



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOU CIVIL APPLICATION NO. E160 OF 2019**

PRUDENZIO NICHOLAS GIATARA.....APPLICANT

AND

THE REGISTRAR OF COMPANIES.....1<sup>ST</sup> RESPONDENT

PATRICK KARIUKI MUIRURI.....2<sup>ND</sup> RESPONDENT

RACHEL WANJIRU KARIUKI MUIRURI.....3<sup>RD</sup> RESPONDENT

JOHN MBURU MUIRURI.....4<sup>TH</sup> RESPONDENT

JOHN SEBASTIAN MUIRURI.....5<sup>TH</sup> RESPONDENT

**RULING**

1. The applicant herein, **Prudenzio Nicholas Gaitara**, filed the Originating Notice of Motion dated 28<sup>th</sup> November 2019 seeking the following orders:

*1. This honourable court be pleased to direct the 1<sup>st</sup> respondent to rectify the Company Register of Thika Dairies Limited by deleting the names of the names of the 3<sup>rd</sup> to 5<sup>th</sup> respondents as directors of the company and that the register do reflect the following as the shareholding and directorship of company:*

*Shareholding*

- i. Private Eye(K) Limited 9,999 shares*
- ii. Patrick Kariuki Muiruri 1 share*
- iii. Lawrence Ngamau Kuria 1 share*
- iv. Prudenzio Nicholas Gaitara 1 share*
- v. Eveready Agricultural Services Limited 9,998 shares*

*Directorship*

- i. Patrick Kariuki Muiruri*
- ii. Lawrence Ngamau Kuria*
- Prudenzio Nicholas Giatara*

*2. This Honourable court be pleased to direct the 1<sup>st</sup> respondent to rectify the Company Register of Thika Dairies Limited by deleting all changes in the Nominal Share Capital and that the Register to reflect the following as the Nominal Share Capital.*

*3. Nominal Share Capital of 2,000,000 divided into 20,000 shares of Kshs 100 each.*

*4. Any acts, conducts and/or activities so far executed and/or performed by the 2<sup>nd</sup> to 5<sup>th</sup> respondents on behalf of Thika Dairies Limited as directors and/or shareholders be declared null and void.*

*5. The costs of this application be provided for.*

2. The application is supported by the applicant's affidavit and is premised on the grounds that: -

*1. The Company known as Thika Dairies Limited (hereafter referred to as the company) was incorporated on or about the 4<sup>th</sup> August 1992 as a limited liability company with Nominal Share Capital of Kshs 2,000,000 divided into 20,000 shares of Kshs 100 each.*

*2. As at the time of incorporation the shareholding and directorship of the company was as below:*

**Shareholding**

*i. Private Eye(K) Limited 9,999 shares*

*ii. Patrick Kariuki Muiruri 1 share*

*iii. Lawrence Ngamau Kuria 1 share*

*iv. Prudenzio Nicholas Gaitara 1 share*

*v. Eveready Agricultural Services Limited 9,998 shares*

**Directorship**

*i. Patrick Kariuki Muiruri*

*ii. Lawrence Ngamau Kuria*

*iii. Prudenzio Nicholas Gaitara*

*3. There was subsequent fraudulent, irregular, illegal and unprocedural alteration of the Company's Nominal Share Capital, shareholding and directorship which irregular, illegal and unprocedural alteration was orchestrated by the 2<sup>nd</sup> respondent.*

*4. The fraudulent, irregular illegal and unprocedural alteration of the Company's Nominal Share Capital, shareholding and directorship as orchestrated by the 2<sup>nd</sup> respondent amounts to breach of trust.*

*5. Upon realization of the fraudulent, irregular, illegal and unprocedural alteration of the Company's Nominal Share Capital, shareholding and directorship the applicant sought the 1<sup>st</sup> respondent to investigate and correct the same.*

*6. The 1<sup>st</sup> respondent refused, failed and/or neglected to investigate and correct the fraudulent irregular, illegal and unprocedural alteration of the Company's Nominal Share Capital, shareholding and directorship necessitating the filing of this originating motion.*

*7. Pursuant to the fraudulent, irregular, illegal and unprocedural alteration of the Company's Nominal Share Capital, shareholding and directorship the 2<sup>nd</sup> to 5<sup>th</sup> respondents have proceeded to conduct the affairs of the company privately and as a family business and in exclusion of the applicant.*

3. The respondents opposed the application through a Notice of Preliminary Objection (PO) dated 22<sup>nd</sup> July 2019 wherein they listed the following grounds: -

*1. The claim is statute barred owing to the Limitation of Actions Act Cap 22 of the Laws of Kenya as the alleged acts forming the claim allegedly transpired in the period between 1993- 1996.*

*2. The claim is resjudicata the same having been heard and determined in ELC case No. 1400 of 2013 where the applicant herein was the plaintiff.*

*3. The entire claim herein is an abuse of the process of this court and ought to be dismissed with costs.*

4. Parties canvassed the Preliminary Objection by way of written submissions which I have considered. The main issue for determination is whether the Preliminary Objection is merited.

