REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 17 OF 2013

ARTICLES 22 & 23 OF THE CONSTITUTION OF KENYA, 2010

AND

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

AND

IN THE MATTER OF ARTICLE 50 OF THE ARTICLES OF ASSOCIATION OF MOGUSII FARMERS GROUP COMPANY LTD

BETWEEN

ELIZAPHAN NYAKUNDI NYATUGA ……....................……………………. PETITIONER

-VERSUS-

DAVID OMBUKI MOTANYA ………………..…....………………….1ST RESPONDENT

NELSON GICHANA MABEYA …………….….…………………… 2ND RESPONDENT

CHARLES ONDARI ACHOKI …………………..…………………. 3RD RESPONDENT

MESHACK OCHENGO ……………………….....………..…..……..4TH RESPONDENT

DR. STEVE ORINA OKERIO …………………...…………………. 5TH RESPONDENT

RULING

1. The Notice of Motion dated **26th October 2016,** is for stay of execution of orders made on 17th October 2016 and for the review and/or variation of the said orders.

The applicants also seek a dismissal of this Petition. They come to this Court under S.3 and 3A of the Civil Procedure Act and Orders 22(ii), 21 and 45 rule (1) (2)(i) of the Civil Procedure Rules on the basis of the grounds that this petition was separated with Kisii High Court Civil Case No. 292 of 2010 on 30th March 2016 and that the separation was not in the court's mind when writing its Judgment.

2. The supporting grounds are fortified by the averments contained in a supporting affidavit dated **26th October 2016**, deponed by the applicants' counsel, **Joash Momanyi Nyagwencha** and which was

countered by a replying affidavit dated 7th November 2016, deponed by the respondent/petitioner, **Elizaphan Nyakundi Nyatuga.**

At the hearing of the application, the applicants through the learned counsel, **Mr. Nyagwencha**, argued that an order made by the court on 30th March 2016, in effect separated this petition from Civil Suit No. 292 of 2010, but in its ruling of 17th October 2016 the court went ahead to dismiss both the petition and the suit.

3. It was the applicants' contention that the court made a determination on a matter which was pending and not before it. Further, the dismissal of both the petition and the civil suit was an oversight on the court's part.

As for the respondent, he argued through the learned counsel, **Mr. Migiro,** that the application is frivolous, vexatious and an abuse of the court process in as much as it does not meet the threshold set out under S.80 of the Civil Procedure Rules and Order 45 of the Civil Procedure Rules.

4. The respondent further argued that the application is based on vague grounds such that this court would have no jurisdiction to deal with it. He contended that the court invoked the concept of substantial justice and applied Article 159 (a) of the Constitution to dismiss both the petition and the civil suit if at all.

The respondent contended further that if the applicants were aggrieved by the court's order, then they ought to have filed an appeal rather than the present application for review.

It was also contended by the respondent that the court merely mentioned the civil suit without making a determination on it.

5. The respondent urged this court to dismiss the application for want of merit while contending that the supporting affidavit is defective in as much as it was deponed by the respondent's counsel instead of the respondents themselves and in as much as it is grounded on contentious matters.

From the foregoing arguments, the issue arising for determination is whether the applicants have demonstrated a good cause for the exercise of this court's discretion in their favour.

6. The application at hand is essentially premised on Order 45 of the Civil Procedure Rules which arises from S.80 of the Civil Procedure Act.

Thus, a person considering himself aggrieved by a decree or order of the court and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistakes or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

7. The impugned decision was made on the 17th October 2016, while the present application was filed on 27th October 2016.

The application was therefore filed within a reasonable time but it falls short of demonstrating discovery of new and important matter or evidence which was not within the knowledge of the applicants at the time when the impugned decision was made. It however, implies that there is an error apparent on the face of the record or a mistake, in that the court, due to an oversight determined both the petition and the civil suit instead of the petition alone.

8. The implication would be valid if this Petition and Kisii High Court Civil suit No. 292 of 2010, were based on distinct and different causes of action and/or involved different parties all together.

