



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. 126 OF 2015**

**MUGUGA INVESTMENT COMPANY LIMITED.....1<sup>st</sup> PLAINTIFF**

**DAVID NJANE RUIYI.....2<sup>nd</sup> PLAINTIFF**

**ESROM NGUGI MIRINGA.....3<sup>rd</sup> PLAINTIFF**

**VERSUS**

**NICHOLAS KABUCHO MURIMI.....1<sup>st</sup> DEFENDANT**

**JOE GATHU KIMEMIA.....2<sup>nd</sup> DEFENDANT**

**JOSEPH KARANJA MBUGUA.....3<sup>rd</sup> DEFENDANT**

**PAUL KINUTHIA MBURU.....4<sup>th</sup> DEFENDANT**

**FRANCIS KAGWE MBAYA.....5<sup>th</sup> DEFENDANT**

**ERASTUS GATHAGE GATU.....6<sup>th</sup> DEFENDANT**

**DAVID MUROKI KAGWE.....7<sup>th</sup> DEFENDANT**

**NUNI GENERAL TRADING COMPANY LIMITED.....8<sup>th</sup> DEFENDANT**

**JUDGMENT**

1. Incorporated on 17<sup>th</sup> May 1974, Muguga Investment Company Limited (Muguga or the 1<sup>st</sup> Plaintiff or the Company) is lately bedeviled with wrangles over its leadership and control. This dispute is partly about those wrangles and partly about a lease allegedly granted to Nuni General Trading Company Limited (the 8<sup>th</sup> Defendant or Nuni Company) over some Company property.

2. At the outset of these proceedings, presented by way of Plaint on 18<sup>th</sup> March 2015, David Ngare Ruiyi (Ruiyi) and Estom Ngugi Miringa (Miringa) joined the Company as the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs respectively. In the course of the proceedings and some days after testifying, Miringa passed on and at the instance of a Notice of Motion dated 19<sup>th</sup> June 2019, the Court permitted that he be substituted by Gordon Miringa Ngugi (a holder of Limited Grant *ad litem* to his estate) as the 3<sup>rd</sup> Plaintiff.

3. The Plaintiffs' case is that, for some time, until 19<sup>th</sup> December 2014 the 1<sup>st</sup> to 7<sup>th</sup> Defendants were directors of the company. Emphasized throughout, nevertheless, is that the Plaintiffs hold that the seven are not shareholders of the company.

4. The Plaintiffs aver that, in the time of the tenure as directors, the 1<sup>st</sup> to 7<sup>th</sup> Defendants breached their fiduciary duty to the Company. The

particulars are set out in paragraph 6 of the Amended Plaintiff and reworded as follows:-

- a) That they, in concert with the 8<sup>th</sup> Defendant, and without the knowledge and approval of the shareholders granted a long term lease over the premises to the 8<sup>th</sup> Defendant notwithstanding that premises were already leased to other tenants
- b) The impugned lease involved the demolition of a building which required the approval of the shareholders which had not been procured
- c) That the said Defendants had failed to disclose the terms of the lease to the shareholders before its execution
- d) That the said arrangement put the property of the Plaintiff at a risk
- e) The said Defendants have misapplied funds of the Company.

5. It is further alleged that even after termination of their directorship on 19<sup>th</sup> December 2014, the seven continued to act without authority of the Company and failed to handover the Company documents in their custody and to execute documents to facilitate the handover of Bank accounts of the Company. Further that they misapplied funds of the Company. They are also accused, in concert with Nuni Company, of filing returns with the company registrar showing that Mohamed Abdi Sale and Swale Mohamed Sale (said to be directors of Nuni Company) had been allocated 50 shares each in the Company.

6. The eight Defendants are also charged for colluding to frustrate and forestall termination and/or challenge of the impugned lease by applying for, and on 26<sup>th</sup> February 2015 procuring, approval for redevelopment of the premises from the Nairobi City County. Again that on 16<sup>th</sup> March 2015, they obtained authority of the County to demolish the Company premises.

7. Lastly, that the Defendants have without authority issued notices to the tenants of the Company occupying the premises to vacate thereby prejudicing rental income derived from the building.

8. In respect to the lease to Nuni company, it is contended that it was without the approval of the shareholders of the Company and so too with the alleged issuance of shares to new shareholders. The Plaintiffs assert that the action by the 1<sup>st</sup> and 7<sup>th</sup> Defendants are ultra vires, voidable and that they should be held personally liable for any loss resulting to the company.

9. Ultimately the Plaintiffs seek the following orders:-

- a) An order of injunction restraining the Defendants themselves, their agents, servants, and or employees from carrying out any work on the Plaintiff's property L.R 36/499/VII in Eastleigh and or demolishing the existing developments and or otherwise interfering with the Company's possession thereof.
- b) A declaration that the lease granted to the 8<sup>th</sup> Defendant is voidable at the instance of the Plaintiffs.
- c) An order for the Defendants to deliver up to the Plaintiffs all documents of title of the Company in their custody together with full accounts of all monies they had received and or expended within 14 days of making the order.
- d) A declaration that the 1<sup>st</sup> to 7<sup>th</sup> Defendants are personally liable for any loss the Plaintiffs may incur as a result of the said lease to the 8<sup>th</sup> Defendant.
- e) An order for the 1<sup>st</sup> to 7<sup>th</sup> Defendants to deliver an account of the Company assets.
- f) Special and general damages.
- g) Costs of the suit.

10. The 1<sup>st</sup> to 7<sup>th</sup> Defendants filed a joint statement of Defence and mounted a counterclaim. In their Defence they deny any allegation of wrongdoing and maintain that their term of office as Directors was not terminated on 19<sup>th</sup> December 2014 and that they are Directors to date. They, in deed, aver that neither Ruiyi nor Miringa are Directors of the Company and the two do not have the authority to institute these proceedings on behalf of the Company.