#### **Limitation of Actions.**

5. The respondents argued that the instant application is time barred as the alleged acts forming the claim transpired in the period between 1993-1996.

6. I have perused the applicant's pleadings and I note that indeed, the actions complained about took place between 1993 and 1996. At paragraphs 5,6, 7 and 9 of the supporting affidavit, the applicant states as follows: -

*1. That on or about 13<sup>th</sup> October, 1993 the 2<sup>nd</sup> respondent unilaterally signed a resolution purporting to increase the Nominal Capital of the company from Kshs 2,000, 000 to Kshs 3,000,000 by creation of additional 10,000 shares of Kshs 100 each, without the involvement or consent of the rest of the directors and/or shareholders as provided for under the Articles of Associations of the Company. Annexed hereto and marked as PNG-3 (a) and (b) respectively are copies of an alleged special resolution and a Notice of Increase of Nominal Share Capital.*

*2. That further on 4<sup>th</sup> September 1996, the 2<sup>nd</sup> respondent again unprocedurally and fraudulently signed another Notice of Increase of Nominal Share Capital increasing the Nominal Share of the Company from Kshs 3,000 to Kshs 5,000,000 hence creating additional 50,000 ordinary shares each of Kshs 100. This was reflected in the Annual Returns dated 28<sup>th</sup> February 1994, May 1995 and 29<sup>th</sup> August 1996. These changes again were done without the consent of the shareholders of directors. Annexed hereto and marked as PNG-4 (a), (b), (c) and (d) respectively are copies of special resolution, statement of increase of Nominal Capital, Return of Allotment made and Annual Returns respectively.*

*3. That on 4<sup>th</sup> and 6<sup>th</sup> September 1996, the 2<sup>nd</sup> respondent filed Returns of Allotment of 50,000 shares supported by an alleged resolution, as fraudulent, irregular, illegal and unprocedural alteration of the Company's Nominal Share Capital, shareholding and directorship a Statement of Increase of Capital bringing the Nominal Capital to Kshs 10,000,000 up from Kshs 5,000,000.*

*4. That in addition on the 4<sup>th</sup> of September 1996 the respondent filed a Notice of Change of Particulars of the Directors and Secretaries of the Company allegedly appointing the 4<sup>th</sup> and 5<sup>th</sup> respondents as directors of the Company. Annexed herewith and marked PNG-5 is a copy of the Notice of Change of Particulars.*

7. Going by the applicants own averments, it is quite clear that as at 2019 when the instant case was filed, the limitation period of had already lapsed and I therefore find that the suit is statutorily barred.

#### **Resjudicata.**

8. The respondents further argued that this matter is resjudicata having been heard and determined by the Environment and Land Court (ELC) in case No. 1400 of 2013. The existence of the Environment and Land Court matter is admitted by the applicant at paragraphs 16 and 17 of his supporting affidavit wherein he states as follows: -

*1. That the applicant filed a suit in Environment and Land Court being ELC No. 1400 of 2013 seeking to have the fraudulent, illegal and unprocedural alteration of the Company's Share Capital, directorship and shareholding nullified by the court in addition to having the court cancel an irregular transfer of the company's property.*

*2. That the Honourable Court delivered a ruling on the 17<sup>th</sup> January 2019 dismissing the suit on the grounds that the transfer of the company's property to a third had been cancelled and therefore the substratum of the suit had been compromised. The court further held that it did not have jurisdiction to entertain the issues concerning the prayer for rectification on the register. Annexed hereto and marked as PNG-9 is a copy of the ruling delivered in the 17<sup>th</sup> January 2019.*

9. Having regard to the applicant's own admission that his earlier suit before the Environment and Land Court was dismissed, this court finds that the instant suit is resjudicata the finding by the Environment and Land Court that it lacked the jurisdiction to entertain the prayer for rectification of register notwithstanding.

10. For the above reasons I find that the Preliminary Objection raised by the respondents is merited and I allow it with the result that the Originating Notice of Motion dated 28<sup>th</sup> November 2019 is struck out with costs to the respondents.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 1<sup>st</sup> day of October 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Wakwaya for applicant.

No appearance for respondents

Court Assistant: Silvia