



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

MISC CAUSE No 173 OF 2014

IN THE MATTER OF GATUNDU HOLDINGS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION BY MUNYAMBU NJUGUNA GACHAGO,
DOMINIC STEPHEN KARANJA AND KANYONGO KIMANI KAMAU FOR THE
APPOINTMENT OF ONE OR MORE COMPETENT INSPECTORS TO INVESTIGATE THE
AFFAIRS OF GATUNDU HOLDINGS LIMITED AND RELATED MATTERS**

AND

IN THE MATTER OF

MUNYAMBU NJUGUNA GACHANGO.....1ST APPLICANT

DOMINIC STEPHEN KARANJA.....2ND APPLICANT

KANYONGO KIMANI KAMAU.....3RD APPLICANT

VERSUS

GATUNDU HOLDINGS LIMITED.....1ST RESPONDENT

DANIEL KAMITA GICHUHI.....2ND RESPONDENT

MOSES NGANGA MUIHIA.....3RD RESPONDENT

MUTUA KIHU.....4TH RESPONDENT

PAUL KABUBI NJUGUNA.....5TH RESPONDENT

RULING

1. Before the Court was the amended Notice of Motion application dated and filed on 21st April 2015 and 22nd April respectively, and brought under the provisions of Section 165 of the Companies Act, Rules 3, 4 and 8(c) of the Companies (High Court) Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, as well as Order 40 Rule 2 of the Civil Procedure Rules. The applicants sought for the following prayers;

1. *Spent*
2. *THAT pending the hearing and determination of this application this Honourable Court do and hereby restrain the 2nd-5th Respondents or anybody whatsoever from acting on their behalf from convening and presiding over any Annual General Meeting (AGM) or special meeting of the directors or shareholders Gatundu Holdings Limited.*
2. *THAT this honourable Court be pleased to declare as illegal or unlawful, null and void the purported Annual General Meeting of the 1st Respondent held on 20/4/2014 at Amboseli National Park called and presided over by the 2nd-5th Respondents and all the decisions, actions, resolutions made on that date and all other consequential decisions, actions or resolutions that have been made or taken pursuant to the purported Annual General Meeting.*
3. *THAT pending the hearing and determination of this application, the honourable Court do and hereby restrain the 2nd-5th Respondents from acting on behalf of the 1st Respondent, including operating the 1st Respondent's bank accounts, executing any contract, selling, transferring, disposing of any of the 1st Respondent's properties or dealing in any manner with the company's property, particularly the land in Kitengela, Emali and Kayole.*
4. *THAT pending the hearing and determination of this application, the 1st Respondent's bank accounts be frozen particularly the account at Consolidated Bank Koinange Street and any other accounts held in the name of the 1st Respondent.*
5. *THAT this honourable Court do and hereby appoint one or more competent inspectors to investigate the affairs of Gatundu Holdings Limited and table a report to this honourable Court.*
6. *THAT pending the conclusion of the investigation by the inspectors or further orders of this honourable Court, the 2nd-5th Respondents be and are hereby restrained from convening and presiding over any annual general meeting, or any other meeting or operating the affairs of the company, or in any manner howsoever dealing with the properties of Gatundu Holdings Limited.*
7. *THAT the costs of the inspectors appointed and proceedings herein be met by the 1st Respondent.*

2. The application was predicated upon the grounds that the 2nd-5th Respondents were conducting the affairs of the 1st Respondent (hereinafter referred to as the "company") contrary to the law and good corporate governance practice. It was further alluded that the 2nd-5th Respondents had called for an Annual General Meeting, which was contrary to the provisions of Sections 130, 133, 134 and 158 of the Companies Act, in that, they had not served a twenty-one (21) days written notice to the members of the Company, and that no balance sheet or books of account had been circulated to the members.

3. Further, it was reiterated that there was a need to investigate the affairs of the Company, especially with regards to the status of its assets, bank accounts, as well as the appointment and removal of directors and the register of its members, which was alleged may have been interfered with. These averments, as well as other alluded to, were further reiterated in the supporting affidavit of the 1st Applicant sworn on 17th April 2014.

4. Therein, it was deposed to that there had not been held an Annual General Meeting for a long time, and that on 15th April 2014, the 1st Applicant discovered that he had been appointed a director without his knowledge. He reiterated that there had been no meeting held to appoint him as a director, and further, that he had never been invited to any director meeting following the appointment.

