiff.*

b) *This suit contravenes section 6 of Arbitration Acts on the grounds that article 31 of the plaintiff’s Articles of Association states that disputes ought to have in the first instance be referred to Arbitration to a single Arbitrator and if they cannot agree refer the same to two arbitrators appointed by each of the parties in difference and hence this honourable court lacks jurisdiction.*

c) *That this notice of motion is vexatious, bad in law and incurably defective, nonstarter and premature and in law you cannot restrain a stranger who is not a party to the suit.*

d) *That the alleged special general meeting held on 12th October 2019, contravenes section 277(1) of the Companies Act on the ground that notice was not sent to the current secretary of the company who is mandated to call for the said meeting.*

e) *That prayer number (4) stopping of Annual General Meeting is contrary to the company’s law.*

8. Finally, the respondents filed a joint statement of defence dated, 4th February 2020, averring that they are the bona fide directors of the 1st Plaintiff herein.

9. Be that that as it were the parties agreed that the court should determine the preliminary issue as to whether it has jurisdiction to hear this matter in view of the arbitral clause under the provisions of Article 31 of the 1st Plaintiff’s “Articles of Association”. I have considered the said article31 of the Articles of Association and I find that it states as follows;

“Whenever any differences arises between the Company on the one hand and any of the members, their executors, administrators, or assigns on the hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises, or to these Articles or to any statutes affecting the Company, or to any of the affairs of the Company, every difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, or whom one shall be appointed by each of the parties in difference.”

10. The key issue from these provisions is that, the dispute to be referred to arbitration must be between the “the Company on the one hand and any members, their executors, administrators, or assigns on the hand”. However it is clear from the pleadings herein that the dispute does not involve the company. It is between two groups of persons, each purporting to be the lawfully elected directors of the 1st plaintiff/company.

11. Even then the 1st plaintiff cannot even be a party to this suit without evidence of a board of directors’ resolution authorising the suit to be instituted. Neither is this a derivative suit. Thus on that ground alone the company is not in this matter properly as a party thereto. The matter cannot therefore be a subject of arbitration under article 31 of the Articles of Association.

12. I therefore, decline to find that the court has no jurisdiction to hear and determine the subject matter herein. The subject preliminary objection is thus dismissed as far as it relates to that issue.

13. It is so ordered

Dated, delivered and signed in court on this 12th day of February 2020.

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Ndung’u holding brief for Mr. Kabathi for the plaintiffs

Mr. Waiyaki for the defendants

Dennis----- Court Assistance