



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E229 OF 2019

BETWEEN

KHINGO VILLAGE (WARIDI GARDENS) MANAGEMENT ONE LIMITED.....PLAINTIFF

AND

WILLIAM EDWARD PIKE.....1ST DEFENDANT

NARESH MEHTA.....2ND DEFENDANT

GITAHI GETHENJI.....3RD DEFENDANT

SHEETAL KHANNA.....4TH DEFENDANT

KISHOR KUMAR VARSANI.....5TH DEFENDANT

MOHAN SINGH PANESAR.....6TH DEFENDANT

SAMUEL MWANGI WAMBU.....7TH DEFENDANT

VARSANI HARJI DHANJI.....8TH DEFENDANT

AND

COUNTERCLAIM

BETWEEN

WILLIAM EDWARD PIKE.....1ST PLAINTIFF

NARESH MEHTA.....2ND PLAINTIFF

GITAHI GETHENJI.....3RD PLAINTIFF

SHEETAL KHANNA.....4TH PLAINTIFF

KISHOR KUMAR VARSANI.....5TH PLAINTIFF

MOHAN SINGH PANESAR.....6TH PLAINTIFF

SAMUEL MWANGI WAMBU.....7TH PLAINTIFF

VARSANI HARJI DHANJI.....8TH PLAINTIFF

AND

KIHINGO VILLAGE (WARIDI GARDENS) ONE MANAGEMEN LIMITED...1ST DEFENDANT

CHACHA MABANGA.....2ND DEFENDANT

JAMES NGUNGU GETHENJI.....3RD DEFENDANT

JUDGMENT

Plaintiff's Claim

1. The Plaintiff commenced this suit by the Plaint dated 26th July 2019. It is the developer of Kihingo Village ("the Village"), a gated community. Its purpose is to maintain and secure the developer's interests, residual assets and property within the village and the area in which the company has management responsibilities. It contends that it is the majority shareholder of Kihingo Village (Waridi Gardens) Management Limited ("the Management Company") holding 60 Class B shares while the 1st to 8th Defendants each hold a single share each.
2. The Plaintiff's claim against the Defendants is that they illegally convened a meeting at Capital Club on 13th April 2019 and made attempts to remove the Plaintiff's shares and representatives from the Board, administration and management of the Management Company.
3. The Plaintiff stated its duly appointed proxy at the meeting voted against the said resolution and in applying the principles of voting by shares, the resolutions to remove its shares and representative from the Management Company were defeated. Despite defeating the resolutions, the Defendants attempted to register the resolutions at the Office of the Registrar of Companies in order to remove the Plaintiff's representatives. The Plaintiff complained that the Defendants attempted to interfere with the Management Company's assets including fixtures, fittings, furniture, equipment, building and structures found at the Bustani Club House at the Village and also threatening and intimidating its staff and employees.
4. The Plaintiff stated that the Defendants' actions contravened Clause 85 of the Management Company's Articles of Association which provide that its Chair and Deputy Chair were to be nominated by the holder of Class B shares. Further and by attempting to effect a change of in the Board, the Defendants acted contrary to Clause 83 of the Articles of Association which provides that quorum of the Board must have at least two duly appointed representatives of the holder of Class B ordinary shares.
5. As a result of the Defendant's violation of the Management Company's Articles and Association, the Plaintiff sought the reliefs that:
 - a. *A permanent injunction be and is hereby granted, restraining the Defendants either by themselves, their officers, servants, agents, assigns or any other person claiming under them, from interfering with the Plaintiff's shareholding in Kihingo Village (Waridi Gardens) Management Limited.*
 - b. *A permanent injunction do issue stopping the Defendants, their officers, servants or agents or any other person claiming under them from interfering with the participation of the Plaintiff's representatives in the Board, administration management and general running of the affairs of the Company as determined by the general assembly of members.*
 - c. *A permanent injunction do issue stopping the Defendants, their officers, servants or agents from interfering with, trespassing onto or in any way committing to waste or interfering with or tampering with any equipment, IT infrastructure, fixtures, fittings, assets under the care of the Plaintiff that are contained in and constitute part of what is known as Bustani Club House in Kihingo Village and also in other parts of the village.*
 - d. *A declaratory order that the purported resolution of a general meeting held on the 13th April 2019 by the Defendant purportedly adopting the removal of the Plaintiff's shares as shares in the Kihingo Village (Waridi Gardens) Management Limited be declared illegal, void and of no effect the same having been defeated by a majority of the shareholders present.*
 - e. *That a permanent injunction do issue stopping the implementation of the purported resolutions of a meeting held on the 13th April 2019, purportedly removing the Class B shares of the Company and removing the representatives of the Plaintiff from being directors of the Company.*
 - f. *A permanent injunction do issue stopping the Defendants, their officers, servants or agents or any other person claiming under them, from interfering with, intimidating, suspending, sacking or transferring the staff and employees of Kihingo Village (Waridi Gardens) Management Limited.*
 - g. *A declaratory order that the Company is bound by its Memorandum and Articles of Association and that voting at the Company's general meetings is by shares as stipulated in the Company's Articles of Association.*
 - h. *Costs of this suit.*
 - i. *Any such other relief that the court may deem just and fit to grant.*

