IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & OKWENGU JJ.A.)

CIVIL APPLICATION NO. E025 OF 2021

(An application for an injunction from the judgment and decree of the Commercial and Tax Division in the High Court of Kenya (D. S. Majanja, J.) dated 2nd November, 2020

in

Milimani Commercial Court Civil Suit No. E229 of 2019)

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BETWEEN

KIHINGO VILLAGE (WARIDI GARDENS)

MANAGEMENT ONE LIMITED..APPLICANT

AND

WILLIAM EDWARD PIKE...1ST RESPONDENT

NARESH MEHTA..2ND RESPONDENT

GITAHI GETHENJI...3RD RESPONDENT

SHEETAL KHANNA...4TH RESPONDENT

KISHOR KUMAR VARSANI..5TH RESPONDENT

MOHAN SINGH PANESAR...6TH RESPONDENT

SAMUEL MWANGI WAMBU...7TH RESPONDENT

VARSANI HARJI DHANJI...8TH RESPONDENT

JAMES NDUNGU GITHINJI..9TH RESPONDENT

CHACHA MABANGA...10TH RESPONDENT

RULING OF THE COURT

Before us, is a Notice of Motion under **Rules 5(2)(b), 41, 42** and **47** of the **Court of Appeal Rules 2010** and **all other enabling provisions of the law** substantively seeking orders as follows:

> **"2. THAT the Honourable Court do issue a temporary injunction restraining and stopping the implementation of the purported resolutions of the Kihingo Village (Waridi Gardens) Management Company prepared by the respondents arising from a special general meeting held on the 13th April, 2019 at Capital Club, pending the hearing and determination of the**

appeal;

3. THAT the Honourable Court do issue a temporary injunction restraining the respondents, their servants or agents or any other person claiming under them from interfering with the participation of the Applicant's representatives in the Board, administration, management and general running of the affairs of Kihingo Village (Waridi Gardens) Management Company, pending the hearing and determination of the Appeal;

4. THAT the costs of this application be provided for."

The motion is supported by grounds on its body and a supporting affidavit of **Hon. Ndungu Githinji** together with annextures thereto. It has been opposed by a replying affidavit sworn by **Gitahi Gethenji** the 3rd respondent on his own behalf and on behalf of the 1st, 2nd, 4th to 8th respondents together with annextures thereto. It was canvassed through rival pleadings, written submissions and legal authorities filed by advocates for the respective parties, without their attendance or oral highlighting.

The background to the application albeit in summary form is that the applicant filed in the High Court of Kenya at Milimani Law Courts Commercial and Tax Division Civil Case No. E229 of 2019 against the respondents claiming inter alia that the respondents illegally convened a meeting at Capital Club Nairobi on 13th April, 2019 and made attempts to remove the applicants shares and representation from the Board, Administration and Management of the company. The applicant duly appointed a proxy at the said meeting, voted against the resolution and in applying the principles of voting by shares, the resolution to remove its shares and representation from the management of the company were defeated. Despite the resolution being defeated, the respondents purported to register the resolutions at the Office of the Registrar of Companies in order to remove applicant's representation. They also attempted to interfere with the management of the company's assets on the basis of which the applicant sought various reliefs from the Court.

In rebuttal, the respondents filed a defence denying applicant's claim that he was a majority shareholder. Further that, applicant's claim was res judicata as the issue of shareholding of the management company was conclusively determined in the arbitration proceedings culminating in a final award dated 28th July, 2016 (the Award) which was adopted as a judgment of the Court by a ruling dated 6th February, 2019 in **ELC No. 1225 of 2013 Kifaru Investments Limited & 2 Others vs. Kihingo Village (Waridi Gardens) Limited & Another** and a decree issued on 15th February, 2019.