In the civil suit, the pleadings show that the Plaintiff was Mogusii Farmers Group Company Ltd whose directors prior to the **26th March 2009,** were the first seven defendants in the suit. The eighth and ninth defendants were employees of the company. After the 26th March 2009, the applicants in this Petition replaced the defendants in the civil suit as directors of the plaintiff company. Apparently, the former directors declined and/or refused to hand over the management of the company to the new directors. This state of affairs prompted the company to file the civil suit against the former directors.

9. The company prayed for an order to compel the former directors to hand over to the new directors i.e the applicants herein and others.

It is instructive to note that the civil suit was filed on the 15th October 2010, meaning that it remained unprosecuted for a period of six (6) years before its fate was sealed by the court in its decision of the 17th October 2016.

It is also instructive to note that the court was very much alive to the existence of the civil suit when it rendered the impugned decision. In fact, the court went further to give a synopsis of the civil suit so as to shade light on its relationship and/or linkage with the Petition.

10. It was that linkage which earlier prompted the court to order the consolidation of the two matters for hearing and determination at the same time. This was done on 17th July 2013. In effect, the consolidation was a confirmation that both the civil suit and the petition were a product of one and similar cause of action only that the parties were differently described but were all "stems of one tree" or cause of action. Invariably, even without consolidation, the decision respecting the petition would grossly impact on the civil suit and "vice-verse".

The fact that the petition was filed after the civil suit and while the suit was pending was a clear indication of abuse of the court process intended to delay the expeditious resolution of the existing dispute.

Such abuse was not only reflected in the timing of the petition but in the failure by the parties and in particular the applicants herein, to take a date for the hearing and final disposal of the suit.

11. Be that as it may, the parties through their respective advocates recorded a consent order on the 30th March 2016 to the effect that the consolidation order made on 31st July 2013, be set aside to pave way for the petition and the suit to be heard separately.

The consent order was made in the civil suit and on the 11th May 2016, the court directed the parties to take a hearing date in the registry. However, none of the parties deemed it fit to take a hearing date. The civil suit was therefore left "hanging". The applicants were the "defacto" plaintiffs in the suit but they displayed great indolence in fixing a hearing date yet the very purpose of consolidating the suit and the petition was to enable expeditious disposal of the two matters at the same time and attain the objectives of the Civil Procedure Act and Rules specified in Ss 1A and 1B of the Act.

12. With the setting aside of the consolidation order, the two matters were left to proceed separately and in that regard the respondent herein proceeded with his petition while the applicants went into a slumber with regard to the civil suit.

Consequently, the petition was heard and decided prior to the civil suit being fixed for hearing.

Among the prayers in the petition dated 16th May 2013, was an order directing the applicants/respondents to convene and hold an annual general meeting before the intended special general meeting slated for 19th May 2013.

In effect, the petition was granted in favour of the respondent with drastic effect on the applicants' civil

suit which was effectively determined and/or rendered obsolete.

13. Given that the subject matter of the cause of action in both the petition and the civil suit was the same and that the parties were more or less similar, the implication by the applicants that there is a mistake or error apparent on the face of the record is invalid and unsustainable.

As observed hereinabove, a decision on either the petition or the civil suit had the capacity to impact either positively or negatively on either.

Unfortunately, the decision of the court made on 17th October 2016, impacted negatively on the civil suit.

In the circumstances, the option available to the aggrieved party was to appeal the decision rather than apply for a review of the decision which in effect would be asking this court to sit on appeal against the decision of a court with concurrent or equal jurisdiction. This court has no such jurisdiction.

14. Suffice to state that the decision on the Petition was akin to a "tsunami". It swept away everything on its path including the civil suit which now remains as dead as a "dodo". It would thus be foolhardy to proceed with the civil suit in view of the impugned decision which has upset the unpleasant state of affairs involving a farmers group company and given it a new dawn.

The applicants herein were allegedly elected as the new directors of the company. They need not fear and have nothing to lose if their election as directors was free and fair devoid of any irregularities.

In sum the present application is wanting in merit and is hereby dismissed with costs to the respondent.

[Read and signed this **15th** day of **November 2016**].

J.R. KARANJAH

JUDGE

In the presence of

Njoroge CC

Mr. Nyagwencha for Applicant

Mr. Migiro for Respondent

J.R. Karanjah , Judge

15/11/16