



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 196 OF 2015**

MOSES NJOROGE THARA.....1<sup>ST</sup> PLAINTIFF

WINFRED MWENDIA.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

ACTAE DEVELOPMENT LIMITED.....1<sup>ST</sup> DEFENDANT

SIX SIXTY ONE GALU BEACH MGT LTD.....2<sup>ND</sup> DEFENDANT

MANJIT SINGH BRAR (IN HIS OWN RIGHT PLEADING/ACTING

ON BEHALF OF SURINDER KAUR BRAR).....3<sup>RD</sup> DEFENDANT

NGINYA MUNGAI LENNEIYE (in his own right and pleading/acting on behalf of

GUGU NOLWANDLE MAHLANGU).....4<sup>TH</sup> DEFENDANT

MOUNT KENYA ACADEMY LTD.....5<sup>TH</sup> DEFENDANT

KAPAN KUMAR K. PATEL & SHREETI KALPAN PATEL.....6<sup>TH</sup> DEFENDANT

JAYANY KUMAR K. PATEL.....7<sup>TH</sup> DEFENDANT

JAGAJI HOLDINGS LIMITED.....8<sup>TH</sup> DEFENDANT

RICHARD JOHN BUCKLEY & ALLISON JANE BUCKLELY.....9<sup>TH</sup> DEFENDANT

MEHBOOB MANSURALI H. TEJPAN.....10<sup>TH</sup> DEFENDANT

PIUSH R. PATEL.....11<sup>TH</sup> DEFENDANT

JULIO GARRIDO-MIRAPEIX (CERADES LTD).....12<sup>TH</sup> DEFENDANT

**RULING**

1. By a notice of Motion dated 20<sup>th</sup> February, 2019 brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 rules 2 and 4, Order 51 rule 1 of the Civil Procedure Rules and any other enabling provisions of the law, the Plaintiffs/Applicants seek the following orders:

**1. That in the first instance service of this application be dispensed with and the Applicant be heard ex-parte.**

**2. That a temporary injunction be issued to restrain the 2<sup>nd</sup> Defendant, through itself, or through its agents, workers, servants, employees from convening the Extraordinary General Meeting of the members of Six Sixty One Galu Beach**

**Management Limited to be held on Saturday, 2<sup>nd</sup> March 2019 at 10.am to deliberate on the agenda business set out in the notice convening the said meeting pending the hearing and determination of this Application.**

**3. That a temporary injunction be issued to restrain the 2<sup>nd</sup> Defendant through itself or through its agents, workers, servants, employees, from convening the Extraordinary General Meeting of the Members of Six Sixty One Galu Beach Management Limited to be held on Saturday 2<sup>nd</sup> March 2019 at 10 am to deliberate on the agenda business set out in the notice convening the said meeting pending hearing and determination of the main suit.**

**4. That the costs of this Application be borne by the Defendants.**

2. The Application is based on the grounds on the face of motion and is supported by the affidavit of Moses Njoroge Thara, the 1<sup>st</sup> Plaintiff sworn on 20<sup>th</sup> February, 2019. Briefly, it is the Applicants' case that the 2<sup>nd</sup> Defendant has issued a notice for an Extra-Ordinary General Meeting in which the resolutions proposed to be passed at the subject meeting are in violation of the provisions of the Companies Act, 2015 and are an action which is *sub judice* to these proceedings. The Applicants contend that should the proposed resolutions be passed, the substratum of this suit will be destroyed. That there is no reason or urgency as to the passing of the resolutions presently and the same can await the hearing and determination of this suit and that no harm or prejudice will be suffered by the 2<sup>nd</sup> Defendant or any other party should the orders sought herein be granted.

3. The Application is opposed by the Defendants. In opposing the Application, the 1<sup>st</sup> Defendant filed a replying affidavit sworn by Eric Govani sworn on 12<sup>th</sup> March 2019 in which he deposes inter alia, that the 1<sup>st</sup> Defendant is the developer of Lantana Galu Beach and incorporated the 2<sup>nd</sup> Defendant to manage and also to hold the reversionary interest in the property known as **KWALE/GALU KINONDO/661**. That the 2<sup>nd</sup> Defendant company would ultimately be owned by the buyers/lessees in the development. The Plaintiffs acquired villa 10 at the said development. It is the 1<sup>st</sup> Defendant's contention that the Plaintiffs knew exactly what they were buying from the 1<sup>st</sup> Defendant, in particular the existence of the rental scheme, and that the other 35 home owners have not raised any objections as to the user of the development. The 1<sup>st</sup> Defendant further contends that the orders sought should not be granted.