The cause was canvassed through oral testimony and written submissions at the conclusion of which the learned Judge, **Majanja, J.** evaluated the record and on 2nd November, 2020 rendered himself as follows:

45. The plaintiff's case is based on the exercise of its voting rights at the meeting of the Management Company in which it asserts that it is the majority shareholder. Its ability to exercise those rights and to litigate this suit is dependent of the consent of its shareholders more so a majority of them. The principle of majority rule in company law has long bene recognized since the seminal case of Foss vs. Harbottle [1843] 2 Hare 46. In the circumstances of this case, either Ndungu Gethenji or Gitahi Gethenji acting alone could authorize the filing of the suit or appoint an additional or other director as neither constitute a majority of the plaintiff's shareholders as they hold equal shares.

46. I have also found that Chacha Mabanga was not qualified to be a director of the plaintiff under its Article of Association and was not lawfully appointed by Ndungu Gethenji acting alone. Consequently, Ndungu Gethenji either acting alone or with Chacha Mabanga could not authorize the filing of these proceedings on behalf of the plaintiff."

The applicant was aggrieved and timeously filed a notice of appeal dated 4th November, 2020 intending to appeal against the whole of the said judgment, on which the application under consideration is anchored.

Supporting the application, the applicant avers and submits that it has satisfied the twin prerequisites for granting relief under the above rule. In support of the first prerequisite, the applicant relies on the annexed draft memorandum of appeal containing seven (7) grounds of appeal. The applicant intends to fault the learned Judge *inter alia* for the failure: to properly construe and apply the binding provision of **section 133** of the **Companies Act**; to consider the conclusive evidence before him to the effect that applicant had lawfully passed resolution which authorized the filing of the suit and appointed the person to swear the affidavit; to properly consider, appreciate and apply the various provisions of Articles of Association which are binding on members and the board, specifically **Article 47** of the **Article of Association** of the **Company** as replicated in **Article 23** and **29** which provides that the voting of the company is 50% of the members of the Board and that incase of equity of the votes, the chairman has a second casting vote. Further, the learned Judge is faulted for proceeding to speculate on the manner in which the members or directors of the company at a general meeting so called or at Board meetings so called would vote, and that the said votes would result in a stalemate and in the process erroneously failed to give effect to the relevant clear provisions of the Articles of Associations of the Company which provide explicitly that in the event of the stalemate the same was to be resolved through a casting vote. Also for failing to hold that Articles of Association are binding on both members and the Directors of the Company and lastly, when he erroneously failed to find in favour of the applicant.

Turning to the satisfaction of the second prerequisite, the applicant asserts that if the relief sought is not granted, the company may be committed to third parties and thereby incur liabilities.

To buttress the above submissions, applicant relied on the case of **<u>Mombasa Bricks and Tiles Limited & 5 Others vs. Arvind Shah & 7 Others</u> [2017] eKLR** on the binding effect of a memorandum and Articles of Association of a Company once registered; **<u>MM Butt vs. The Rent Restriction Tribunal</u> [1979] eKLR**; and **Rhoda Mukuma vs. John Abuoga [1988] eKLR** on the need for the Court to exercise its discretion in such a matter so as to prevent the appeal from being rendered nugatory should it ultimately succeed; **<u>Jared Sagini Keengwe vs. Walter Onchari & 2 Others</u> [2016] eKLR** for the proposition that an appeal would be rendered nugatory in instances where the substratum of the appeal is likely to be transferred to third parties and made beyond the reach of the appellant should the appeal succeed.

In rebuttal, the 3rd respondent on behalf of himself and the rest of the respondents as already mentioned above contends that he is conversant with matters in controversy herein being a brother to **Hon. Ndungu Githinji** the deponent of the supporting affidavit to the application under consideration. The two are both shareholders and Directors of the Company. He is a stranger to any company resolution authorizing the filing of the application under consideration on behalf of the company and second, instructing the advocate on record for the company to act for the company. Further, that the application is a nonstarter as all that applicant purports to forestall was in fact effected long ago and the application is therefore an exercise in futility.