11. Regarding the lease to Nuni Company, the 1<sup>st</sup> to 7<sup>th</sup> Defendants assert that as Directors, they were empowered by the Company and a board resolution made in 2008 to develop one of the properties of the Company being LR No. 36/499/VII. Pursuant to which, with full knowledge of the members of the Company and despite this not being a requirement, negotiated and executed a lucrative lease. It is averred that the agreement was more than for mere demolition and that it secured the interest of the Company on the property.

12. While setting out the terms of the agreement in the Defence, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that the shareholders of the Company were well aware of those terms and amount paid or to be paid pursuant to the lease. The said Defendants deny misapplying these or any other funds or assets of the Company.

13. The 1<sup>st</sup> to 7<sup>th</sup> Defendants take the position that this suit is brought for ulterior motive and instigated by some purported current tenants in the suit premises who have instituted ELC Case No. 1566 of 2014 (Hussein Isaak, Yebyo Mebrahtu Tsadik v Muguga Investment Company Ltd, Nuni General Trading Company Limited) and that these proceedings are merely intended to protect their unlawful occupation of the suit property and to prevent actualization of the lease granted to Nuni Company.

14. As regards shares allegedly issued to the Sales, the 1<sup>st</sup> to 7<sup>th</sup> Defendants deny that any such return was ever filed by them with the Registrar of Companies.

15. The 1<sup>st</sup> to 7<sup>th</sup> Defendants aver that they are all shareholders and/or immediate family members of deceased founding members of the Company and therefore have an interest in the assets of the Company.

16. It is common ground that on 20<sup>th</sup> December 2016, and on an appeal from the decision of Justice Gikonyo herein, the Court of Appeal in Civil Appeal No. 294 of 2016 consolidated with 17 of 2016 Nicholas Kabucho Murimi & 6 Others –vs- Muguga Investment Company Limited & 3 others ordered: -

“26)As aforesaid, an AGM is a normal function, nay a statutory requirement of a company .Holding an AGM of shareholders cannot hurt anybody ;it is a forum where all the parties will have an opportunity to express their views and to exercise their right to choose their directors .As time has passed since the order no(d) was issued by the High Court, we are inclined to extend the time issued by the High court by 21 days from the date of delivery of this ruling for the 1<sup>st</sup> to the 7<sup>th</sup> appellants to convene a Special General Meeting as ordered by the High Court , failing which the shareholders hall constitute a Special General Meeting shall at venue to be communicated to all the shareholders and the agenda shall be the election or appointment of Directors. Due to the ranging acrimony between the parties, it is further ordered that the said meeting shall be conducted under direction and supervision of the Registrar of Companies.”

17. The 1<sup>st</sup> to 7<sup>th</sup> Defendants state that the said meeting has never been convened by the Registrar of Companies because issues surrounding the share register of the Company arose and that on 27<sup>th</sup> January 2017 the registrar informed the parties that he would notify them of the way forward and on a new date for the meeting ordered by Court. That notwithstanding the above, Ruiyi purported to call for a special meeting of the Company on 15<sup>th</sup> March 2017 for purposes of appointment of directors.

18. The 1<sup>st</sup> to 7<sup>th</sup> Defendants aver that the said meeting which was scheduled to take place at Kena Mothers Garden Muguga did not take place and they were surprised when their advocate received a letter dated 17<sup>th</sup> May 2017 from the Registrar of Companies responding to a letter dated 26<sup>th</sup> April 2017 from the Plaintiffs’ lawyers which was seeking changes in respect to the Company.

19. In the end, the 1<sup>st</sup> to 7<sup>th</sup> Defendants seeks the following prayers:-

- i. The Plaintiff’s suit be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff save for our Counterclaim herein be allowed.
- ii. A declaration that the actions of change of directorship by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff and by the Registrar of Companies and its agents, servants to alter or interfere with the 1<sup>st</sup> Plaintiff Company was illegal and null and void.
- iii. A Declaration that the 1<sup>st</sup>-7<sup>th</sup> Defendants are the rightful and legal directors of the 1<sup>st</sup> Plaintiff Company
- iv. An Order setting aside the decision of the Registrar of companies purporting to alter the directorship of the 1<sup>st</sup> Plaintiff Company contained CR12 form referenced as c12621 dated 29<sup>th</sup> May 2017,
- v. A declaration that the contents of the aforesaid CR 12 was irregular, null and void *ab initio*.
- vi. An Order be made that the 1-7<sup>th</sup> Defendants do convene a Special General meeting for purposes of election or appointment of Directors as directed by this Court and the Court of Appeal on 20<sup>th</sup> December 2016.
- vii. Costs

20. The 8<sup>th</sup> Defendant, Nuni Company, defends its lease and avers that it entered it after mutual negotiations with the Company. It states that it gave good consideration to the Company to wit:

- i. Rent increment from Kshs. 640,000.00 to 1,000,000.00.
- ii. Payment of advance rent of Kshs. 24,000,000.00.
- iii. The 8<sup>th</sup> Defendant was to erect a state of art shopping mall.
- iv. The 8<sup>th</sup> Defendant was to provide a bank guarantee of Kshs. 30,000,000.00 until completion of works.
- v. The 8<sup>th</sup> Defendant was to give an interest free loan of Kshs. 15,000,000.00 to the Company for construction of rental houses at a

plot of the Company's choice.

