



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 726 OF 2014

(Formerly Nyeri HCCC NO. 498 of 1993)

NDATHI MUGUNDA COMPANY LIMITED PLAINTIFF

-VERSUS-

GABRIEL WAWERU NJOGU 1ST DEFENDANT

WILSON NDERITU NGIRI 2ND DEFENDANT

JAMES NJERU KANJA 3RD DEFENDANT

STEPHEN GIKUNJU MIGWI 4TH DEFENDANT

DAVID KANYUIRA 5TH DEFENDANT

DISTRICT OFFICER, KIENI WEST DIVISION .. 6TH DEFENDANT

JUDGMENT

1. Through the plaint dated **15th December, 1993** the plaintiff seeks judgment against the defendants for:-

a). An order compelling the 1st to the 5th defendant to hand over its affairs and property to its new directors.

b). An injunction to restrain the 1st to 6th defendants from carrying out a balloting exercise for the allocation of its parcels of land known as L.R 7391 Samaki Farm and L.R No.3949 Thegu Farm pending the hearing and determination of the suit. (The balloting exercise sought to be restrained was scheduled to be held on 17th December, 1993).

c). Costs of the suit and interest thereon at Court rates.

d). Any further or better relief which this court may deem fit to grant.

2. The plaintiff contends that the defendants have wrongfully and unlawfully refused to hand over its affairs to its new Board of Directors; that the defendants without any colour of right and without lawful

mandate intend to convene a meeting and carry out a balloting exercise in respect of the plaintiff's properties to wit, Samaki farm on L.R 7391 and Thegu farm on L.R 3949 (hereinafter referred as the suit properties).

3. Upon being served with summons to enter appearance, the 1st to **the 5th** defendant filed their statement of defence dated **5th April**, 1994 in which they contend that they are the *bona fide* directors of the plaintiff company; that the current directors of the plaintiff are in office illegally (procured change of directorship of the plaintiff company fraudulently) and that the plaintiff does not disclose why the 6th defendant is a party to the suit.

4. The 1st to 5th defendants have also admitted that the Government appointed them (read all the defendants) as members of a probe committee to look into the affairs of the plaintiff company.

5. On its part the 6th defendant filed the statement of defence dated **15th June, 1994** in which it reiterates the contention by the 1st to 5th defendants that they are the *bona fide* directors of the plaintiff company and that the current directors of the plaintiff, if at all registered, were registered fraudulently. Like the 1st to the 5th defendants, he explains that the Government appointed a probe committee comprising of the defendants to look into the affairs of the plaintiff and to oversee fair balloting of the plaintiff's parcels of land to its shares holders.

6. Whilst admitting that it is not a shareholder of the plaintiff company, the 6th defendant contends that the probe committee appointed by the Government had mandate to carry out the balloting. Further, that the directors suing had no capacity to bring the suit. Like the 1st to 5th defendant, the 6th defendant contends that it was wrongly sued (the reliefs sought cannot issue against it).

EVIDENCE

The plaintiff's case

7. PW-1, Charles Kinyua Karoki, informed the court that he is a shareholder and a director of the plaintiff company. He produced the following documents in respect of the plaintiff company-Certificate of Incorporation; Memorandum of Understanding; Certificate of Registration of the plaintiff company dated 7th October, 2009 as **Pexbt 1** to **3** respectively.

8. He explained that the company has over 1500 members and that they brought the current suit against the members of the Probe Committee appointed by the District Commissioner (D.C) in 1990.

9. He informed the court that the appointment of the Probe Committee was made following a complaint by 15 members of the plaintiff to the area D.C (At the time the D.C appointed the Probe Committee the Plaintiff company had a Board of Directors).

10. P.W.1 further informed the court that the Probe Committee was formed in a shareholders meeting held on 15th September, 1990. He produce the minutes of the meeting as **Pexbt-4**.

11. He further informed the court that the members of the plaintiff company differed with the D.C when he started selling their land. As a result, they appealed to the Provincial Commissioner who organised for a shareholders meeting on 11th March, 1993. In that meeting, (Annual General Meeting) members of the plaintiff company elected new directors. He informed the court that he was one of the directors elected in that meeting. He produced a certificate of registration in that respect as **Pexbt-5**.

12. After they were elected as the directors of the plaintiff company, they demanded for the money that the Probe Committee had collected from the members of the plaintiff company but the area D.C refused to accede to their demands. In the meantime, the 6th defendant issued a notice convening the company's Annual General Meeting (AGM). He produced the notice as **Pexbt-6**. According to the notice, the meeting was to be held on 13th December, 1993. To forestall what had happened, they filed the current suit.

13. P.W.1 further informed the court that the defendants, in conjunction with the D.C, instigated criminal proceedings against them. He produced the proceedings in the criminal case proceedings preferred against them to wit, Nyeri CMC's Criminal Case No. 4149 of 1992) as **Pexbt 7**.

14. He lamented that the probe committee (read the defendants) has refused to hand over the company's records and documents to wit, company seal, files, receipt books and safe. He produced an inventory of the records and documents held by defendants as **Pexbt-8** and urged the court to grant them the orders sought in order to allow them to get the company's records and documents from the defendants. He also prayed for the costs of the suit.

