



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 16 OF 2018

RAPHAEL M. NZOMO1ST PLAINTIFF

DR. KENNEDY AMOKE.....2ND PLAINTIFF

LAWRENCE OTIENO OUMA.....3RD PLAINTIFF

JOANNE MWANGI4TH PLAINTIFF

JOHN KENNEDY WANYAMA.....5TH PLAINTIFF

ROSEMARY LUGALIA KHAMATI.....6TH PLAINTIFF

MERCY MUKWA MUTUA.....7TH PLAINTIFF

SAMUEL ODERO OJANGA.....8TH PLAINTIFF

VERSUS

NAIROBI COUNTY GOVERNMENT.....DEFENDANT

AND

NAIROBI CITY WATER & SEWERAGE

COMPANY LIMITED.....INTERESTED PARTY

RULING

1. This ruling is in respect of two applications.

2. The application dated 23rd January, 2018 principally seeks orders that an order of temporary injunction be issued restraining the Defendant and or its agents, servants, employees, nominees or any other person whosever either acting at the behest of the Defendant or otherwise from proceeding with the Extra Ordinary Meeting of the Interested Party convened by the Defendant on 26th January 2018 at City Hall at 8.00 a.m., pending determination of arbitration proceedings to be initiated by the Plaintiffs herein.

3. The application is predicated on the grounds stated therein and is supported by the affidavit of Raphael M Nzomo, the 1st Plaintiff and the Interested Party's Board of Directors Chairman. The 2nd - 8th Plaintiffs are the Co-Directors. The appointment is for a three year period from 11th July, 2016 to 10th July, 2019.

4. The Interested Party, Nairobi City Water & Sewerage Company Limited (hereinafter the Company) is a limited liability company incorporated under the provisions of the Companies Act (Cap 486 Laws of Kenya), repealed and transited by the Companies Act, 2015. The Company is a public corporation managed under the Companies Act and the Company's Memorandum and Articles of Association.

5. The Defendant, Nairobi County Government (hereinafter the County Government), administers the water and sewerage services through

the Company pursuant to the provisions of Section 79 of the Water Act, 2016.

6. The Directors complaint is that the County Government, a shareholder in the Company issued a Notice calling for the convening of an Extra Ordinary General Meeting of the Company with the principal agenda of removing them from the Company's Board of Directors. The Directors' view is that the Notice is in breach of the Company's Articles of Association. Aggrieved by the said Notice, the Directors declared a dispute. It is stated that the said declaration of a dispute is in accordance with the company's Articles of Association. The Directors then went ahead to nominate an arbitrator but the County Government declined to accede the choice of the Arbitrator.

7. It is stated that vide a letter dated 27th September, 2017, the County Government purported to suspend the operations of the Board of Directors. That the Directors in response filed H.C. Nbi ELRC No. 85 of 2017 Raphael Nzomo & others v Nairobi County Council Government & Others which ended up being struck out as having been filed in the wrong forum. The Directors then filed Constitution Petition H.C. Nbi Petition No. 563 of 2017 between the same parties which petition is still pending but is limited to the issue of the suspension of the Board of Directors.

8. The Directors contention is that the Extraordinary General Meeting is illegal and will prejudice their position if they are removed from the Board of Directors and other Directors appointed. In addition the Directors allege malice on the part of the County Government particularly with the engagement of the Ethics and Anti-Corruption Commission (hereinafter EACC) by the County Government to investigate the Directors then use the investigation and allegations as a basis for their removal yet the EACC report is yet to be out.

9. The application is opposed by the County Government. It is stated in the replying affidavit that the application is incompetent, has no merits and distorted or failed to disclose material facts to the court. It is further stated that the Notice of the Extra Ordinary General Meeting was issued in accordance with the Company's Articles of Association and that no prejudice will be occasioned to the Company if the Extra Ordinary General Meeting proceeds.

10. The County Government, the Governor and the Ag County Secretary are described as the exclusive shareholders of the Company, with the County Government being the majority shareholder. It is further stated that the Company exercises delegated, controlled and constitutional functions of the County Government to provide water and sewerage services to the residents of the County under the Water Act, the Companies Act and the Public Finance and Management Act.

11. It is further stated that the County Government suspended the operations of the Board following complaints of gross misconduct and complaints of illegalities and irregularities in the nomination and appointment of the Directors of the Board. There are also allegations of abuse of office and misuse of public funds.

12. It is further stated that the County Government requested for the Extra Ordinary General Meeting but the Board failed to convene any, hence the Notice of the Extra Ordinary General Meeting issued by the County Government. The County Government's position is that the matters herein are *subjudice* H.C. Nbi. Constitution Petition No. 563 of 2017 which is between the same parties over the same subject matter. The Board is accused of forum shopping by filing of multiple suits over the same subject matter in various courts.

13. It is contended that the Company's Articles of Association do not provide for arbitration in the kind of dispute herein and that in any event, the dispute is not suitable for arbitration as it relates to allegations of gross misconduct and breach of the constitutional provisions on Leadership, Integrity, Devolved Government, Public Finance and Culpability of Criminal offences.

14. The County Government is objected to the *ex parte* interim orders granted herein on 24th January, 2018 (Hon. Mbogholi Msagha, J) and filed the application dated 31st January, 2018. The application seeks orders that the said interim orders be discharged and/or set aside. Secondly, that the chamber summons and the plaint dated 23rd January, 2018 be struck out.