21. Nuni Company asserts that it has met all its obligations as envisaged and covenanted under the lease agreement.
22. As to whether or not its agreement was approved by or disclosed to the shareholders of the company, Nuni argues that the matter is an internal management issue that has no bearing to the instrument duly signed and registered between it and the Company. That in any event the minutes of the Company show that it had been resolved that the subject property be brought down and a modern building be erected thereon.
23. Nuni Company states that Mohamed Abdi Sale and Swale Mohamed Sale are strangers to it and have never acted for or represented its interests.
24. In response to the 1<sup>st</sup> to 7<sup>th</sup> Defendants Counterclaim, the Plaintiffs filed a Defence on 7<sup>th</sup> December 2018. They state that this action is brought by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as the Directors of the Company and also in their personal capacities as shareholders.
25. The Plaintiffs contend that the 1<sup>st</sup> to 7<sup>th</sup> Defendants deliberately failed to comply with the orders of the High Court and Court of Appeal with a view to clinging onto their previous positions as directors of the Company so as to protect or conceal their illegal and irregular personal gains and interests.
26. The Plaintiffs aver that the alleged controversy in regard to the share register was orchestrated by the 1<sup>st</sup> to 7<sup>th</sup> Defendants to scuttle the intended lawful election of Directors ordered by Court. The Plaintiffs take the position that there has never been a dispute as to the voting rights and number of eligible voters.
27. The Plaintiffs state that a special General Meeting was indeed held by the shareholders on 15<sup>th</sup> March 2017 and the same was legal and verified by the Registrar of Companies. Further, that the change of Directorship of the Company was done in the full spirit and intention of the orders of the Court and there is full compliance with the orders requiring the shareholders to appoint interim Directors.
28. At the hearing, which commenced on 31<sup>st</sup> January 2019 and proceeded on various staggered days, a total of six (6) witnesses were heard Miringa (PW1), Joseph Kibira Muiruri (PW2), Hussein Isaak Hassan (PW3) and Yebyo M. Tsadik (PW4) on behalf of the Plaintiffs. Nicholas Kabucho Murimi (DW1) spoke for himself and the 2<sup>nd</sup> to 6<sup>th</sup> Defendants. While Hussein Ibrahim Nuni (DW2) testified on behalf of Nuni Company.
29. Although the evidence of the witnesses was without doubt lengthy and made reference to several bundles of documents, it is clear to this Court that the very pointed issues that arise from determination only require a rehash of a small portion of the evidence. For that reason, the Court will evaluate the evidence that is relevant in resolving the issues that have arisen.
30. The issues are:-
  1. Whether the Company Board of Directors had power to grant the lease to the 8<sup>th</sup> Defendant.
  2. Whether the lease granted to the 8<sup>th</sup> Defendant is voidable for any other reason?
  3. Are the 1<sup>st</sup> to 7<sup>th</sup> Defendants guilty of misapplying Company funds and if so are the Plaintiffs entitled to an order of accounts?
  4. Whether the meeting of the Company said to have been held on 15<sup>th</sup> March 2017 was in compliance of the orders of this Court and of the Court of Appeal?
  5. Whether the persons purportedly elected or appointed as Directors in the said meeting are lawfully in office?
  6. Are the Plaintiffs entitled to the orders sought?
  7. Are the Defendants entitled to the Counterclaim?
  8. What is the appropriate order on Costs

#### The lease

31. The lease between the company and the 8<sup>th</sup> Defendant was entered into and signed on 26<sup>th</sup> November 2014 (P. Exhibit 1 Pages 78 to 87). The lease was duly registered against the title to LR. No. 36/499/VII on 3<sup>rd</sup> December 2014 (See certificate of postal search P. Exhibit 1 Page 4).
32. Whilst the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs on the one part and the 1<sup>st</sup> to 7<sup>th</sup> Defendants on the other are not agreed as to who are the current directors of the Company, there is consensus that at least up to 19<sup>th</sup> December 2014, the 1<sup>st</sup> and 7<sup>th</sup> Defendants were Directors of the Company. Common ground, as well, is at the time of execution of the lease and its registration the seven held the said Directorship.

33. As I understand it, while the Plaintiff's case is not that the 1<sup>st</sup> to 7<sup>th</sup> Defendants were not Directors at the time of the contract with the 8<sup>th</sup> Defendant, the substratum of their complaint is that the contract needed approval of the shareholders which had not been given. In this regard the Plaintiff's Counsel points out to the evidence of Miringa. Miringa testified:-

"We did not approve demolition. We approved renovation".

34. In submitting further on this, Counsel for the Plaintiff argued that even renovations and developments had to be permitted by the Annual General Meeting of the members/shareholders of the company. To buttress this, Counsel points to the minutes of a Special Committee Meeting held on 15<sup>th</sup> May 2008 (P. Exhibit 3 Pages 128-129). The minutes of that meeting has the following entry:-

"The committee observed that the permission to develop this premises was given at an annual general meeting".

It was then argued that shareholders had a say and had a legitimate expectation to be consulted if any of their investments were to be given away for demolition.

35. Counsel further submitted as follows:-

"On cross-examination DW1 was shown several minutes whereupon he conceded to the fact that approval of the members of the 1<sup>st</sup> Plaintiff was always sought before decisions are made by the board of directors in relation to investments by the 1<sup>st</sup> Plaintiff."

36. This Court has read the evidence of DW1 keenly and to be fair to him he does not concede that the approval of members was required before decisions were made by the board in respect to investments. He, for instance, testified:-

"I did not need consent of shareholders to reconstruct the house".

37. One of the minutes shown was that of 15<sup>th</sup> May 2008 alluded to earlier (**see paragraph 34** above) to which he responds:-

"This record is correct it was not a practice to get permission".