4. The 2<sup>nd</sup> Defendant in opposing the Application filed a replying affidavit sworn by Hamisi Govani on 12<sup>th</sup> March 2019 more or less echoing the averments of the 1<sup>st</sup> Defendant. The 5<sup>th</sup> Defendant which is the registered leasehold proprietor of Villa No.9 which is part of the developments erected on the suit property filed a replying affidavit sworn by Steve Evans, its director sworn on 18<sup>th</sup> March 2019 opposing the Motion. It is deposed inter alia, that the passing of the proposed resolution is necessary to allow for the smooth operation of the 2<sup>nd</sup> Defendant being the Manager of the developments. That failure to hold the stated Extra-ordinary General Meeting in a timely manner will negatively affect the operations of the 2<sup>nd</sup> Defendant, which will greatly prejudice the 5<sup>th</sup> Defendant as a property owner and a shareholder of the 2<sup>nd</sup> Defendant's. It is the 5<sup>th</sup> Defendant's contention that the agenda for the EGM sought to be stopped by the Plaintiff is part of the running of the affairs of a limited company and is not *sub judice* to these proceedings.

5. In opposing the Application the 6<sup>th</sup> Defendant filed a replying affidavit sworn on 8<sup>th</sup> April 2019 in which it is deposed inter alia, that the 6<sup>th</sup> Defendant is a joint registered proprietor of Villa No.20 and that he has also been authorized by the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 13<sup>th</sup> Defendants. That they were aware at all times of the user of the Property in question. That as owners, they have an important and significant role to play in the mode and manner through which the affairs of Lantana Galu Beach are operated, and this can only be done through meetings of the 2<sup>nd</sup> Defendant, as owners/shareholders, including the Plaintiffs. That the 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 13<sup>th</sup> Defendants are gravely prejudiced by the inability to meet us owners and participate in the elections of directors who shall take charge of the operations of the 2<sup>nd</sup> Defendant and their properties because the Plaintiffs have dispute with regard to the nature of use of the development undertaken by the 1<sup>st</sup> Defendant. It is argued that by restraining the 2<sup>nd</sup> Defendant from conducting such meeting as are relevant for its operations under the law, the operations of the entire development would be affected leading to the potential of the value of the entire property being dissipated and wasted which shall occasion a grave loss to the property owners. It is further argued that the plaintiffs as part and parcel of the owners of the 2<sup>nd</sup> Defendant Company have a right to raise issues in a meeting of the 2<sup>nd</sup> Defendant, as shareholders/owners, with a view to effect any changes subject to the law and rules of passing resolutions by the Defendant.

6. The Application was canvassed by way of written submissions. The Plaintiffs filed their submissions on 7<sup>th</sup> May 2019, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed theirs on 7<sup>th</sup> May 2019, and the 6<sup>th</sup> -13<sup>th</sup> Defendants filed on 10<sup>th</sup> May 2019 while the 3<sup>rd</sup> -5<sup>th</sup> Defendants filed theirs on 15<sup>th</sup> May, 2019. The said written submissions were highlighted by Mr. Chacha Odera counsel for the plaintiff, Mr. Mohamed Karega for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Mr. Hamisi for the 3<sup>rd</sup> -5<sup>th</sup> Defendants and Mr. Wakhisi for the 6<sup>th</sup> - 13<sup>th</sup> Defendants

7. Mr. Chacha Odera submitted inter alia, that the issue for determination in this suit is the permitted user of the suit property which, according to the plaintiffs is the use by the lessee and his/her immediate family, and not for rental. He further submitted that the intended meeting is meant to discuss over a matter pending before court, hence *sub judice* and an abuse of the court process.

8. Mr. Karega counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that this court has no jurisdiction to address the complaints raised by the Plaintiffs which he submitted are hypothetical or speculative and urged the court to decline to entertain it.

9. On his part, Mr. Hamisi for the 3<sup>rd</sup>-5<sup>th</sup> Defendants agreed with the Plaintiffs submissions that the issue in this case is the permitted user and whether it extends to renting out the units. He submitted that the EGM is proposing election of members to the board of directors of the 2<sup>nd</sup> Defendant and that the proposed meeting will not destroy the substratum of the suit.

10. Mr. Wakhisi, counsel for the 6<sup>th</sup>-13<sup>th</sup> Defendants submitted that the Application had been overtaken by events because the Extraordinary General Meeting has lapsed, adding that there is no *sub judice*.

11. In brief reply, Mr. Odera submitted that the Application seeks to stop election of directors and classification of directors as rental and non-rental owners, and that the articles of the company cannot be amended when the issue is pending before court.

12. I have considered the Application, the affidavits in support and against and the rival submissions made as well as the authorities relied on. The principles to be applied when considering an application for injunction such as this are well settled. In the case of the **Giella-v-Cassman Brown & Co. Ltd (1973) EA 358**, the Plaintiff must show that he has a prima facie case with a probability of Success; that she stands to suffer irreparable damage which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt it will decide the matter on the balance of convenience.

13. In the case of **Mrao Ltd-v- First American Bank of Kenya (2003)KLR 125**, a prima facie case was said to be one in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the opposite party.

