



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 313 OF 2013

SHIRIN JIWA.....APPLICANT

VERSUS

ISMAILIA COOPERATIVE SOCIETY LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Plaintiff Notice of Motion application dated 9th July 2013 and filed on the 10th July 2013 was brought under the provisions of Section 3A of the Civil Procedure Act, Cap 21, Order 51 Rule 1 Civil Procedure Rules 2010 and Section 125, 131, 135, 142, 145, 146, 147, 158, 184 and 199 of the Companies Act. Prayer No (1) was spent. It sought the following remaining orders:-

(1) Spent.

(2) That the Respondent be ordered to submit 2008 to 2013 AGM, EGM Minutes, Share Holder Meetings Minutes, KRA returns, audited accounts, List of Shareholders, Certified copies of all shareholder Certificates, List of debtors and Bank financial statements of Ismailia Cooperative Society Limited from the year 2008 to 2013 within 14 days.

(3) An order compelling the directors to call a shareholders meeting for the purpose of electing new directors within 30 days.

(4) An Order compelling the Directors to make good any loss occasioned to the company by their wrongful conduct and lack of due diligence.

(5) The costs of this Application be in cause.

THE PLAINTIFF'S CASE

2. On 9th July 2013, the Plaintiff, a shareholder of the Defendant swore a Supporting Affidavit. She filed her written submissions on 14th November 2013.

3. The Plaintiff complained that the Chairman and Directors had totally abandoned the proper management of the Defendant in accordance with the laid down principles of company law and the governing Memorandum and Articles of Association of the said Company.
4. She contended that since the year 2007, the Directors had not held annual shareholders general meetings which were aimed at reviewing the activities of the company and holding the directors accountable for their actions among other matters which was contrary to the succinct provisions of the Companies Act which is the principle governing law.
5. It was her conviction that the directors' failure to hold annual meetings was an orchestrated scheme by the directors to misuse the assets of the company for their own personal gains which put them in conflict with the interest of the company.
6. It was her contention that the Directors had charged the land belonging to the Defendant to Diamond Trust of Kenya Limited without the knowledge of the shareholders and failed to explain how the proceeds of the financial facilities were utilised.
7. The Chairman was also said to have introduced a new rule that every shareholder had to pay an extra parking fee for parking more than one (1) vehicle for each resident yet since 2009, he parked a fleet of over ten (10) matatus without paying any extra parking fee to the company.
8. She therefore urged the court to grant her the orders she had sought.

THE DEFENDANT'S CASE

9. In response to the said application, Al Noor Juma, Chairman of the Defendant's Board of Directors swore a Replying Affidavit on 30th October 2013. It was filed on the same day. The Defendant had also filed a Notice of Preliminary Objection dated 16th July 2013 on 17th July 2013. Its written submissions were dated 4th December 2013 and filed on 6th December 2013.
10. The Defendant contended that the Plaintiff had purported to file the application on behalf of other Shareholders without seeking and obtaining their consent and that she had not disclosed the names of the forty three (43) shareholders she was purportedly acting on behalf of.
11. It said that the Plaintiff's application was based on wild and unfounded allegations that were wholly unsupported by concrete evidence. It stated that despite notices to shareholders to attend general meetings and to seek positions as directors or at least to participate and vote at the said meetings, the general meetings had most times lacked quorum and most of the members had refused to take up the directors' position of the Defendant.
12. It averred that from the year 2006 to the year 2009, Zul Jamal, the Chairman of the Board of Directors and directors of the Society had offered their services purely on a voluntary basis. It said that the current Board of Directors had absolutely no problem convening a shareholder meeting under the superintendence of the Registrar of Companies or any other officer appointed by the court for the purposes of electing new directors as their efforts to have members volunteer to serve on the Board had been fruitless.
13. It was its contention that the purported charge of the subject property to Diamond Trust of Kenya Limited was non-existent, having been discharged in the year 1987 and that there had never been any secret borrowing by the directors as the Plaintiff had alleged.
14. The Defendant was categorical that the Plaintiff had not paid the maintenance charges since 2007 and that the Plaintiff was desperately looking for any ground to avoid payment of outstanding maintenance charges which stood at Kshs. 301,533/=.
15. It averred that the Plaintiff's present application was based on extraneous issues not arising from the

main suit and being an abuse of the court process, it urged the court to strike and dismiss it with costs.

LEGAL ANALYSIS

16. In her plaint dated 18th February 2013, the Plaintiff sought the following reliefs **THAT:-**

a. The Defendant be compelled to restore the withdrawn maintenance and other services ancillary thereto for the Plaintiff to enable her peaceful and quiet enjoyment of her properties within the Old Ismailia Highridge Flats.

b. This Honourable court be pleased to issue a permanent injunction restraining the Defendant through its agents, servants or assigns thereof from allowing any party to conduct commercial ventures within the old Highridge Ismailia Flat's premises.

c. Damages

d. Any further orders that this Honourable court may deem fit to grant.

e. Costs of the suit.