This Court takes the answer to be that while the committee had observed that permission to develop had been granted at an annual general meeting, it was nevertheless not the practice.

38. The witness was also shown minutes of the Annual General Meeting of the Company of 16<sup>th</sup> December 2007. One of the minutes reads:-

"Mr. J. M Kinuthia requested members to allow future developments. This request was passed by 32 members".

Responding to this the witness answered;

"There was a request passed by members. It was not a practice to seek permission".

39. In his written statement at paragraph 8 the witness had stated:-

"On 15<sup>th</sup> May 2008 a meeting was convened to discuss the proposed major renovation of the property. The Board of Directors observed that the permission to develop the property was granted during an annual general meeting".

40. What is the response by the Defendants? The 1<sup>st</sup> to 7<sup>th</sup> Defendants point to the Memorandum of Association of the Company as empowering the Company and its directors to lease, construct, alter and/or pull down the building. Further that Section (8) of the repealed Companies Act (Cap 486) provided that the acts of a Director shall be valid notwithstanding any defects that may afterwards be discovered in his appointments. The Court is also told that the Articles of the Company permitted the business of the Company to be managed by its Directors.

41. It is also argued, on their behalf, that the Directors passed a resolution based on an earlier resolution of 24<sup>th</sup> January 2008 which, it is submitted, had approved that the old building erected on LR No. 36/499/VII be demolished and be replaced by a new shopping mall.

42. As for Nuni Company it states that the 1<sup>st</sup> and 7<sup>th</sup> Defendants were directors of the Company at the time of signing of the lease and that they were empowered to carry out the objects of the Company which included developing, altering and pulling down any buildings. Nuni then leans on the principle set out in the following passage in Royal British Bank –vs- Turquand (1856) 6 EI &bi 327;119 ER 886:-

"The deed allows the directors to borrow on bond such sum or sums of money as shall from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed and the replication shows a resolution passed at a general meeting, authorizing the directors to borrow on bond such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and Act of Parliament; but the resolution does not define the amount to be borrowed. That

seems to me enough.....We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here on reading the deed of settlement, would find, not a prohibition from borrowing but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appear to be legitimately done."

43. As the Court turns to determine whether the Directors had legal authority to deal in the manner in which they did with Nuni Company, it has to be pointed out that at the time of the impugned lease agreement, the law applicable was the now repealed Companies Act (Chapter 486). The matter has to be determined in the context of the past statute.

44. Once it is accepted, and there is a consensus on this, that the 1<sup>st</sup> to 7<sup>th</sup> Defendants were directors at the time of the contract then only two issues arise in respect to the legality of the contract. Were they empowered to grant the long term lease which also involved demolition and rebuilding of the premises? If not is Nuni nevertheless protected by the *Turquand* Doctrine?

45. On powers and duties of Directors, the Articles of Association of the Company have a single provision which is in Article II. It reads-

"A Director may vote as a Director in regard to any contract or arrangement in which he is interested or upon any matter arising there out, and if he shall so vote his vote shall be counted, and he shall be reckoned in estimating a quorum when any such contract or arrangement is under consideration, and paragraphs (2) and (4) of regulation of Table A, Part 1, shall not apply to the Company."

46. That however is not the end of the matter because Articles 1 and 2 import certain regulations of the template regulations of the Repealed Act into the constitution of the Company. Articles 1 and 2 reads:-

1. Subject as hereinafter provided the Regulations contained or incorporated in Part 11 of Table A of the First Schedule to the Companies Act Chapter 486 of the Laws of Kenya,(hereinafter referred to as "Table A, Part 11") shall apply to the Company.

2. Regulations 3,4,24,53,75,79 and 136 of Part 1 of the Table A in the said Schedule ( hereinafter referred to as "Table A, Part 1) shall not apply to the Company, but the Articles hereinafter contained, and the Regulations 2 and 4 to 5 inclusive of Table A, Part 11 subject to the Modifications hereinafter expressed, shall constitute the regulations of the Company

47. Part II of Table A is incorporated (except where excluded) as part of the Articles of Association of the Company. Part II is on regulations for the management of a private company limited by shares. Regulation 1 is of great importance as it provides as follows:-

"The regulations contained in Part I of Table A (with the exception of regulation 24 and 53) shall apply".

With this singular Regulation a raft of Regulations contained in Part I of the Table A are applied to Part II.

48. Regulation 80 of Part I (which is not excluded) is on powers and duties of directors and is by dint of Article 1 and 2 of the Articles of Muguga Investment Company Limited applicable to the Company:

" 80. The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made."

49. Explicit from these provisions is that the Directors of Muguga Investment Company Limited would be the managers of the business of the Company and are empowered to exercise all such powers of the Company as are not by the statute or regulations required to be exercised by the Company in a general meeting.

50. Now, clause 3 of the Memorandum of Association of Muguga Investments is on the objects for which the company was established and sub clauses (b) and (c) provide:-

"b)To develop the resources and turn to account the lands, building and rights for the time being and in particular by laying out and preparing land for building purposes ,constructing ,altering, pulling down, decorating, maintaining, furnishing ,fitting up and improving buildings, and by letting on building leasing or building agreements, and arrangements of all kinds, with builders ,tenants and others.

c) To let on lease or on hire the whole or any part of the moveable or immoveable property of the Company, on such terms as the Company shall determine"

51. Not in the Articles of Company itself or by statute or regulation is the exercise of this object preserved for the general meeting of the Company and so by dint of Regulation 80 reproduced above, the Board of Directors of Muguga had power to lease out the premises on LR. No. 36/499/VII. It also had power to authorize the pulling down of the building on the land and construction of another. This Court so holds because although it was argued by the Plaintiffs that the practice had been for such developments to be placed for approval before a General meeting, this Court was not shown any resolution of a general meeting that had preserved such power to itself and not the directors.