Our invitation to intervene on behalf of the applicant has been invoked under the provisions of law already stated. **Rules 41, 42** and **47** are merely procedural and need no further interrogation. What falls for interrogation is **Rule 5(2)(b)** of the Court's **Rules**. It provides:

> **"5(2)(b) in any civil proceedings, where a notice of appeal had been lodged in accordance with rule, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just."**

The principles that guide the Court in the discharge of its mandate under the said provisions and which we fully adopt are as crystallized by the Court in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR**.

Our take on the said crystallized principles is that in order to succeed in an application of this nature, an applicant has to satisfy the threshold for granting relief under the said provisions namely, demonstration that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant. However, before we delve into the interrogation of the merits of the application, we find it prudent to deal with a preliminary issue which in our view goes to the core of the substratum of the application herein namely, the competence of the application under consideration. This arises from the unrebutted assertion by the 3rd respondent on his own behalf and on behalf of the rest of the respondents at paragraph 3 and 4 of the replying affidavit as follows:

> **"3. I am also the other director and shareholder of Kihingo village (Waridi Gardens) Management One Limited. The applicant only has two shareholders and directors – myself and my brother James Ndungu Githinji.**
>
> **4. I wish to state from the outset that at no material time was any meeting of the shareholders or the board of directors ever called to authorize James Ndungu Githinji to swear the supporting affidavit dated 14th January, 2020. Even if the year the supporting affidavit is dated was a typographical mistake, at no time was any meeting ever called prior to 14th January, 2021 authorizing the deponent to instruct any advocate to file the present application in the Court of Appeal. I would never had authorized the filing of the present application even if a meeting had been called as it would go against arbitral award, the majority rule of the shareholders in the management company and the judgment of Hon. Justice Majanja."**

The gist of the above deposition is that the application is incompetent and therefore a nonstarter.

We have not traced on the record the applicant's rebuttal of those averments nor is the resolution and proxy authorizing the filing of the application under consideration annexed to the supporting affidavit. In our view, upon averring as above, the burden shifted to the applicant to controvert that averment in the replying affidavit. We reiterate none has been brought to our attention. The effect of applicant's failure to rebut leads to only one conclusion that those averments are true and if true there is no basis for us to delve into the interrogation of the merits of the application. It is a proper candidate for striking out as being incompetent. However, should we be wrong considering that the averment in the replying affidavit has not been raised as a preliminary objection, we proceed to determine the merits of the application as a matter of completeness of the record.

In support of the argument that the first prerequisite has been satisfied, the applicant relies on the annexed memorandum of appeal whose contents are already highlighted above. Our take on the same is that they are arguable notwithstanding the ultimate success or otherwise when the appeal will be heard.

In law an arguable appeal is not one which must necessarily succeed, but one which is not frivolous but raises a bona fide issue that can be argued fully before the Court. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd.** & **2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

Applying the above threshold to the rival positions herein, we are satisfied that the grounds of appeal raised in the memorandum of appeal annexed to the application are arguable, their ultimate success or otherwise notwithstanding.

On the nugatory aspect, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See the case of **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**.

Applying the above threshold to the rival position herein on this prerequisite, our take on the applicant's argument with regard to this issue is that there are fears that the respondent may commit the company in transacting with third parties likely to result in liabilities being occasioned to the company. There is however no deposition that such liabilities are likely to be irreversible, such irreversibility of the actions intended to be forestalled is the core criterial for holding that the intended appeal will be rendered nugatory. Second, the applicant has not rebutted the respondents' assertion that what is intended to be forestalled by the relief sought has already been effected, namely, registration of new Directors and change of bank signatories.

It is trite that in law, a court should guard jealously against issuing orders in vain. Granting reliefs sought by the applicant herein, in light of

the uncontested position highlighted above, will be tantamount to issuing an order in vain.

In the result and on the basis of the above assessment and reasoning, we find no merit in the application. It is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR