



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL CASE NO. 5 OF 2019

JENERUS WANJAU WANDERI & 7 OTHERS.....PLAINTIFFS

VERSUS

KIRU INVESTMENTS CO. LTD.....DEFENDANT

RULING

1. The plaintiffs' prayers are two-pronged: Firstly, to compel the defendant company to hold a *general meeting* to elect directors; and, secondly, for an order that *accounts* be taken.
2. The applicants lament that the defendant last held its annual general meeting (hereafter *the AGM*) in the year 2006 and that the management of the company is shrouded in mystery.
3. Those matters are pleaded at length in the Notice of Motion dated 27th May 2019 and the deposition of the 1st plaintiff of even date. The plaintiffs aver that they are shareholders of the defendant, a public limited liability company. From the list annexed, it has a fluctuating membership of about 2583. The plaintiffs claim to be shareholders and appear on the list marked *PMG 2* in an affidavit filed by *Peter Gatawa* in different proceedings at the Chief Magistrates Court at Murang'a in *Civil Case 105 of 2016*.
4. It is important to point out that the defendant now disputes the authenticity of the document; and, submits that only *two* of the plaintiffs are members of the company. The defendant's list of members was filed on 24th June 2019. The number of members is still 2,583 but the type font and names differ. The defendant claims that the latter is the official list filed with the Registrar of Companies (hereafter *the Registrar*)
5. The applicants aver that they toiled hard to acquire Loc.14/Kiru/1965/56 which has an estimated monthly rental income of Kshs.200 ,000. But they say that the members have not reaped any fruits. They accuse the present management of not being forthright with the accounts.
6. The plaintiffs aver that at the last AGM in 2006 the following directors were elected:
 - i. Peter Gatawa Muthoga.....9 shares
 - ii. Cyrus Maina Kihuga.....48 shares
 - iii. Julius Muhia Macharia.....48 shares
 - iv. Geoffrey Mwangi Manjunga.....48 shares
 - v. Stephen Kamau Mucheru.....48 shares
 - vi. John Mwangi Mukiri.....48 shares
 - vii. Stephen Mwangi Githinji.....48 shares
7. The applicants aver further that some of the above directors have since died, resigned or were removed from office by the current chairman. The effect is that the company is run unilaterally by the chairman and the treasurer, *Cyrus Maina Kihuga*.
8. They aver that they lodged complaints with the Registrar. A meeting of the company was scheduled for 14th April 2015 but flopped

because the incumbent directors failed to comply with the **Companies Act**. On 21st July 2015, the Registrar ordered that a register of members be filed. The applicants aver that the updated register has been shrouded in secrecy by the management.

9. The applicants aver that a subsequent AGM was slated for 23rd December 2016 at Rurii Stadium but the chairman and directors were a no show. Another meeting was to be held on 25th January 2017 at Kiruru Coffee Factory to elect new directors but was thwarted by a court order issued in the Chief Magistrates Court at Murang'a in *Civil Case 105 of 2016*. The order prohibited the company from proceeding with the meeting. The applicants aver that the suit was dismissed on 18th July 2017 for want of jurisdiction.

10. The applicants have expressed frustrations with several pending suits on the issue including Murang'a CMCC No. 191 of 2017 *Peter Muthoga Gatawa (suing as Chairman of Kiru Investment Housing Company Ltd) v George Kariuki Kamau*. In that suit a new list of directors was attached by the company notwithstanding that no AGM has been held since 2006.

11. The applicants submitted that no annual returns have been filed; that no dividends have been declared or paid; and, that they are in the dark about tax returns. They contend that the very existence of the company is in serious jeopardy.

12. In a synopsis, the applicants contend that the affairs of the company are being conducted in an opaque and undemocratic manner; that the chairman has remained a fixture; and, that he runs the business akin to a small partnership.

13. The application is contested by the defendant. There is a replying affidavit sworn on 20th June 2019 by *Peter Gatawa*, the current chairman. He avers that only two of the applicants appear on the official list of members submitted to the Registrar. He contends that the motion is an abuse of court process. He blames the plaintiffs for blocking the company meetings through various court orders in Nairobi High Court *Judicial Review 436 of 2006* (exhibit DMG2) and Chief Magistrates Court at Murang'a *Civil Case 191 of 2017* (exhibit DMG5).

14. He avers that the company called a *special general meeting* on 18th May 2017 as per the minutes marked DMG3. However, a splinter group of officials convened a counter "*extra ordinary general meeting*" on 22nd June 2017. On 26th July 2018, the lower court in *Civil Case 191 of 2017* declared the latter meeting illegal. He says the suit is still pending.

15. The deponent has attached notices calling for meetings of the company on 14th April 2015 and 23rd December 2016. He also avers that some disgruntled members wrote to the Registrar on 10th January 2017 and 14th July 2018 requesting the Registrar to change the list of directors. Earlier, an interim chairman, *George Kariuki*, had petitioned the Registrar to nominate a company secretary for a meeting slated for 25th January 2017. The purpose of that meeting was to among other matters "*elect interim officials for three months*".

16. The defendant avers that the issues of the *bona fide* officials and members should be resolved first. The defendant in principle does not object to the meeting; its position is that such a meeting is not practical unless those twin issues are resolved first. Secondly, it is of the view that the company members should be allowed to resolve their internal wrangles without undue interference from the court.

17. Both parties filed written submissions on 22nd July 2019 and 25th July 2019 respectively. They all agreed that this application be determined on the basis of those submissions.

18. The main suit is pending for hearing. Many of the issues now raised by the parties have not been tested on cross-examination. But I can safely state the following: The two conflicting lists of members emanate from *Peter Gatawa*, the current chairman. One was in his earlier affidavit at the Chief Magistrates Court at Murang'a in *Civil Case 105 of 2016*. The other is the one he filed on 24th June 2019 in the present suit. He cannot blow hot and cold.

19. But that is not to say that the *bona fide* list of members is resolved at the moment. The question whether six of the plaintiffs are members of the company belongs to the province of the trial court on tested evidence.

20. However, the defendant has been unable to demonstrate that the company has held its general meeting since 2006. The defendant has instead tried to shift the blame to the applicants for blocking such meetings through court actions.

21. The dispute as pleaded in the plaint revolves around *governance* and the *management* of an incorporated public company. A company is an *inanimate* legal person. The centre piece of *corporate governance* is the AGM. It is at that meeting that the directors account to the members and the latter get a say on the management of their company. So critical is the AGM that under the **Companies Act 2015**, failure to hold the meeting attracts criminal sanctions.

22. The primary prayer in the plaint is to compel the company to hold the general meeting. If the court calls the meeting at this stage without tested evidence, the value of the main suit will be spent or greatly diminished. Paraphrased, the *interests of justice* would obviously be better served by hearing the *main suit* and eschewing numerous interlocutory applications. I am well guided by the decision of *Nyamu, JA in Stephen Boro Gittha v Family Finance Bank & 3 others*, Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR:

23. But the court cannot countenance the current state of affairs or condone the failure to hold a general meeting for over a decade. The court is imbued with power to intervene to correct the course at this stage. Section 280 of the Act is express on the matter. It is clear from the depositions that the company is unable to conduct the meeting in the manner required by the articles of the company or the Act.

24. In the interests of justice, I make the following orders and directions:

- a) That a *general meeting* of the company shall be convened by the Registrar of Companies to be held within 90 days of today's

date.

- b)** That the meeting shall be conducted as much as is practicable in accordance with the company's articles, the Act and any directions by the Registrar.
- c)** That the meeting shall be held at either the company's premises or at Rurii Stadium on a date to be determined and communicated by the Registrar.
- d)** That the principal agenda of the meeting shall be to elect *interim directors* of the company and to appoint an *interim company secretary*. The Registrar will be at liberty to add any other necessary or ancillary agenda.
- e)** That the nearest Officer Commanding Police Division shall provide the necessary security and ensure peace at the meeting.
- f)** That the costs of holding the meeting shall ultimately be borne by the company.
- g)** That the Registrar shall make a return from the meeting and file a report to the Court which shall become part of the record.
- h)** That in order to fast-track the hearing of the main suit, I direct that *summons to enter appearance* shall be served *forthwith*. The parties shall endeavour to close their pleadings within the strict timetable provided by the **Civil Procedure Act**. They shall also comply with *Order 11* of the *Civil Procedure Rules* as soon as practicable particularly with regard to exchange of documents; settlement of issues for trial; and filing of *brief* witness statements of witnesses. In order to further expedite the trial, the witnesses will identify their *statements* and be subjected immediately to cross-examination. The Deputy Registrar shall grant an early date for mention or pre-trial conference.
- i)** Costs shall abide with the final judgment.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 8th day of October 2019.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. Magani for the plaintiffs/applicants instructed by Dola, Magani Advocates.

Mr. Mbugua holding brief for Mr. Kimwere for the defendant instructed by Kimwere Josphat & Company Advocates.

Ms. Elizabeth, Court Clerk.