REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 473 OF 2014

DAVID WAMBUA NGII……………….......................................… 1ST PLAINTIFF

MARGARET KISANGULA (suing as the administrator of the estate of the

late MALUKI K. KISANGULA ……………….........................…2ND CLAIMANT

VERSUS

DR. JOHN KIOKO MUSINGI………………….......................…1ST DEFENDANT

SIMON NJENGA…………………………..…........................….2ND DEFENDANT

EVANS UMBUNDU BOGE………………..............................…...3RD DEFENDANT

KIESTA INDUSTRIAL TECHNICAL SERVICES LTD…..............4THDEFENDANT

RULING

1. Before Court is an Application dated 12th May, 2015 for the following Prayers:-

1. THAT Leave be granted to Margaret Kisangula, as administrator of the estate of Maluki Kisangula, hitherto the 2nd Claimant herein, be joined in this suit as the 2d Claimant in place of Maluki Kisangula, now deceased.

2. THAT an order of this Honourable Court do issue directing the Registrar of Companies to rectify the Companies Register in respect of Kiesta Industrial Technical Services Limited (the 1st Respondent) to accord with the decree issued herein dated 4th February 2014 and in particular;

a) The Registrar of Companies be and is hereby compelled to rectify the register of the 1st Respondent as to allot the 1st Claimant, David Wambua Ngii, 606 shares out of 1,876 determined as issued and fully paid up shares in the capital of the 1st Respondent.

b) The Registrar of Companies be and is hereby compelled to rectify the register of the 1st Respondent as to allot Margret Kisangula, as administrator of the estate of Maluki Kisangula, 166 fully paid up shares of the 1st Respondent out of the 1,876 determined as issued and fully paid up shares in the capital of the 1st Respondent.

3. THAT an order of this Honourable Court do issue compelling the Registrar of Companies to rectify the current share register in respect of the 1st Respondent, Kiesta Industrial Technical Services Limited, as to reflect that the issued share capital is 1,876 shares out of which the 1st Claimant shall be allotted 606 fully paid up shares while Margaret Kisangula shall be allotted 166 fully paid up shares.

4. THAT Leave be granted to the Claimants to execute against the Respondents jointly and severally for the sums due in the decree dated 14th February 2014 with interest at 15% per annum form 17th October 2011 until payment in full pursuant to Clause 18.3(b) of the Arbitrator's Final Award on costs dated 17th October, 2011.

5. THAT a prohibition order do issue restraining the 1st Respondent from transferring, charging or in any way whatsoever disposing of its interest in Land Reference No.209/11521 (Grant No.71609) until the full realization of the Clamants' decree on costs.

6. THAT such further order or orders as it commends the Honourable Court to issue as to compel the Respondents, and in particular the 1st Respondent, to honour in full the decree dated 14th February 2014 be made in the circumstances.

2. Before delving into the arguments made for and against the Motion, I need to give the following brief background.

3. A dispute arose between David Wambua Ngii and Maluki Kisangula (now deceased) on the one hand and the Respondents on the other. That dispute was referred to Arbitration to Richard Mwongo (now Judge) as the Sole Arbitrator. In an Award dated 30th April, 2009 , the Sole Arbitrator identified the nature of the dispute as follows:-

2.1. The core of the dispute revolves around the regularity or propriety of company meetings and their effect on shareholding records, the amount of shares already held by each of the shareholders, the legality of termination of the Claimants' employment, and alleged misappropriation of funds by the Claimants.

2.2. The 1st Claimant's case is that he was the key force behind the establishment of the Company. He states that at inception of the Company in 1993, he and the 2nd Respondent were the two subscribers to the Memorandum and Articles of the Company. He subscribed for 300 shares, paid for 200 of them, and, pursuant to general meetings thereafter he was allotted and paid up for additional shares. At the time of filing the claim he alleges he held 872 shares in the capital of the Company.

2.3. The 1st Claimant also alleges that he was unprocedurally removed as Managing Director by the members at a General Meeting held on 1st March 2003. He alleges that the meeting was irregularly and unprocedurally convened, and the matters transacted thereat were void.

2.4. The 2nd Claimant claims that he joined the Company at its inception with a share contribution of 60 shares. He served as Secretary to the Board from inception to 1997 and, by the time of filing of the claim, his shares had grown to 237.

2.5 The 2nd Claimant also alleges that the General Meeting of 26th January 2002 at which he was appointed the Chair, was unprocedural as he was wrongfully removed from the directorship of the Company at a meeting held in December 2002.

2.6 The Respondents deny all the contentions of the Claimants. Further, they allege that the 1st Claimant irregularly allocated himself 300 shares at inception of the Company, without paying for them. In addition, the Respondents deny that the Company regularly increased its nominal or paid

up share capital as alleged by the Claimants.

2.7 With regard to the removal of the 1st Claimant as Managing Director of the Company, the Respondents alleged that there was not notice or agreement to retain him as Managing Director for life. The removal was therefore done regularly in a validly convened meeting.

2.8 Further the Respondents raise counterclaims against the Claimants seeking refund of allegedly misappropriated or irregularly obtained moneys, both in dollar and Kenya shilling currencies. Details are set out in the next section.

2.9 The Respondents further allege that the Company's business was adversely affected by the Claimant's failures and other misdemeanors in respect of their poor management.

4. The Award was in favour of the Claimants who then moved Court for its Recognition through Chamber Summons of 14th March 2011. That Application was however dismissed on 18th September 2012 as the Claimants had failed to file the Original Arbitration Agreement or a duly certified copy of the Award alongside the Application.

5. The Claimants rectified the omissions by an Application for Review on 28th November 2012 and in a Ruling dated 28th May 2013 Justice Havelock made the following Orders:-

> "Consequently, I allow the Application before Court and set aside my Ruling of 18th September 2012. I enter Judgement for the Claimant as against the Respondents in terms of the said Arbitral Award dated 30th April, 2009 as well as the Final Award on costs dated 24th February 2012. The Claimants may now take enforcement proceedings as regards the Award as necessary".

6. The motivation of the Application, now before Court, on the main, is that the Award of the Arbitrator has not been satisfied and the intervention of the Court is sought to enforce the Decree. This Court considers the arguments of Counsel for both sides as it now turns to determine the issues.

Of substitution of Maluki Kisangula.

7. It is common ground that Maluki Kisangula died on 26th July 2006. It is also not in dispute that Margaret Kaseo Kisangula was issued with Grant of Letters of Administration Intestate to the Estate of the Deceased on 28th November 2006.

8. It is therefore true as argued that the Death of the 2nd Claimant and appointment of an Administrator to his Estate both happened as the matter was pending before the Arbitrator. And looking at the Award, there is no evidence that this was brought to the attention of the Arbitrator. It is therefore clear to me that the Application for Substitution should have been made in the Arbitral Proceedings. However what is the proper course to take in view of the fact that neither party brought this matter up before the Arbitrator and later at the proceedings for Recognition of the Award?. There is now a Court Decree which is partly in favour of a Dead person and therefore his Estate. Is the Estate to loss out as suggested by the Respondents?

9. In dealing with the question this Court must be concerned with making an Order that advances the Course of Justice. The Respondents have not demonstrated how they would be prejudiced by the request of substitution. On the other hand, the Estate of the Deceased is at risk of losing from the benefit of a Decree in its favour. In the circumstances of this case the Court leans towards an Order that will effectuate the outcome of the Arbitral proceedings to which the parties submitted their dispute.

Rectification of the Register

10. The Parties jointly put the following two issues, amongst others to the determination of the Arbitrator,

(i) How many shares do the Claimants have in the Respondent Company? How and when were they issued?

(ii) How has the nominal share capital changed over time and were the changes regular?

11. In resolving those issues the Arbitrator determined that;

i) The 1st Claimant is the holder of 606 fully paid up shares as at 30th December 2000 out of 1876 determined as issued and fully paid up shares in the Capital of the 1st Respondent Company as at that date.

ii) The 2nd Claimant was the holder of 166 shares.

12. The Court is now told by the Respondent that there has been changes on the shareholding structure after 2000, and that the Claimant ought to move the Arbitrator for interpretation and/or amendment of the Arbitration Award to conform with the current shareholdings in the Company.

13. I take the following simple view of the matter. In opposing the Recognition of the Award the Respondents had made this same argument in respect to the change of shares. Yet in the face of that argument Justice Havelock on 28th May 2013 recognized the Award and entered judgment in terms. He then commented, ***"The Claimant may now take Enforcement Proceedings as regards the Award as necessary".***

That decision has not been set aside or reviewed and in my view brought an end to that matter.

Interest on Costs.

14. In the final Award on Costs the Arbitrator ordered that it would incur simple interest at the rate of 15% per annum as long as it remained outstanding. I am now told by the Claimant that the factor of interest on costs was omitted from the Decree of 4th February 2014 and so requests as follows in Prayer 4 of the Application:-

"THAT Leave be granted to the Claimants to execute against the Respondents jointly and severally for the sums due in the decree dated 14th February 2014 with interest at 15% per annum form 17th October 2011 until payment in full pursuant to Clause 18.3(b) of the Arbitrator's Final Award on costs dated 17th October, 2011".

15. The Respondents make short thrift of the matter and submit that the Prayer is superfluous as the Applicant does not need leave of Court to execute the Decree. But that submission misses the point and misunderstands the thrust of the Claimants request. Item 5 of the Decree of 4th February 2013 reads as follows:-

"That the Claimant Bill of Cost of Khs.4,617,930.00/= is hereby taxed off by 3,145,541.50 and the amount of Kshs.1,472,388.00 shall be paid by the Respondent to the Claimant".

The Claimants are therefore correct when they state that the aspect of interest has been left out. When the Court recognized the Award, it recognized it in its entirety and the Decree should faithfully reflect the Award. The request is that the Decree aligns it to the Award on interest and does not seem to be unreasonable.

Prohibitory Orders

16. Order 22 Rule 7(2)(i) of the Civil Procedure Rules sets out the various modes of execution of a court Decree. One of which is by attachment and sale of any property. Order 22 Rule 9 elaborates on an Application for attachment of immovable property. Order 49 of the CPR provides for Special Powers of

Registrars. Rule 5 thereof reads:-

> "Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and ordered by imprisonment in execution of a decree of the High Court may be made by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge".

17. It seems to me that Prayer 5 of the Application of 12th May 2015 for Prohibitory Orders to issue should have been made in the first instance before the Deputy Registrar of this Court and I decline to entertain it.

18. My final Orders are that Prayer 1, 2, 3, and 4 of the Notice of Motion of 12th May 2015 are hereby allowed with costs to the Claimants. Prayer 5 is declined.

Dated, Signed and Delivered in Court at Nairobi this 17th day of February,2017.

F. TUIYOTT

JUDGE

PRESENT;

Mwachia for Thuranira for Plaintiff

Ashimosi for Defendant/Applicant

Alex - Court Clerk