15. The application is premised on the grounds stated in therein and is supported by the affidavit sworn by Mr. Leboo Ole Morintat, the Ag. County Chief Officer, Public Service Management and Transformation of the Nairobi City County Government. It is stated that the Notice of the Extra Ordinary General Meeting was issued in accordance with the law and the Interested Party's Articles of Association. It is further stated that the *ex parte* interim orders issued herein are highly prejudicial to the County Government and ought to be discharged as the same interferes with the internal affairs of the Company without reasonable and justifiable cause. The background facts given in support of the application are essentially the same that were given in opposition the application dated 23rd January, 2018.

16. In opposition to the application, the Directors relied on the same facts stated in the affidavit in support of their application dated 23rd January, 2018.

17. The Company did not file a response to any of the two applications and left the matter to the court.

18. The two applications were argued simultaneously before me. The said submissions mainly dwell on the issue whether the dispute between the parties is covered by the arbitration clause provided for under Article 131 of the Company's Articles of Association. The court was also, *inter alia*, referred to Article 42 of the Company's Articles of Association; the Companies Act and the Constitution of the Republic of Kenya.

19. On whether to issue the restraining injunctive orders sought, the principles applicable were well settled in the case of **GIELLA –VS- CASSMAN BROWN & CO. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss which cannot be adequately compensated by award of damages would be suffered and if in doubt, the court will decide on a balance of convenience.

20. Clause 42 of the Company's Articles of Association provides as follows:

“42. (1) The Directors may, whenever they think fit, convene an Extraordinary General Meeting, and they shall, on the requisition of members of the Company representing not less than one-fifth of such of the paid-up capital of the Company as at the date of the requisition carries the rights of voting at General Meetings, forthwith proceed to convene an Extraordinary General Meeting of the Company and in the case of such requisition the following provisions shall have effects:

(a) The requisition must state the objects of the meeting and must be signed by the requisitionists and deposited at the office, and may consist of several documents in like form each signed by one or more of the requisitionists.

(b) If the Directors do not, within twenty-one (21) days from the date of deposit of the requisition proceed to convene a meeting, the requisition, or any of them representing more than one-half of the voting rights of all of them may themselves convene the meeting, but the meeting so convened shall not be held after three (3) months from the date of such deposit.

(c) In the case of a meeting at which a resolution is to be passed as a special resolution the Directors shall be deemed not to have duly convened the meeting if they do not give such notice as is required by the Act.

(d) Any meetings convened under this article by the requisitionists shall be convened in the same manner as nearly as possible as that in which meetings are to be convened by the directors

(e) A requisition by joint holders of shares must be signed by all such holders.

(2) If at any time there are not within Kenya sufficient Directors capable of acting to form a quorum, any Director or any two members of the Company may convene an Extraordinary General Meeting in the same manner as nearly as possible as that in which meetings may be convened by the Directions.”

21. The County Government requisitioned for an Extraordinary General Meeting vide their letter dated 4th December, 2017 (annexture LOM II) and thereafter a Notice dated 28th December, 2017 was issued for the Annual General Meeting to be held on 26th January, 2018. Although under clause No. 42 of the Company’s Articles of Association the County Government was at liberty to convene such a meeting if none was convened by the Board of Directors within 21 days, it is not clear on which date the said requisition was deposited with the Board of Directors. This gives credence to the complaint by the Directors regarding whether the procedures for calling for the Extraordinary General Meeting were followed. There were timelines to be adhered to. However, it is noted that the Directors proceeded to declare a dispute. This brings us to the question regarding the resolution of disputes as provided for by the Company’s Articles of Association.

22. Clause 131 of the company’s Articles of Association provides as follows:

“When any difference arises between the Company and the “Directors on the one hand, and any of the members or their representatives on the other, or between any members or classes of members or between the directors with regard to the true construction of these presents or with regard to anything done, executed, omitted and suffered in pursuance of these presents or the Companies Act, or with regard to any breach of alleged breach of these presents or any claim on account of any such breach or alleged breach or otherwise relating to the premises or these presents or to any of the affairs of the Company, every such difference shall be referred to the decision of an Arbitrator to be appointed by the parties or if they cannot agree upon a single Arbitrator to the decision of two (2) Arbitrators of whom one shall be appointed by each of the parties in difference, and any such reference shall be subject to all the provisions of the Arbitration Act and any statutory modification thereof for the time being in force.”

23. The first category of the dispute is the one that is applicable to the company, Directors and members or their representatives. The second category of disputes is in respect of members or classes of members while the third category involves directors. From the wording “...the Company and the Directors on the one hand...” in my view does not mean that the members cannot have a dispute with either the Company or the Directors. To me it appears that the construction of the arbitration clause read in it’s entirely is that the internal disputes including disputes involving the Company and/or its Directors versus members be referred to arbitration as the first port of call.

24. On whether this matter is *subjudice* H.C. Constitutional Petition No. 563 of 2017 and issues of forum shopping, it is noted that the Constitution Petition is based on the allegations of breach of Constitutional rights following the letter suspending the Board of Directors. The dispute herein concerns, essentially, the calling of the Extraordinary General Meeting. The matter is therefore not *subjudice*. It is also noted that the H.C. Nbi. ELRC No. 85 of 2017 was struck out. Consequently, the Directors were at liberty to file any other suit.

25. I have noted no material non-disclosure or distortion of facts by the Directors.

26. With the foregoing, this court’s view is that the Directors have made out a prima facie case for the grant of the injunctive orders sought. Consequently, the application for the discharge of the interim orders or the setting aside of the same or the striking out of the chamber summons and the plaint cannot succeed. I allow the application dated 23rd January, 2018. The application dated 31st January, 2018 is dismissed. Costs in cause.

Dated, signed and delivered at Nairobi this 7th day of March, 2018

B. THURANIRA JADEN

JUDGE