52. And to be fair to the 1<sup>st</sup> to 7<sup>th</sup> Defendants, the Court has noted that at least one resolution of the Board of Directors on development of its property was made without looking to a general meeting for approval. See minutes of the meeting of 24<sup>th</sup> January 2008 (D Exhibit Volume 1 Pages 218 to 220). There, the Board of Directors decided;

“After some consultation, the board members resolved that if there shall be any investment, the Company shall begin with developing Eastleigh A”

53. From the evidence available it seems that there was occasion when the Board would seek the approval of the Annual General Meeting to carry out development of Company property and on other occasion it would not. But as stated earlier such approval was not required by the Articles and Memorandum of Association of the Company or Statute. Further there was no evidence that such authorization was so routinely sought as to take root as a practice or tradition of the Company. Yet before making a conclusion on the matter, the Court must consider the significance of two meetings in regard to the controversial lease.

54. The evidence of Kibira was that shareholders of the Company were invited by the Directors to visit the suit premises on 20<sup>th</sup> November 2014. That in the visit and meeting that ensued, the proposed demolition was deliberated on and the shareholders resolved that the issue be discussed comprehensively during the Annual General Meeting of the Company since members were not in agreement with the idea. But so as to pull the rug under the feet of the AGM, the Directors hurriedly entered the impugned lease on 26<sup>th</sup> November 2014.

55. Kabucho, on the other hand, stated that the purpose of the meeting was to share the vision of the Board on the development project and a majority were appreciative of the efforts of the Board and were pleased with the Plans.

56. The Court needs to establish two issues in respect to that meeting. What was the purpose of the Meeting? Was it for the Board to inform the shareholders of the intended development or was it to seek their approval? Second, what was the outcome of the Meeting? On this the Court turns to the minutes (P Exhibit 3 pages 49 to 52) of that meeting whose accuracy has not been contested.

57. In respect to the Eastleigh property, the Minutes show the following;

“At this juncture the Chairman called the meeting to order. He sought the views from members on the status of this house. The Chairman reminded the Members about an earlier resolution by the Board of Directors in 2008 to put up 5 storey building which the council had given approval. The plan was displayed to the members.”

58. The minutes show that 11 members gave their views. 8 members supported the proposed developments while only 2 opposed. One of the two was Miringa. One other member, Daniel Karanja, wanted to know whether the Directors had sourced enough funds for the project. And in making his contribution, John M. Kinuthia observed;

“...that the previous Board built Eastleigh B without consulting the shareholders....that the Chairman consulted out of sheer courtesy”

59. At the end of the discussion, the Minutes show that the idea was put to vote and 30 shareholders and 7 directors out of 41 shareholder approved “the idea of the intended development”

60. Emerging from the Minutes is that the primary purpose of the meeting was for the Board of Directors to inform the Shareholders of the decision to proceed with the intended development and for the Board to seek the support of the members. Support which the overwhelming majority of the persons present gave. Also apparent is that one member alluded to the position taken by the 1<sup>st</sup> to 7<sup>th</sup> Defendants in these proceedings; that the approval of the AGM for such a decision was not a requirement.

61. The Court’s attention next turns to the AGM of 19<sup>th</sup> December 2014 (See Minutes P Exhibit 3 pages 45 to 48). In that meeting Miringa raised the issue of the lease to Nuni Company and the minutes show that a section of the members were agitated. The Minutes then read;

“The Chairman passionately tried to calm down the crowd by explaining the contents of the lease document and that it was registered at lands. He further explained that the lease agreement was of major financial benefit to Muguga Investment Company. He requested the members to focus on the Jubilee Celebrations because he intended to call a special general meeting early in January to discuss the Eastleigh development”

62. From those minutes, I am unable to glean a concession by the Directors that they needed to get the authority of the AGM to proceed with the lease and development. Whilst the exact nature of the discussion of the meeting promised for January is not revealed, it has to be observed that by the date of the meeting of 19<sup>th</sup> December 2014 the impugned lease had been executed and registered. And the members informed of it on that day.

63. Even if the Company had legally made a reservation that it needed to authorize such developments at an AGM, Nuni Company may have a case for shielding behind the doctrine restated in the Turquand case. The Rule is that where persons permitted to conduct the affairs of the Company appear to do so in consonance with the articles and memorandum of association of the Company, then those dealing with them are entitled to infer that the acts done are done regularly, and they are not affected by any internal irregularity. This doctrine, sometimes referred to as the presumption of regularity, has been embraced into our law by our Courts in recognition that it serves a useful purpose. The Article by T. E. Cain a “The Rule in Royal British Bank –vs- Turquand in 1989 (Bond Law Review Volume I issue 2 Article 8 of 12-1-1989)” gives this short but comprehensive rationale for the rule;

“At the back of the rule is a question of policy as to who should run the risk of loss from unauthorized acts purporting to be done on

behalf of companies. The rule demonstrates that, *prima facie*, losses are to be borne by companies and not by outsiders, and the courts should not be astute to weaken the effect of the rule”

64. Just by looking at the Articles and Memorandum of Association of the Company, Nuni was entitled to assume that the Board of Directors of the Company were empowered to grant it such an extensive lease and that it was done regularly. And although it was the testimony of Kibira that Nuni Company knew that the shareholders objected to the lease as his representative, one Japheth Kasuu, was present in the meeting of 20<sup>th</sup> November 2014, the Minutes of the meeting which I have discussed elsewhere in the decision shows that the majority of those present supported it.

