



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
THE COMMERCIAL AND TAX DIVISION OF THE HIGH COURT
CIVIL SUIT NO. 367 OF 2010

NYAKINYUA INVESTMENTS LIMITED.....1ST PLAINTIFF
GATUNDU NYAKINYUA COMPANY LIMITED.....2ND
PLAINTIFF

VERSUS

NDUTA MDIRANGU CHEGE.....1ST
DEFENDANT

LUCIA NYAGAKI.....2ND
DEFENDANT

KIMANI GITHONGO T/A KIMANI GITHONGO & CO. ADVOCATES.....3RD
DEFENDANT

R U L I N G

The Applicants in the Notice of Motion dated 7th June 2010, seek orders of this court in the nature of an interlocutory injunction, restraining the Respondents, their agents, servants and/or employees from conducting or transacting any business of the plaintiff companies and from using any or all of the official documents bearing the names of the Applicants pending the hearing of the suit. They also pray that, pending the hearing of the suit, the Respondents be ordered to hand over to the directors of the Applicants all official documents that they may be keeping in their Gatundu Offices.

The application is premised on the grounds, mainly, that

- 1. The Respondents are planning to transfer the applicant companies' properties**
- 2. That there is a danger of the companies losing their assets and that the running of a parallel office by the Defendants puts the Applicants' shareholders' properties at risk**
- 3. That the 3rd Defendant/Respondent, in his capacity as the Company Secretary and the companies' advocate holds a lot of money in his client account of which he has refused to give an account**
- 4. That the 1st and 2nd Respondents did not attend a extraordinary general meeting held on 22nd May 2010, at which elections were held and the two were not elected as officials of the company.**

The application is supported by an affidavit sworn on 7th June 2010, by Isaac Nderitu in which he says he is the chairman and a shareholder of the Applicants. He depones that new directors of the company were elected on 22nd May 2010, and a new team mandated to run affairs of the company. That despite the change, the Defendants are still conducting the companies' affairs illegally and should be stopped from so doing to save the companies' assets from being sold.

The deponent states that there have been in place, several other suits involving the same parties, seeking to have the Respondents restrained from interfering with the shareholders' properties. He singles out HCCC No. 265 of 2009, wherein the present Applicants' injunction application dated 17th November 2009, against the 1st and 2nd Respondents herein and 12 others was dismissed on 16th February, 2010. A copy of the court's ruling is annexed to the supporting affidavit herein as annexure "IN5". The said suit was, on 5th March 2010, stood over generally by consent of the parties to pave way for either an Annual General Meeting or a Special General Meeting at which elections would be held to elect a new management team to "*tackle the problems of the shareholders*". The consent order is annexed as annexure "IN7". He depones further that 1st Defendant also acted in contempt of a court order and changed the venue of the meeting scheduled for 22nd May 2010, as evidence by a letter of the Gatundu District Commissioner dated 13th May 2010, annexed to the supporting affidavit as "IN8".

The application is opposed on the strength of the replying affidavit sworn by the 1st Respondent on 24th June 2010, in which she depones, *inter alia*, that:

- 1. The application and the suit on which it is founded are incompetent in that they have been instigated by Isaac Nderitu, the deponent of both the verifying affidavit and the supporting affidavit filed in respect of the Plaint dated 26th May 2010, and the present Notice of Motion respectively, yet the said person has no legal capacity to represent the Applicant companies in any way as was found by the court in the ruling of 16th February 2010, (annexture "IN5").**
- 2. The supporting affidavit contains falsehoods in that the 1st and 2nd Respondents were, at the meeting of 22nd May 2010, elected as directors (among others) to carry out the operations of the Plaintiff/Applicant companies on behalf of the shareholders and are therefore the rightful custodians of the company properties including it's documentation.**

Annexed to the replying affidavit and marked "NNC1" are two notifications by the Registrar-General

dated 24th May 2010, issued pursuant to the meeting held on 22nd May 2010, and the filing by the Companies Notification of Change of Directors dated 24th May 2010, in which the 1st and 2nd Respondents are listed as directors of the 1st Plaintiff/Applicant. The initiator of the suit and the present application does not appear in the Registrars' list of directors of either 1st or the 2nd Plaintiffs/Applicants.

The documentation filed in reply to the Notice of Motion clearly and unequivocally rebuts all the averments contained in the supporting affidavit of Isaac Nderitu the depositions of which are not supported by any documentary evidence. His claim to be the chairman of the two Plaintiff companies is not supported. Neither has he proved any authority to act on behalf of the companies or their shareholders. The position established by the ruling by the Hon. Mr. Justice Mwera of 16th February 2010 (annexture "IN5") to the effect that the said Isaac Nderitu and six others "*are not directors or officials of the Plaintiff companies with the capacity to sue or litigate on behalf of the 2 companies at all*" remains unchanged.

In view of this fact, the application is incompetent and cannot be maintained. Given the facts, as demonstrated by the replying affidavit filed by the Respondents, who have proved themselves to be legal office bearers of the plaintiff companies, I see no possibility of the suit against them as, instigated by the said Isaac Nderitu, ever succeeding, since the company itself has no quarrel with the Respondents. Quite clearly, a case for an injunction has not been established at all and no cause of action, even on a prima facie basis has been demonstrated against the 3rd Defendant/Respondent. I see no need venture into the submissions made herein, save to say that the attempt by Mr. Njoroge, learned counsel for the purported Applicants, to introduce evidence from the bar should be discouraged. I must however state that the present application ought to have been filed in the pending suit H.C.C.C. 625 of 2009 as was submitted by Mr. Kimani, learned counsel for the Respondents.

In view of my above findings, the Notice of Motion dated 7th June 2010, is hereby dismissed, it being an abuse of the court process. I order that the costs of the same be borne by Isaac Nderitu personally, in view of the circumstances.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 1ST day of MARCH, 2011.

M. G. MUGO

JUDGE

In the presence of:

Ms Bett holding brief for Mr. Njoroge

For the Applicant

Mr. Kimani

For the Respondent