17. While the court agreed with the Plaintiff that it was not mandatory for her to have obtained the consent by other shareholders as she appeared to have sought the prayers in her capacity as a shareholder of the Defendant, she failed to demonstrate the relationship between the submission of 2008 to 2013 AGM, EGM Minutes, Share Holder Meetings Minutes, KRA returns, audited accounts, List of Shareholders, Certified copies of all shareholder Certificates, List of debtors and Bank financial statements of Ismailia Cooperative Society Limited from the year 2008 to 2013, the calling of a shareholders' meeting for the purpose of electing new directors or ordering the Directors to make good any loss occasioned to the Defendant by their wrongful conduct and lack of due diligence and the relief she had sought in her Plaint.

18. It was evident that although the Plaintiff had argued that her application was in line with the prayers that she had sought in her Plaint, the orders sought in the application herein had no relation to the reliefs sought in the Plaintiff. The prayers were distinct. It is irrespective that the matters at issue arose out of the same transactions as had been contended by the Plaintiff for the reason that they purported to create a totally new cause of action. They had no relationship whatsoever with the subject matter of the suit as had been rightly pointed out by the Defendant.

19. Again, as was rightly submitted by the Defendant, the Plaintiff also failed to demonstrate the loss allegedly caused by the Directors of the Defendant. If there had been any such loss, the court did not see the nexus of that prayer to the reliefs that the Plaintiff had sought in her Plaint.

20. Going further, whereas any shareholder who suspected dubious dealings by directors had every right to ask questions and to have his or her questions answered, the Plaintiff did not adduce evidence to show that she had attempted to peruse the books of accounts and was obstructed from doing so by the Defendant.

21. The fact that the Defendant had not annexed copies of minutes of meetings to demonstrate lack of quorum to conduct business would not have been a reason for this court to have found that the Directors of the Defendant had been culpable of misconduct. This was a matter of evidence that could only be adduced at trial. The court cannot rely on affidavit evidence to make a conclusion on such a serious matter. The onus was thus on the Plaintiff to show the relationship of this contention to the prayers that she had sought in her Plaintiff.

22. For the same reason, the court did not find it prudent to delve into the question of whether or not notices for general elections had been issued or whether or not the members of the Defendant had been satisfied with management of its Directors.

23. The prayers sought in the Plaintiff's present application were basically seeking a mandatory order requiring the Defendant to supply her with certain documents and render accounts. She argued that the court had power to make such an order as could be seen in the case of **Nairobi HCCC NO 293 of 2013, Rafique Ebrahim vs William Ochanda t/a Ochanda & Co Advocates** that she relied upon.

24. The prayers that were sought by the Plaintiff were final in nature. The question of whether or not the provisions of the Companies Act Cap 486 (Laws of Kenya) were applicable herein was a question that the court could not determine through affidavit evidence. There was also no evidence that the subject property had been charged as was clearly evident from endorsements number 4, 8 and 12 in the copy of the title deed submitted by the Plaintiff and if so, its relevance to the Plaintiff's case could only be dealt with at full trial.

25. While the Defendant contended that the Plaintiff had accrued service charges of Kshs 301,533/= which amount continued to accumulate, this was an issue that needed to be resolved at full trial. The court could not order the Plaintiff to deposit the said sum as had been proposed by the Defendant in the absence of an appropriate application seeking the said orders. In the same vein, this court could also not discharge the interim orders herein as had been sought by the Defendant as such a prayer would ordinarily require to be brought to court in the proper manner.

26. Based on the affidavit evidence herein, the end result of this case cannot be determined at this interlocutory stage. Indeed, the circumstances of when a mandatory injunction could be granted was aptly stated in the case of **Shepherd Homes Ltd vs Sandahm (1971)1 CH.34** that was relied upon by the Plaintiff where it was held as follows:-

"...it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At trial of the action, the court will of course grant such injunctions as the justice of the case requires; but at an interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation..."

27. As can be seen hereinabove, the court ought not to grant a mandatory injunction in an interlocutory stage except where special circumstances exist and only if it satisfied that it would most probably arrive at the same decision at the end of trial so as to save judicial time. Such special or exceptional circumstances were not evident in this case to warrant the granting of the orders that the Plaintiff had sought.

28. In this regard, the court agreed with the holding in the case of **ELC suit No. 463 of 2013 Peterson Kamau Maina vs Mahiira Housing Company Limited & Another (2013) eKLR** that was relied upon by the Defendant in which the court underscored the importance of examining further evidence during trial.

29. Having considered the pleadings, affidavit evidence, written submissions and case law in respect of the parties' respective cases, the court came to the conclusion that the Plaintiff did not meet the required threshold of being granted a mandatory injunction. It was not clear if the Companies Act was applicable to the Defendant bearing in mind that it appeared to have been a Co-operative society. If so, no orders were required from the court to actualise the prayers therein as the governance of the Defendant would be well spelt out in the Memorandum and Articles of Association.

DISPOSITION

30. Accordingly, the upshot of this court's ruling was that the Plaintiff's Notice of Motion dated 9th July 2013 and filed on 10th July 2013 was not merited and the same is hereby dismissed with costs to the Defendant.

31. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 12th day of February 2015

J. KAMAU

JUDGE