14. The essence of the Plaintiffs' case is, firstly that the 2<sup>nd</sup> Defendant has issued a notice of an Extra-ordinary Meeting in which the resolutions proposed to be passed at the subject meeting are in violation of the provisions of the Companies Act; Secondly, that the resolutions proposed to be passed at that meeting are an action which is *sub judice* to these proceedings, and that should the proposed resolutions be passed, the substratum of this suit will be destroyed. The Plaintiffs aver that the conversion of the permitted user of the property from residential to hotel type apartments, villas and bungalows is not only a breach of the terms agreed upon by the parties, but also a breach of the regulatory approval upon which the development of the project was authorized. The specific prayers in the suit by Plaintiff dated 19<sup>th</sup> August 2015 are as follows:

**a. An order of permanent injunction against the Defendants, their servants and agents restraining them from breaching the terms of the sub-lease dated 4<sup>th</sup> March, 2011 entered into by the Plaintiffs as Lessee, the first Defendant as lessor and the second Defendant as the Management Company and more particularly from breaching the covenant respecting the permitted user of units constructed in the development situate on all that piece of land comprised in the Certificate of Lease in respect of PLOT NUMBER KWALE/GALU KINONDO/661.**

**b. General damages for loss of use and quiet enjoyment by the Plaintiffs of Villa 10 situated in PLOT NUMBER KWALE/GALU KINONDO/661.**

**c. Special damages as pleaded in paragraph 16 above.**

**d. Interest on (a) and (b) above.**

**e. Costs of this suit.**

**f. Any further relief that the court may deem just and fit to grant in the circumstances of this suit.**

15. It has been submitted that this court does not have jurisdiction to address the issues raised by the Plaintiffs. The Environment and Land Court (ELC) is anchored in the constitution. Article 162 provides for the creation of the ELC as one of the superior courts in Kenya and provides as follows:

**162. (1) The superior courts are the supreme court, the Court of Appeal, the High Court and the courts mentioned in clause (2).**

**(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –**

**a) Employment and labour relations; and**

**b) The environment and the use and occupation of, and title to, land.**

**(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)**

**(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.**

16. It will be seen from Article 162 (2) (b) that the Constitution mandated Parliament to create a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Parliament did create the ELC through the Environment and Land Court Act No. 19 of 2011. The jurisdiction of the ELC is provided under Section 13 of the Act. In exercise of its jurisdiction under the Act, the court has power to make any orders and grant any relief including interim injunctions.

17. The dispute before this court relates to the permitted user of the suit property. That in my view, is squarely an issue that falls within the jurisdiction of this court. Since the dispute is over the use of land, this court has jurisdiction to entertain the dispute.

18. At this interlocutory stage, pending the substantive canvassing of the case, in relation to the prayers sought by the plaintiffs, the plaintiffs seeks injunctive relief; to the extent that the Extraordinary General Meeting proposed to be convened by the 2<sup>nd</sup> Defendant to deliberate on the agenda that are *sub judice* to these proceedings and which resolution to be passed may destroy the substratum of this suit.

19. It is clear to my mind, that whether or not the interlocutory prayers are to be granted, depends on prima facie perceptions of the weight of the suit itself; is this a serious suit, to be heard on the merits, and judicially determined? If yes, then the prayers are for granting, as the court shall not hear and determine a suit in vain. If the outcome of the suit can only issue from a complex set of hearing, dealing with evidence and issues of merit, then, the very nature of landed interests will dictate a conservation of the status quo, until the matter is disposed of. Should it turn out, in that event, that a party suffers extraordinary damage on account of the interim measures of restraint, then the remedy is always available in the form of awards of damages and costs. This court, therefore is free in its exercise of discretion, in relation to the prayer made at this interlocutory stage.

20. Whereas the Defendants rest their case on the fact that the resolutions proposed to be passed at the Extraordinary Meeting are not *sub-judice* to these proceedings and that the substratum of this suit will not be destroyed, and argue that it is part of the running of the affairs of a limited company, it is apparent that should the meeting proceed and new directors elected, no doubt decisions on what constitutes permitted user of the development in question may arise. In any case, the notice calling for the said EGM has an agenda "Any other business"

In my view, the plaintiffs have every fear that issues that touch on permitted user may end up being discussed.

21. In my considered view, it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.

22. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is the view of the court that the plaintiffs have established a prima facie case with a probability of success against the Defendants. As regards irreparable damage, I take the view that should the injunction not be granted and the meeting proceed as scheduled the substratum of this case will be destroyed and the plaintiffs will suffer irreparable loss which may not be quantified in damages. The balance of convenience if I had doubt, would tilt in favor of the plaintiffs in order to safeguard the current status quo of the subject matter of the suit pending hearing and determination.

23. Arising from all the above, I find merit in the application. Accordingly, I allow the Notice of Motion dated 20<sup>th</sup> February 2019 in terms of prayers (3). Considering the circumstances of this case, I order that each party shall bear their costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 24<sup>th</sup> day of September 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Karega holding brief for Aisha Abdalla for 1<sup>st</sup> and 2<sup>nd</sup> defendants

Wachira holding brief for Chacha Odera for plaintiffs

Ms. Onesmus holding brief for Kiprop for 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants and holding brief for Wetangula for 6<sup>th</sup> -13<sup>th</sup> defendants.

Yumna Court Assistant

**C.K. YANO**

**JUDGE**