5. It was deposed to, however, that they were not opposed to the holding of the AGM as intimated by the 2nd-5th Respondent, only that the same should be conducted in accordance with and in adherence to the law and regulations. The Applicants also relied on the supplementary affidavit

- sworn on 25th August 2014, in which it reiterated the averments in the affidavit deposed to on 17th April 2014, as well as the grounds adduced in support of the application.
6. It was further reiterated that the 2nd-5th Respondents had one (1) day prior to the proposed AGM to be held on 20th April 2014, which was contrary to the law, and an attempt by the 2nd-5th Respondents to conceal malpractices.
 7. In opposing the application, the Respondents relied on the dispositions made in their two affidavits, namely; the replying affidavit sworn on 27th May 2014 and the further replying affidavit dated 22nd September 2014. It was deposed to that the Respondents had conducted the affairs of the 1st Respondent with utmost diligence and transparency, and in accordance with the law.
 8. It was also contended that the meeting held on 20th April 2014 was held in accordance with the law, and the requisite notices were issued to the shareholders and members, including the Applicants, and that the same was held pursuant to the resolution passed on 4th January 2014, of which the Applicants were in attendance.
 9. Further, it was contended that the failure to furnish the Applicants with the books of account was not deliberate or meant to conceal information but that the same was occasioned by the loss of some of the documents in the custody of Messrs Waithaka Kiarie & Co. the 1st Respondents duly appointed auditors, and further, that it was the aforementioned loss that the Company had been unable to hold any AGM as the lost documents were reconstituted.
 10. It was the 2nd-5th Respondents' contention that the 1st Respondent was appointed a director in the year 1987 and took up the place of one Dominic Stephen Karanja, the 2nd Applicant. He was re-elected as director in the Company's AGM held on 21st February 1991, and has held such position since then up until 20th April 2014. It was contended that there was no evidence tendered to disclose any good reasons warranting the appointment of investigators to investigate the affairs of the 1st Respondent.
 11. I have considered the amended application by the Applicants dated 21st April 2015, the affidavits sworn on 17th April 2014 and 25th August 2014, the response by the 2nd-5th Respondents vide the replying affidavit and further relying affidavit sworn on 27th May 2014 and 22nd September 2014 respectively, as well as the oral and written submissions made and filed by the Applicants and 2nd-5th Respondents dated 18th June 2015 and 11th November 2015.
 12. The issue for determination before the Court, therefore, at this juncture, is whether the Applicants have established a claim to warrant the issue of the orders prayed for in their amended application, and whether the same are merited.
 13. With regards to the application, the Court noted that the parties had not sought to resolve the dispute arising as provided under Article 159(2)(c) of the Constitution, and as provided under Article 31 of the Company's Articles of Association, which provided that;

Whenever any difference arises between the Company on the one hand and any of the members, their executors, administrators or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching any breach, or alleged breach of Articles, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises, or to these Articles or to any statutes affecting the Company, 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 in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, one of whom shall be appointed by each of the parties in the difference.

14. Any difference, as reiterated by the aforementioned Article 31, was to be referred to arbitration. The differing parties in this instant, were the Applicants and the 2nd-5th Respondents on a number of issues as set out hereinabove. All of the issues that have been considered above, are the subject of arbitration, and which therefore, would give the differing parties a sanctioned opportunity to deliberate on the issues and come to a conclusive determination.

15. The Court does not, in the instant, have the requisite jurisdiction to determine the issues raised, and would therefore, in consideration of the arbitration clause, refer the matters back to the parties, in order for them to consider the appointing of an arbitrator to determine the issues raised. The issues of notices are provided under Articles 27 & 28 of the Articles of Association, as is provided under Article 21 for the appointment of directors.
16. The Court, in holding that it lacks the requisite jurisdiction to make and/or issue orders as prayed for in the presence of applicable alternative dispute resolution mechanisms, will accord the parties an opportunity to appoint an arbitrator (or arbitrators) as the case may be, to resolve any issue(s) on conflict arising between them.
17. Given that none of the parties had made an application under Section 6(1) of the Arbitration Act, the Court will nonetheless exercise its inherent jurisdiction as donated under Section 3A of the Civil Procedure Act, and further, as provided under Section 1A and 1B of the aforementioned Act, to stay all proceedings in this matter, pending the referral of the matter to hearing and determination before an arbitrator.
18. The upshot is that the application is stayed under Section 6(1) of the Arbitration Act, pending the hearing and determination of the Arbitral proceedings, and the parties hereby are directed to appoint an arbitrator(s) within fourteen (14) days of this ruling. Costs shall be in the course.
19. There be liberty to apply.

Dated, Signed and Delivered in Court at Nairobi this 8th day of April, 2016.

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C. KARIUKI

JUDGE