15. Upon being cross-examined by Wilson Nderitu Ngiri, he reiterated that they went to court to stop balloting and denied the defendants' contention that there was a Court of Appeal decision allowing the defendants to manage the plaintiff's business.

16. He maintained that his fellow directors and he were elected in 1993 and denied having any knowledge that their directorship was suspended.

17. Upon being cross-examined by Mr. Mugambi; P.W.1 told the court that the probe committee took charge of the affairs of the plaintiff company from 1990 to 2001 and maintained that they had gone to court to stop the probe committee (read the defendants) from taking over the company.

18. The defendants' did not present any evidence in support of their case. This was so, despite having been offered an opportunity by the trial court to do so.

Submissions

19. In the submissions filed on behalf of the plaintiff, a brief background of the circumstances leading to the filing of this suit is given and the following issues identified as the issues for the court's determination:-

- **Whether the change of directors effected on 29th June,1993 was fraudulent?**

- **Whether the defendants, as members of the probe committee appointed by the D.C, had legal capacity/right or any mandate to manage the affairs of the plaintiff company?**

- **Whether the defendants' refusal to hand over the affairs and property of the plaintiff company is wrongful or unlawful?**

20. With regard to the first issue, it is submitted that the evidence on record shows that the plaintiff conducted an AGM on 11th March, 1993 and elected new directors. That fact is said to be borne out by **Pexbt-5**. It is also out that the newly appointed directors were charged with the offence of giving false information to the Registrar of Companies concerning the said elections and change of directorship of the plaintiff company and acquitted under **Section 210** of the Criminal Procedure Code.

21. For the foregoing reasons, it is submitted that registration of the new directors of the plaintiff company following the election of 11th March, 1993 was proper and lawful.

22. With regard to the 2nd issue, reference is made to the pleadings filed in this suit and the evidence adduced in support thereof and submitted that the defendants took office as members of a probe committee and not as duly elected directors of the plaintiff company.

23. On whether the probe committee appointed by the D.C had legal mandate to run the affairs of the plaintiff company, reference is made to **Sections 182, 184** of the Companies Act Cap 486 and the case of **Prebyterian Foundation vs. Ndathi Mugunda Company Limited & Jane Wangui Waweru Nyeri HCCC No.246 of 1998** and submitted that the defendants had no authority to engage in the affairs of the plaintiff company.

24. In the case of Presbyterian Foundation vs. Ndathi Mugunda Company Limited & Jane Wangui Waweru (*supra*) Kasango J., observed:-

“...the first defendant’s witness, who in my view was an honest and reliable witness, stated that the probe committee was only supposed to carry out investigations into complaints made by members. On carrying out that investigation, it was supposed to make a report. It was not mandated to distribute land.”

Analysis and determination

25. With regard to the first issue, it is noteworthy that the defendants merely alleged that the registration of the current directors of the plaintiff company was done fraudulently without leading any evidence capable of proving that fact. Under **Section 107** of the Evidence Act, Cap 80 Laws of Kenya, the burden of proving that registration of the current directors of the plaintiff was done fraudulently and as such improper or unlawful lay with the defendants. There being no evidence capable of proving that the registration of the current directors of the plaintiff was procured by fraud, I return a negative verdict to this question.

26. On whether the defendants, as members of the probe committee appointed by the D.C, had legal capacity/right or any mandate to manage the affairs of the plaintiff company, having read and considered the pleadings filed in this suit and the uncontroverted evidence of P.W.1, I entertain no doubt that the defendants were not directors of the plaintiff. I say this because, for one to qualify as a director of a company, he must have been appointed or elected as such in accordance with the company’s Articles of Association and/or the Companies Act. In that regard see **Section 22(1)** as read with **Section 184(1)** of the Companies Act Cap 486.

27. In my view, the role of the 6th defendant or any other member of the Provincial Administration, if any, in resolving the problems faced by the plaintiff and its members was restricted to assisting the plaintiff and its members to find a solution to their problems but not taking over the management of the affairs of the plaintiff company.

28. By purporting to convene a meeting of the plaintiff’s company for purposes of election, the 6th defendant, clearly exceeded his mandate as, under **Section 135** of the Companies Act Cap 486 only a court has power to order a company to hold a meeting. In that regard see the said Section of the law which provides as follows:-

“135. (1) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the articles or this Act, the court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient; and it is hereby declared that the directions that may be given under this subsection include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) Any meeting called, held and conducted in accordance with an order under subsection (1) shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.”

29. On whether the defendants’ refusal to hand over the affairs and property of the plaintiff company is wrongful or unlawful, in view of what I have stated above, I find and hold that the defendants’ refusal to hand over the affairs and property of the plaintiff company is wrongful and unlawful. Consequently, I find the plaintiff’s claim to be merited and allow it as prayed.

Dated, signed and delivered at Nyeri this 28th day of July, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Gitibi for the plaintiff

Mr. Kihara for the 1st – 5th defendants

Ms Masaka for the 6th defendant

Court assistant – Lydia