65. At this juncture, the Court needs to make some observations of the resolution of 14<sup>th</sup> February 2014 on which Nuni Company leans on as the resolution which authorized the contract. The Plaintiffs have at both the hearing and in submissions made heavy weather as to the authenticity of the said meeting and minutes. Indeed, this Court was urged to find that they were fabricated and are fictitious. The Plaintiffs call out an alleged fraud. Yet before this Court can agree with them, the fraud needed not only to have been pleaded but also proved to the threshold fixed by law (higher than a balance of probability although not as high as beyond reasonable doubt). For some reason the alleged fraud of the minutes of 14<sup>th</sup> February 2014 was not pleaded notwithstanding that the Plaintiffs had a copy of the minutes of meeting on 7<sup>th</sup> November 2018 (P. Exhibit 1 Page 76 and 77) before the hearing commenced. For that reason alone, and notwithstanding strong suggestions that they were not authentic, this Court is unable to fault the minutes.

66. Before leaving this part of the decision, I need to deal with a further submission by the Plaintiffs that because the board resolution made reference to the earlier resolution dated 24<sup>th</sup> January 2008, Nuni Company was under a duty to call for and look at the resolution of the earlier meeting. This is because of minute 1.1 of the minutes of the meeting of 14<sup>th</sup> February 2014 which read as follows:-

“The Company pursuant to an earlier Board resolution dated 24<sup>th</sup> January 2008 had discussed and approved that the old building erected on L.R no. 36/VII/499 be demolished and be replaced with a new shopping mall”

67. I think not because, as held earlier, the Board of Directors had wide powers in respect to dealing with its property and even if the resolution of 24<sup>th</sup> January 2008 did not explicitly resolve to demolish the old premises and put up another, Nuni Company was entitled to assume that the Board on 14<sup>th</sup> February 2014 had power to, inter alia, grant it a long term lease in which he could redevelop the premises

68. So the first issue is answered in favour of the Defendants.

69. Is the lease voidable? Impleaded against the lease was that it was voidable because there was no authority for it to be granted. Yet because the Plaintiffs have failed to fault the manner in which it was granted, the Court has no reason to hold that it is voidable. Even a further suggestion (though not pleaded) that the lease was a bad deal for the Company remained just that, an allegation. The Plaintiffs said it was a bad deal, while the Defendants asserted it to make good business sense. At the end, however, neither placed before the Court any material on which it could base a judgment call on the viability or commercial sense of the agreement. Yet because it is upon the Plaintiffs to prove its case, they must bear the brunt for not providing the necessary evidence. I dare add that the Plaintiffs were well aware of the burden that befell them because they had requested one George Njuguna Mungai a certified Bank accountant to review the benefits of the lease. Unfortunately, the accountant passed on before testifying and the Plaintiffs abandoned his evidence. This Court is unable to understand why the Plaintiffs would not commission another such review because of its centrality to its case. By failing to do so, their case on this aspect lost traction.

70. Related to the issue of the lease, the Plaintiffs had asked the Court to hold the grant of the long term lease Agreement being irregular then it amounted to an act of conversion. But this Court has held that at the time the 1<sup>st</sup> to 7<sup>th</sup> Defendants comprising as the Board of Directors of the company, granted the lease, they did so as within the powers granted to them by the Memorandum and Articles of the Company and the same was lawful.

71. Lastly on the question of the lease, the Plaintiffs asked this Court to find that the 1<sup>st</sup> to 7<sup>th</sup> Defendants were irresponsible and reckless in leasing out the premises in the face of existing leases and thereby attracted litigation, a potential loss to the company. However as stated by both Tsadik (PW4), and one Hussein Isaak Hassan (PW3), two of the tenants, they had jointly filed Environment and Land Court Case No. 1566 of 2014 to protect their tenancies and to restrain the demolition proposed in the lease to Nuni Company. It is in that suit that a determination will be made as to whether the Company is liable. Only then can it be said that the 1<sup>st</sup> to 7<sup>th</sup> Defendants failed in their duty as directors and caused a loss to the company. Only then can claims on that basis be made against the 1<sup>st</sup> to 7<sup>th</sup> Defendants in person.

#### Should the 1<sup>st</sup> to 7<sup>th</sup> Defendants render accounts?

72. At the cross-examination Kabucho conducted on 25<sup>th</sup> June 2019, he was extensively questioned about some aspects of the income of the Company. He told Court that up to sometime in 2015, Mungai Agencies (Chuma Mbili) was responsible for collection of rent on behalf of the Company yet some rent or goodwill appears to have being collected by Kabucho himself. These include:-

i. Kshs.1,220,000/=

ii. Kshs.40,000/=

Then on 22<sup>nd</sup> March 2012 he received Kshs.240,000/= from the Agents.

73. Murimi attempted to make explanations as to how the money was spent on behalf of the Company but did not have documents to back

the alleged expenditure. This amount adds upto Kshs.1,500,000/=. Should the Court ask the 1<sup>st</sup> to 7<sup>th</sup> Defendants to pay up the money without further ado as submitted by Counsel for the Plaintiffs?

74. In the Amended Plaint before Court the Plaintiffs pray for special damages without seeking a specific amount. The Plaintiffs expressly conceded that the law is that special damages must be specifically pleaded and then specifically proved. This Court was nevertheless asked to deviate from the strict requirements of specific pleading because the Plaintiffs would not be able to ascertain the exact amount because the 1<sup>st</sup> to 7<sup>th</sup> Defendants have the books of the Company.

75. This Court is not certain that it should depart from this well settled rule. This Court has not been told of any attempt by the Plaintiffs to access the books through the intervention of Court. But so as not to disadvantage the Plaintiffs, the solution lies in the rendering of accounts by the 1<sup>st</sup> to 7<sup>th</sup> Defendants. The Plaintiffs have in the Amended Plaint made a specific request for accounts and this Court holds that the Plaintiffs have demonstrated a basis for the grant of such an order.