Defendants' Defence and Counterclaim

6. The Defendants filed a Defence and Counterclaim dated 5th September 2019. They denied that the Plaintiff is the majority shareholder of the Management Company. They pleaded that the suit is *res judicata* as the issue of shareholding of the Management Company was conclusively determined in the arbitral proceedings culminating in a Final Award dated 28th July 2016 ("the Award") which was adopted as a judgment of the Court by a ruling dated 6th February 2019 in **ELC No. 1225 of 2013 Kifaru Investments Ltd & Others Vs. Kihingo Village (Waridi Gardens) Ltd & Another** and a decree issued on 15th February 2019.

7. The Defendants contended that the Plaintiff does not own Class B shares as these were removed by the Award which determined that Class B shares were not contemplated and ordered the rectification of Clause 5 of the Articles of Association of the Management Company to ensure equality of all shareholders. The Defendants stated that the Award required the Management Company to hold a meeting of its members within 90 days from the date of publication failing which the members were at liberty to call for a meeting in accordance with the **Companies Act**. They further stated that the Special General Meeting was convened by the members in accordance with the Award and decree issued by the court.

8. The Defendants stated that they held the Special General Meeting on 13th April 2019 whereby they discussed and passed several motions including that the Company forthwith initiates rectification of several clauses of the Articles of Association of the Management Company including Clause 5 by removing Class B shares and retaining 55 ordinary shares in consonance with the Award; Article 59 by deleting references to holders of Class B ordinary shares and their power to appoint and remove directors; Article 62 by requiring all directors to be shareholders of the Management Company. They also resolved to remove James Ndungu Gethenji, Cecil Miller, Eric Giovanni and Chacha Mabanga from the office of directors and appointed Harji Dhanji Varsani, Samuel Wambu, Mohan Singh Panesar and William Pike.

9. The Defendants further resolved to remove Scribe Services and Woodvale Associates as the Company Secretary and Auditors respectively and directed the Board to appoint a new Company Secretary and Auditor within 30 days of the resolution. They also resolved that share certificates be issued to all shareholders who were duly paid up and had not been issued with share certificates. The members present also discussed and agreed that the Clubhouse was the property of the Management Company and for the benefit of all 55 shareholders.

10. It was further resolved at the meeting that the Management Company initiates the process of acquiring the reversionary rights in the parcel of land known as Land Reference No. 27754 Grant No. I.R. 108885 from Kihingo Village (Waridi Gardens) Limited within 30 days of the resolution and that the Management Company to implement the Award.

11. The Defendants claimed that despite the meeting held on 13th April 2019, the former directors Chacha Mabanga and James Ndungu Gethenji proceeded to produce fake and forged documents which they purported were genuine minutes of a meeting of shareholders of the Management Company of 13th April 2019 purported to have been held at the same venue where they purportedly passed motions defeating all the resolutions of the members. They enumerated the particulars of fraud as follows;

a. There was no attendance of the shareholders

b. The meeting was not attended by Gitahi Gethenji, Naresh Mehta or Sheetal Khanna as alleged in the minutes

c. The purported resolutions that were passed were all fake as no meeting to pass them took place.

*d. The purported use of Class B shares was a nullity ab initio as the same had been nullified by the court in **Petition No. E105 of 2018 Gitahi Githinji & Others Vs. James Ndungu Gethenji & Other** and the majority resolution of the shareholders in the genuine meeting held on 13th April 2019.*

e. No company secretary was present and it was admitted that the fake meeting was never properly convened.