76. Yet there is another aspect of expenditure which this Court feels duty-bound to make immediate orders. On 30<sup>th</sup> September 2015 Hon. Gikonyo J made orders restraining the 1<sup>st</sup> to 7<sup>th</sup> Defendants from withdrawing, spending, and or otherwise applying any monies belonging to the Company whether held in the Company bank accounts or otherwise and or paying or receiving any monies for or on account of the 1<sup>st</sup> Defendant.

77. That order has not been set aside or varied. Indeed, in dismissing the Appeal from the High Court decision, the Court of Appeal in its decision in Civil Appeal No. Nairobi 17 of 2016 Nicholas Mirimi & 6 Others and Muguga Investment Company Ltd & 3 Others endorsed the orders of Judge Gikonyo.

78. Yet in the face of those orders, the 1<sup>st</sup> to 7<sup>th</sup> Defendants withdrew the sum of Kshs.1,600,000/= on various occasions after the date of the Court order. In attempting to justify this, Mr. Kibucho stated:-

“The Court order barred us from withdrawing money but we were under pressure for payment from counsel”.

There is no reason to disobey a Court order in this manner and it shall not be countenanced. For that reason, the Court will be making an order that the money paid out be repaid at once by the 1<sup>st</sup> to 7<sup>th</sup> Defendants.

#### Of the question of Directorship of the company

79. As well in the order of 30<sup>th</sup> September 2015, Hon. Gikonyo J made the following order in respect to the appointment of Directors of the Company:-

“d. However, order (c) above is suspended for 30 days to enable the shareholders of the Company to constitute a special general meeting and appoint 5 directors to run the affairs of the Company during the period this suit is pending. For avoidance of doubt ,the 1<sup>st</sup> to 7<sup>th</sup> Defendants shall convene a special meeting within 7 days of today which failing the shareholders shall constitute a special general meeting on 5<sup>th</sup> of November 2015 to appoint the Directors”

80. The Ruling which contained that Order attracted an Appeal but which, as stated earlier, was not successful. In regard to that order, the Court of Appeal made some salient observations and then made further orders :-

“26)As aforesaid, an AGM is a normal function, nay a statutory requirement of a company .Holding an AGM of shareholders cannot hurt anybody ;it is a forum where all the parties will have an opportunity to express their views and to exercise their right to choose their directors .As time has passed since the order no(d) was issued by the High Court, we are inclined to extend the time issued by the High court by 21 days from the date of delivery of this ruling for the 1<sup>st</sup> to the 7<sup>th</sup> appellants to convene a Special General Meeting as ordered by the High Court , failing which the shareholders shall constitute a Special General Meeting shall at venue to be communicated to all the shareholders and the agenda shall be the election or appointment of Directors. Due to the ranging acrimony between the parties, it is further ordered that the said meeting shall be conducted under direction and supervision of the Registrar of Companies.”

81. The Plaintiffs case is that because the 1<sup>st</sup> to 7<sup>th</sup> Defendants failed to convene the meeting as anticipated by the Court order, the shareholders of the Company called a Special General Meeting on 15<sup>th</sup> March 2017 in which new directors were appointed. The minutes of the meeting (P. Exhibit Pages 295 to 297) shows that the following were appointed as directors of the Company:-

- i. Esrom Ngugi Miringa
- ii. David Njane Ruiyi
- iii. Henry Mungai Thongote
- iv. Simon Karanja Kariuki
- v. James Mungai Nganga

82. To be noted is that prior to the meeting, Counsel for the Plaintiffs had , on 20<sup>th</sup> February 2017, (P. Exhibit 1 Page 289) informed the Registrar of Companies of it and invited him/her to appoint a representative to supervise the election. The supervision of the election by the Registrar had been explicitly ordered by the Court of Appeal. I detour a little to note that the successor of the Registrar of Companies after the coming into effect of the new statute is the Registrar General.

83. The 1<sup>st</sup> to 7<sup>th</sup> Defendants had on their part prior to the Shareholders acting called for Special General Meeting which was to be held on 30<sup>th</sup> January 2017(D exhibit 3 page 85).The meeting did not take place because it was cancelled by the Registrar General (D exhibit 3 page 87) In the notice cancelling the meeting, the Registrar reveals that the reason for suspending the meeting was to resolve the issue on the disputed share register .He also notifies members that he would, upon ruling on the shareholder register and giving directions on how the elections would be conducted, call for fresh elections.

84. With this backdrop in mind, it is common cause that the Registrar did not supervise the elections conducted on 15<sup>th</sup> March 2017.

85. The Plaintiffs ask the Court to uphold those elections arguing that the Registrar's role in the meeting was to supervise and direct the meeting and all that the requesting shareholders had to do was to convene a meeting with due notice to the other shareholders and to the Registrar.

86. The 1<sup>st</sup> to 7<sup>th</sup> Defendants, not surprising, take a different position. It is submitted that as it was the express direction by the Court of Appeal that the same be supervised by the Registrar of Companies then any elections conducted on 15<sup>th</sup> March 2017 without that supervision would be illegal.

87. In resolving these competing positions, I again reproduce the Order of the Court of Appeal;

**“26) As aforesaid, an AGM is a normal function, nay a statutory requirement of a company. Holding an AGM of shareholders cannot hurt anybody ;it is a forum where all the parties will have an opportunity to express their views and to exercise their right to choose their directors .As time has passed since the order no(d) was issued by the High Court, we are inclined to extend the time issued by the High court by 21 days from the date of delivery of this ruling for the 1<sup>st</sup> to the 7<sup>th</sup> appellants to convene a Special General Meeting as ordered by the High Court , failing which the shareholders shall constitute a Special General Meeting shall at venue to be communicated to all the shareholders and the agenda shall be the election or appointment of Directors. Due to the ranging acrimony between the parties, it is further ordered that the said meeting shall be conducted under direction and supervision of the Registrar of Companies.”**

88. The Court of Appeal explains the rationale for requiring that the Registrar directs and supervises the conduct of the meeting to elect or appoint directors. It notes that it is because of the raging acrimony of the parties. The Court of Appeal, I would think, was fully alive to the possibility of the meeting becoming disorderly if not directed and supervised with a person who was not only neutral but who could wield some authority over the parties. I am afraid that the meeting of 15<sup>th</sup> March 2017 does not pass muster the order of the Court of Appeal. The Order was mandatory in terms.

89. If, however, the Plaintiffs took the view that the Registrar was, for whatever reason reluctant to direct and supervise the meeting, then the solution was to seek a revision or variation of the Court order. The answer did not lie in conducting a meeting that fly in the face of an explicit Court Order.

90. Even as I reach that conclusion, the Court is keenly aware that the wrangle that is this dispute has deprived members from exercising the authority that is comprised in an Annual General Meeting in electing directors of their choice. It is an Annual General Meeting of shareholders acting in accordance with the Articles and Memorandum of Association of the Company that has the ultimate say on who will lead the Company. Members of Muguga Investment Company Limited deserve to exercise their right as shareholders to elect directors of their choice. And it is the right time, I hold, that clear directions be given in this regard.

91. The source of acrimony in holding elections has been the list of members eligible to vote and the strength of each vote. The Plaintiffs are emphatic that there are only 34 shareholders as had existed since inception of the Company and not 64 as presented by the 1<sup>st</sup> to 7<sup>th</sup> Defendants. On this there is evidence by no less the 1<sup>st</sup> Defendant himself that the returns of the company for the year 2015 (P. Exhibit 1 page 118) which were prepared by the Directors under his Chairmanship reflected 34 shareholders only.

92. Once feature of the membership of the Company is that a majority of its original members passed on. Happily, nevertheless, the Articles of Association has provided the manner in which the interests vested in the Deceased members before their death will be treated. The amendment to Articles 18 and 19 (P. Exhibit 3 Page 24) reads:-

**18) Every Member of the Company shall be entitled to one vote. Voting shall be by way of Secret Ballot unless the chairman thinks otherwise as long as it is not in contravention with the Companies Act (Cap 486 Laws of Kenya)**

**19) Any Person who is not a founder member of the Company shall not be recognized as a member or shareholder and shall not have any rights in the company unless he or she produces to the company any document which is by law sufficient evidence of Probate of the will, or Letters or Certificate of Administration of the Estate of the deceased member that grants him or her the rights held by the deceased member in the company.**

93. The rights of the estate of a Deceased member passes on to the person who, by Probate of a Will or Grant of Letters or Certificate of Administration, is entitled to such shares. By virtue of Article 18 every member shall be entitled to one vote and so even if the rights to a Deceased's members share is taken up by more than one person, all the persons shall be treated as a single member for purposes of voting

and jointly entitled to one vote.

94. Ultimately the Court makes the following orders:-

94.1. Prayers (a), (b), (d) and (f) of the Amended Plaintiff dated 19<sup>th</sup> June 2019 are dismissed.

94.2. Prayer (c) is partly granted and prayer (e) is wholly granted as follows; the accounts of the Company assets, including money received and or expended shall be delivered within 30 days hereof by the 1<sup>st</sup> to 7<sup>th</sup> Defendants for the period ending at the time of the accounts.

94.3. The 1<sup>st</sup> to 7<sup>th</sup> Defendants shall within 14 days pay the sum of Kshs.1,600,000/= into the Company accounts and furnish evidence of that payment to the Plaintiffs and Court.

94.4. The Counterclaim of the 1<sup>st</sup> to 7<sup>th</sup> Defendants succeeds in terms of prayers (i), (ii),(iv)and(v).

94.5. In respect to prayer (iii) of the Counterclaim, the Directors of the Company are those who were in office on the date the Court of Appeal made its order of 20<sup>th</sup> December 2016 in Civil Appeal No 294 of 2016 consolidated with Civil Appeal No 17 of 2016 Nicholas Kabucho Murimi & 6 Others v Muguga Investment Co. Ltd & 3 others.

94.6. In answer to prayer (vi) of the Counterclaim, The Registrar General shall within 30 days hereof, at the expense of the Company, convene an Annual General Meeting for the election or appointment of Directors of the Company.

94.7. The Registrar General shall supervise and conduct the elections and the register of members eligible to vote shall be 34 members and regard shall be given to Articles 18 and 19 of the Amended Articles of Association of the company.

94.8. Upon election or appointment of Directors as ordered in Orders 94.6 and 94.7 above, the 1<sup>st</sup> to 7<sup>th</sup> Defendant shall ,within 7 days of that appointment or election, hand over all documents of title, other documents and books of the Company to the elected or appointed Directors.

94.9. The Plaintiffs of the one part and the 1<sup>st</sup> to 7<sup>th</sup> Defendants of the other part shall each pay their own costs on the main claim and counterclaim.

94.10. The Plaintiffs suit against the 8<sup>th</sup> Defendant is hereby dismissed with costs to the 8<sup>th</sup> Defendant.

**Dated, Signed and Delivered in Court at Nairobi this 17<sup>th</sup>Day of April 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this Ruling has been delivered to the parties online with their consent. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules* which requires that all Judgments and Rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of Civil disputes.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**