12. The Defendants further contended that the firm on record for the Plaintiff, *Otieno Ogola & Co. Advocates* had no instructions to institute these proceedings on behalf of the Company as Chacha Mabanga is not a director of the Company and there is no legal and valid company resolution authorizing the filing of the proceedings. They further averred that the verifying affidavit and Plaintiff should be struck out and the deponent investigated for perjury and charged for the offence for failing to disclose the Award and other suits; **ELC No. 1225 of 2013** aforesaid as well as **Petition No. E105 of 2018 Gitahi Gethinji & Others v James Ndungu Gethenji & Others**.

13. The Defendants counterclaim is against the Plaintiff, Chacha Mabanga and James Ndungu Gethenji. The basis of the claim is that upon inquiry, the Registrar of Companies by a letter dated 6th August 2019 informed them that the Plaintiff was registered on 5th October 2010 with Ndungu Gethenji and Gitahi Githenji as directors and shareholders each holding 1 ordinary share. They alleged that on 12th October 2018 an application for linking the company was filed by Ndungu Gethenji with Gitahi Gethenji and Ndungu Gethenji as directors and shareholders. The application was verified on 16th October 2018 and on 21st November 2018, an application for change of director was lodged using Ndungu Gethenji's e-citizen account where Chacha Mabanga was appointed director.

14. The Defendants stated that the meeting of 21st November 2018 never took place and the purported minutes were fake and criminal fabrications by Chacha Mabanga and Ndungu Gethenji made with the sole aim of introducing a new director in contravention of the Company's Articles of Association and the **Companies Act**. The Defendant set out the following particulars of fraud and dishonesty;

a. The purported meeting started at 1.00pm and ended at 4.45pm

b. The Notices of Appointment of Directors and residential address of director (CR 6 and CR 8) were lodged at the companies'

registry on the same date at 3.04pm.

c. The documents were lodged in the registry before the end of the meeting

d. The 3rd Plaintiff who is listed as having attended the meeting never received any notice for the meeting and never attended the meeting of 21st November 2018.

e. The minutes do not indicate the venue of the meeting

f. The minutes do not indicate who presided over the meeting and thus the authentication of the same by one of the directors does not comply with Section 211 the companies Act, 2015.

g. There being no resolution terminating the services of Scribe Corporate Services Limited as the Company Secretary and appointing Charles Njenga as the Company Secretary, the latter has no authority to sit at the Company meetings and execute company documents in his capacity as Company Secretary.

15. Following a complaint by the advocate for Gitahi Gethenji regarding the alleged meeting of 21st November 2019 by a letter dated 9th August 2019, the Registrar of Companies served a 14-day notice on Chacha Mabanga, Ndungu Gethenji and Charles Njenga as the purported Company Secretary giving them 14 days to respond. On 14th August 2019, Charles Njenga informed the Registrar of Companies that he was never the Company Secretary and was not privy to the meeting of 21st November 2018 and that his signature was a forgery. Since Chacha Mabanga and Ndungu Gethenji failed to respond, on 23rd August 2019, the Registrar of Companies expunged the purported appointment of Chacha Mabanga as a director of the Company. The Defendants therefore averred that the entire suit was nullity as the suit was filed by a stranger.

16. The Defendants claimed that the actions of Chacha Mabanga and Ndungu Gethenji interfered with the rights of shareholders of the Management Company as follows;

a. Using the order dated 26th July 2019 to stay the implementation of the Resolutions passed at the Special General Meeting of 13th April 2019.

b. Appointing themselves as Chairman and Managing Directors of the Management Company and purporting to run the management of the company contrary to the decree in **ELC 1225 of 2013 Kifaru Investments Ltd & Others Vs. Kihingo Village (Waridi Gardens) Ltd & Another**

c. Interfering with the quiet enjoyment of the tenants and shareholders residing in Kihingo Village

d. Forging and faking meetings of a meeting held on 13th April 2019 to defeat all the motions by the majority shareholders of the Management Company when in fact no such meeting took place.

17. As a result of the matters pleaded, the Defendants pray the Court should issue disqualification orders against Chacha and Ndungu pursuant to **sections 214 and 215** of the **Companies Act** restraining them from acting or attempting to join as directors for up to 15 years in Kihingo Village (Waridi Gardens) Management One Limited, Kihingo Village (Waridi Gardens) Limited, Kihingo Village (Waridi Gardens) Management Limited or any other public and private company where they are directors or seek to be appointed directors in future.

18. The Defendants sought the following orders in the Defence and Counterclaim:

a. A permanent injunction be issued restraining James Ndungu Gethenji and Julius Mabanga Chacha from directly or indirectly managing, calling meetings, issuing instructions or notices whether by themselves, servants or agents in any manner whatsoever, dealing or interfering with the business and operations of the following companies; in Kihingo Village (Waridi Gardens) Management One Limited, Kihingo Village (Waridi Gardens) Limited, Kihingo Village (Waridi Gardens) Management Limited or any other public and private company where they are directors or seek to be appointed directors in future.

b. James Ndungu Gethenji and Julius Mabanga Chacha be disqualified for a period of 15 years or such time as the court deems fit from directly or indirectly managing any of the following listed companies and any other public and private companies pursuant to Sections 214 and 215 of the Companies Act, 2015; in Kihingo Village (Waridi Gardens) Management One Limited, Kihingo Village (Waridi Gardens) Limited, Kihingo Village (Waridi Gardens) Management Limited or any other public and private company where they are directors or seek to be appointed directors in future

c. A declaration that James Ndungu Gethenji and Julius Chacha Mabanga are unfit to be appointed as directors or to hold offices directors in any public or private companies for contravening Sections 214 Companies Act, 2015 and should be investigated for perjury and fabrications of evidence.

d. Costs on a full indemnity basis.

Defence and Reply to Defence and Counterclaim

19. In its Reply to Defence and Counterclaim dated 12th September 2019, the Plaintiff reiterated the contents of its Plaintiff. It denied that its

suit was *res judicata* in so far as **ELC No. 1225 of 2013** was concerned in that the Plaintiff's cause of action against the Defendants arose on the 13th April 2019 after the determination of that suit. It further stated that the Company at a duly constituted Board meeting passed a resolution to institute the current suit. The Plaintiff averred that the Award never dealt with the manner of voting at the general meeting of 13th April 2019 and in any case the meeting took place after the Award had been made and it could not have dealt with the manner in which members vote at the said general meeting.

20. In response to the Counterclaim, the Plaintiff stated that at all material times to these proceedings it had 3 directors. It further stated that the Defendants' contentions in the Counterclaim are remote and unrelated to the main suit and should be dismissed. That the Counterclaim does not raise any cause of action against it and is in essence a separate claim against third parties and should be dismissed as not disclosing any reasonable cause of action against it.

21. Chacha Mabanga and Ndungu Gethenji filed a Defence to the Counterclaim dated 9th December 2019 in which they denied the averments in the Counterclaim. They stated that they have not been convicted of any offence by a competent court and neither are they guilty of committing any such offence that would require the Court to disqualify them from being directors of any company. They further stated that no basis for the Court to either restrain them or disqualify them from being directors. They also averred that the Counterclaim does not raise any cause of action against them.

The hearing

22. The Plaintiff called Wairimu Waiyaki (PW 1), the Company Secretary, Chacha Mabanga (PW 2) and Ndungu Gethenji (PW 3). Gitahi Gethenji (DW 1), William Edward Pike (DW 2) and Naresh Mehta (DW 3) testified on the Defendants' behalf. I do not propose to outline the evidence as it emerged as it largely mirrors what the parties stated in their pleadings as I have summarized above. Further, the basic facts and documents were largely not contested. The parties also filed written submissions in support of their respective positions. I shall therefore refer to the testimony and submissions where it is necessary to clarify any points.

Whether the suit was lawfully instituted?

23. Although the several issue emerged from the pleadings and evidence, the Defendants challenged capacity of the Plaintiff to institute the suit on account of the fact that Chacha Mabanga ("Chacha"), who swore the verifying affidavit to the Plaintiff, as a director of the Plaintiff was not a director and could not be authorised to do so on its behalf. Additionally, it was alleged that counsel on record for the Plaintiff lacked authority to agitate the suit.

24. This issue had been raised as a preliminary objection but Muigai J., in ruling dated 27th July 2018 and Odera J., in a ruling dated 14th November 2019 ruled that the matter could not be determined as a preliminary issue as it required the taking of evidence. The Plaintiff raised the matter in a further application and in my ruling dated 20th February 2020, I ruled that I could not revisit the matter in view of the previous decisions hence the matter was reserved for trial. This issue together with the matters raised in the Counterclaim hinged on the argument that Chacha was not a director of the Plaintiff. That he did not have lawful authority to file the suit.

25. The Plaintiff's case is that Chacha was its lawfully appointed director. PW 1 testified that he was appointed at a meeting in 2013 and a Notification of Change of Directors lodged at the Companies Registry to confirm his appointment. Although she did not produce any minutes, she recalled that there was a meeting and that she had the records on file. On his part, Chacha admitted he did not have any evidence showing how he was appointed director but he confirmed that he was a director of the Plaintiff since 2013 and that a resolution of the Plaintiff's directors on 2nd May 2019 attended by himself and Ndungu Gethenji ("Ndungu") in presence of PW 1 authorised filing of this suit. When pressed on the issue of appointment of Chacha, Ndungu stated that his co-director, Gitahi Gethenji ("Gitahi") had since stopped participating in activities of the Plaintiff and had resigned hence he appointed Chacha as a director to fill a casual vacancy. He was of the view that since 2013, the appointment has been in place and had never been challenged and it was now being challenged in bad faith.

26. The Defendants contended that Chacha's name was expunged as a director of the Plaintiff by the Registrar of Companies on 23rd August 2019 as evidenced by the CR 12 dated 12th September 2019. Since the Plaintiff's had not rebutted the CR 12, they took the position that Chacha was not a director. They further contended that there was no resolution by the shareholders authorizing the filing of suit.

27. The issue whether Chacha was properly appointed was placed before the Registrar of Companies. Both Chacha and Ndungu denied that they instigated the changes of the Plaintiff's records at the Companies Registry. They also denied the minutes of a meeting that took place on 21st November 2018 in the presence of Charles Njenga as Company Secretary. By a letter dated 14th August 2018 addressed to the Companies Registrar, Charles Njenga denied that he had anything to do with the Company. In fact, both Chacha and Ndungu denied knowledge of the meeting and of the said Charles Njenga. Likewise, Gitahi who is recorded as having been at the meeting denied that he attended the meeting. On the basis of all this evidence and not having received any response from Chacha and Ndungu, the Registrar of Companies by a letter dated 23rd August 2019 expunged from the record, removed Chacha as a director of the Plaintiff and expunged all the documents that supported the appointment of Chacha as a director of the Plaintiff.

28. The suit however was filed on 26th July 2019, about a month before Chacha's appointment had been revoked by the Registrar of Companies. Although at the time of filing suit, Chacha was still a director of the Plaintiff based on the registry records, this does not dispose of the issue he was qualified to be appointed as a director and whether he was properly appointed in the first place.

29. Both Ndungu and Chacha supported by PW 1 confirmed that Chacha was appointed director of the Plaintiff in 2013. When cross-examined, Ndungu admitted that he appointed Chacha in 2013 by himself, without consulting his co-director, Gitahi, who at the material time had stopped participating in the Plaintiff's activities. He insisted that he had a right to fill a casual vacancy and he did. Both Chacha and Ndungu clarified that they challenged the removal of Chacha as a director of the Plaintiff by the Registrar of Companies by letters dated 1st January 2020 and 31st January 2020 but these did not elicit any response.

30. The appointment of a director is governed by Articles of Association. Some of the key clauses in the Plaintiff's Articles of Association germane to this case are as follows;

37. *The number of Directors (Excluding alternates) shall not be less than two and not more than eight directors.*

38. *Until otherwise determined by the company in general meeting, the number of directors shall not be more than eight provided as much as possible two board members shall be drawn from each of the two companies of Kihingo Village (Waridi Gardens) Management One Limited and of Kihingo Village (Waridi Gardens) Management Two Limited.*

39. *The subscribers to the memorandum shall be the first directors of the company.*

40. *The board of directors may from time to time and at any time appoint any member of the company as a member of the board directors to fill a casual vacancy or by way of addition to the board of directors. Any member shall retain his office only until the next general meeting by shall then be eligible for a re-election.*

41. *All members of the Board of Directors shall be members of the company and Kihingo Village (Waridi Gardens) Management Two Limited ...*

31. The position and place of a director in a Company is not a matter to be taken lightly. It is established law that a body corporate can only act through the agency of its Board of Directors or the shareholders (see ***East Africa Portland Cement Limited v Capital Markets Authority and 4 Others* NRB HC Pet. No. 600 of 2013**). In ***Affordable Homes Africa Limited v Henderson and 2 Others* NRB HCCC No. 524 of 2004 [2004] eKLR**, the court held as follows:

*As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty. As to which of these two organs should give the necessary sanction depends, in the case of registered companies, entirely on the construction of the company's articles of association. In ***AUTOMATIC SELF-CLEANSING FILTER SYNDICATE v. CUNINGHAME [1906] ch.34, C.A.***, it was held that where a company's powers of management are, by the articles, vested in the board of directors, the general meeting cannot interfere in the exercise of those powers. It is therefore necessary to examine a particular company's articles of association to ascertain wherein lies the power to manage the company's affairs, for therein also lies the power to sanction the commencement of court actions in the name of the company.*

32. Counsel for the Defendants referred to the case of ***Bugerere Coffee Growers Ltd v Sebaduka & Another (1970) 1 EA 147*** to support the contention that a written resolution or authority of the shareholders or directors was necessary to support the filing of the suit. The court, in that case held as follows:

When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case.

33. The courts, in subsequent cases, have resiled from the above position and have held that there no requirement for a company to present a resolution of a company indicating that it has authorized the filing of a suit or has authorized the swearing of an affidavit on its behalf (see ***Bethany Vineyards Limited and Another v Equity Bank Ltd and 2 Others* HC COMM No. 518 of 2011 [2020] eKLR** and ***Fubeco China Fushun v Naiposha Company Limited & 11 Others* H COMM No.222 of 2012 [2014] eKLR**). This case is distinguishable as the Plaintiff has two shareholders; Ndungu and Gitahi who are now in dispute as to whether the Company was authorised to file this suit. In such circumstances, the authority for the Company to agitate these proceedings must be established.

34. An important point is that even where there is no board resolution or the resolution is defective, it may be ratified by the shareholders. This was the case in ***East Africa Safari Air Limited v Antony Ambaka Kegode and Another* NRB CA Civil Appeal No. 42 of 2007 [2011] eKLR** where the Court of Appeal held that where a shareholder or an advocate initiates litigation in the name of the company without the authority of the company, it is open for the company to ratify the act and where the issue is raised in a motion to strike out the claim, the court ought to adjourn the matter to give the company any opportunity to ratify the acts.

35. Turning back to the Articles of Association, it is clear that from the clauses I have set out above that Chacha did not qualify and could not be appointed as a director of the Plaintiff as he was not a member of the Plaintiff or Management Two Limited. Those provisions are further augmented by Clause 46 which provides that a person ceases to be a director if he or she ceases to be a member of the Plaintiff.

36. As regards the meeting held on 2nd May 2019 authorizing filing of the suit and authorising Chacha to swear an affidavit on behalf of the Plaintiff, Clause 47 provides as follows:

47. The board of directors may meet together for the dispatch of business adjourn and otherwise as they think fit and determine the quorum necessary for the transaction of business, Unless otherwise determined the quorum for a meeting of the board of directors shall be at a minimum of two members or 50% of the members of the board whichever shall be higher.

37. Taking all these provisions together with the evidence, I arrive at the inescapable conclusion that Chacha was not properly appointed as a director of the Plaintiff whether in 2013 or 2018 as he was not a member of the Company. Further and under the Articles of Association, Ndungu could not act alone to appoint Chacha as a director or even pass a resolution authorizing the filing of this suit or for that matter appoint counsel to prosecute the matter on behalf of the Plaintiff.

38. Because Ndungu and Gitahi are equal shareholders, ratification of subsequent acts would be impossible and returning the matter back to the shareholders as was held in *East Africa Safari Air Limited v Antony Ambaka Kegode and Another (Supra)* would only result in a deadlock. The net result of my findings is that this suit cannot, in the circumstances, be sustained on the back of one shareholder to the exclusion of the other. I therefore strike it out.

Whether James Ndungu and Julius Chacha committed acts of fraud?

39. The Counterclaim relates to the attendance of the Special General Meeting of the Management Company held on 13th April 2020 by Ndungu and Chacha and the appointment of Chacha as a director of the Plaintiff

40. The classic and accepted common law definition of fraud or fraudulent misrepresentation was established by the House of Lords in *Derry v Peek [1889] 14 App Case 337* where it was held that fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly careless whether it be true or not. It is settled law that allegations of fraud are serious and as such they must be pleaded with particularity and proved to a standard higher than on a balance of probabilities (see *Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR* and *Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, Kinyanjui Kamau v George Kamau [2015] eKLR*).

41. At the heart of this case is the manner in which Class B shares in the Plaintiff were created. Gitahi, as the only other shareholder of the Plaintiff, denied that he was involved in the creation of Class B shares. On this issue, I would only state that the issue of Class B shares, which was an acknowledged fact, has been resolved by the Award. It is worth noting that Gitahi never argued that shares were never created or that they were created illegally. It is for this reason that as long as the shares were still in existent prior to the meeting of 13th April 2019, Chacha and Ndungu were entitled to act in the belief that they were acting bona fide on behalf of the Plaintiff. I cannot therefore impute fraud in their actions.

42. The Defendants accused Ndungu and Chacha of purporting to conduct the meeting of 13th April 2019 and producing what they termed as fake minutes of that meeting. Ndungu and Chacha contended that they were acting on behalf of the Plaintiff and asserting their right to vote and control the meeting as majority shareholders. Fraud imports a level of dishonesty and I do not find this element proved as they believed they were asserting the rights of the Plaintiff however mistaken.

43. The Defendants claimed that Ndungu deviously used his e-citizen account to appoint Chacha as a director so as to use him to fraudulently create minutes for the filing of the present suit knowing that Gitahi would not authorize the filing of the present suit. The issue of the changes at the Companies Registry was dealt with by the Registrar who, when confronted with a letter by the purported Company Secretary, Charles Njenga and the lack of response from both Chacha and Ndungu reversed the changes. As I stated elsewhere both Chacha and Ndungu denied that they had anything to do with the changes. On this evidence, I cannot say that the fraud was proved given that Chacha had purportedly been appointed as a director long before this suit was filed. Further, there was no direct evidence of how the Companies registration system was manipulated to implicate both Chacha and Ndungu. In addition, Charles Njenga was not called as a witness to be cross-examined on his position.

44. Having reviewed the entirety of the evidence, I do not find any basis to accede to the Defendant's request to disqualify Ndungu and Chacha from holding company directorships under sections 214 and 215 of the *Companies Act*.

Conclusion

45. The Plaintiff's case is based on the exercise of its voting rights at the meeting of the Management Company in which it asserts that it is the majority shareholder. Its ability to exercise those rights and to litigate this suit is dependent of the consent of its shareholders more so a majority of them. The principle of majority rule in Company law has long been recognised since the seminal case of *Foss v Harbottle [1843] 2 Hare 46*. In the circumstances of this case, neither Ndungu Gethenji or Gitahi Gethenji acting alone could authorise the filing of the suit or appoint an additional or other director as neither constitute the majority of the Plaintiff's shareholders as they hold equal shares.

46. I have also found that Chacha Mabanga was not qualified to be a director of the Plaintiff under its Articles of Association and was not lawfully appointed by Ndungu Gethenji acting alone. Consequently, Ndungu Gethenji either acting alone or with Chacha Mabanga could not authorise the filing of these proceedings on behalf of the Plaintiff.

Costs

47. Costs are in the discretion of the court. Since the parties have won and lost in equal measure, all parties shall bear their respective costs.

Disposition

48. For the reasons I have set out above, I now dispose of this suit as follows:

- (a) The Plaintiff's suit is struck out
- (b) The Defendants' Counterclaim is dismissed.
- (c) The parties shall bear their respective costs.

DATED and DELIVERED at NAIROBI this 2ND day NOVEMBER of 2020.

D. S. MAJANJA

JUDGE

Mr Willis Otieno instructed by Otieno Ogola and Company Advocates for the Plaintiffs.

Mr Waiyaki instructed by Wamae and Allen Advocates for the Defendants.

Mr Osiemo instructed by Osiemo Wanyonyi and Company Advocates for the 2nd and 3rd Defendants to the Counterclaim.