



**Gatigithu & 5 others v Kiambiriria Investment Co Ltd (Environment & Land  
Case 47 of 2019) [2023] KEELC 754 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 754 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 47 OF 2019  
FM NJOROGE, J  
FEBRUARY 14, 2023**

**BETWEEN**

**NDUNGU GATIGITHU ..... 1<sup>ST</sup> PLAINTIFF  
NJANJA MBUTU ..... 2<sup>ND</sup> PLAINTIFF  
KAGIMBI MUNGAI ..... 3<sup>RD</sup> PLAINTIFF  
MUHIA WAIGANJO ..... 4<sup>TH</sup> PLAINTIFF  
NJOGU GITAU ..... 5<sup>TH</sup> PLAINTIFF  
NDUNGU GATHIGE ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**KIAMBIRIRIA INVESTMENT CO LTD ..... DEFENDANT**

**RULING**

1. The present ruling arises from an application dated October 5, 2022 lodged by the plaintiffs. That application arose from the directions of this court issued on September 28, 2022 and the further directions made on October 27, 2022.
2. The directions of September 28, 2022 read as follows:

“The plaintiffs are granted 7 days to file and serve an application seeking the orders relating to the information on documents listed above or any other data as may be relevant to their inquiry relating to this suit and as may enable this court to effectively and finally determine the instant suit. The court to decide the issue of mandate to run company affairs for the purposes of this suit only by way of a CR 12 attached to a sworn affidavit of the current directors in a search made after this date September 28, 2022.”



3. The directions of October 27, 2022 read as follows:

“This court is concerned that the disposal of this litigation may be unnecessarily delayed by wrangles about representation of the defendant company. To the extent that the persons on the ground have been admitted to be Mr Njuguna’s clients and to the extent that Mr Muchiri has admitted that his clients are not in possession of the suit premises or accounts.

It is this court’s opinion that the issue of representation of the *de facto* management of the company, has now been resolved.

I hereby order that Mr Njuguna is the rightful counsel to represent the defendant company under its de facto management for the purpose of enabling this litigation to proceed to its conclusion.

For that reason, Mr Njuguna’s clients shall disclose in the first replying affidavit to be filed in response to the motion dated October 5, 2022 their full names and how many they are and the position they hold in the management of the company even as they respond to the other specific inquiries made by that motion. The replying affidavit shall be filed and served within 3 days of today.

In this regard the previous orders of this court pegging the filing of the reply on the availability of the CR 12 from the Registrar of Companies made on October 6, 2022 is hereby set aside for Mr Njuguna to file the response on behalf of his clients.

This matter shall be mentioned on November 2, 2022 for directions on the hearing of the motion dated October 5, 2022.”

4. The application at hand seeks the following orders:

1. The defendant company Kiambiriria Investment Company Limited be compelled to supply to the applicants the following information in regard to the management of the property LR 1144/21/XXIV Naivasha.
  - a. The tenants leasing the premises for the period 2017 to date.
  - b. The rent collected from the suit premises between 2017 to date.
  - c. The bank accounts where the rent collected is banked or where the rent collected is deposited including Mpesa records.
  - d. The accounts of the company indicating how the rental proceeds from the suit premises has been shared from 2017 to date
  - e. Audited accounts of the company for the period 2017 to date.
  - f. The expenditure incurred by the defendant in respect of the suit premises.
  - g. The over heads for managing of the suit premises be presented before the court.

5. The application is premised on the grounds that appear on its face and in the sworn affidavits of Ndungu Gathige and Kagimbi Mungai, both dated October 4, 2022. These are that : the applicants and 16 other persons are owners of the suit premises known as LR No 1144/21/XXIV; the majority of the owners have since died; the defendant company manages the suit property; since 2017 the defendant has refused to call some owners of the property for any meeting and it has also refused to pay some of the owners their share of rental income accruing therefrom; the majority of the owners who are



alive are well advanced in age and they are not able to access their share of the rental proceeds for their sustenance; the dependants of the deceased owners have also been excluded from receiving their share of the rent; there is no transparency and/or accountability by the defendant in its management of the suit premises; the applicants are entitled to the information sought in the application by virtue of being part owners of the property.

6. In his affidavit in support of the application the 3<sup>rd</sup> plaintiff states that: 15 owners of the company have died leaving only 5 owners; in 2010 the surviving owners of the property together with some of the representatives of the deceased owners formed a company to manage it; the company was run in a transparent manner for some time and it held its annual general meeting every year, declared dividends and regularly paid dividends to the property owners or their families; prior to 2017 there had been attempts by the directors of the defendant company to split the property into two portions and sell a portion thereof without full approval of the registered owners and their representatives; the sale did not and could not materialize as the land could not be transferred by the company in the absence of the registered owners; in 2017 some of the directors of the company purported to change the directors of the company and appoint some officials to run the affairs of the company including its accounts; however after the Registrar of Companies was notified those changes were halted; thereafter the company reverted to the directors who were in office prior to 2017; since 2017 the company affairs have been run inefficiently and without transparency and the deponent has not received any dividends from it; only a few of the part owners of the property receive any share of the dividends; the chairman of the company is of advanced age and ill health and is incapable of running the company efficiently; there has been no information forthcoming regarding the number of tenants, the rental income received, the accounts holding the collected rent, the bank statements maintained by the defendants and any other affairs of the defendant; it is in the best interest of the owners that the defendant provide the information requested in the application and that the defendant hand back the affairs of the suit property to its owners.
7. The 6<sup>th</sup> plaintiff in his supporting affidavit depones to the same facts as that of the 3<sup>rd</sup> plaintiff analyzed above with the addition that on February 10, 2022 he fell ill and the company officials sent him Kshs 20,000/= as assistance.
8. The respondent filed its response to the application by way of a replying affidavit and a supplementary affidavit both sworn by one Stephen Njoroge Mungai who is said to be the treasurer of the defendant. The defendant's response as contained in that reply is that: on December 16, 2017 there was an annual general meeting of the defendant; the deponent was elected in place of Samuel Muigai Ngure who had resigned; some other persons were also elected into other offices of the defendant; the company had five directors from 2018; later Samuel Muigai Ngure complained to the Registrar of Companies that he had not resigned and an exchange of correspondence began among the three; due to wrangles the Registrar of Company's portal has been locked with respect to the defendant company; at one director has died since and has been replaced by another person informally; the former treasurer had handed the deponent the records regarding the suit property during the AGM which he is still in possession of; various directors owed the company monies as at the time of the deponent's taking over; however records of income and expenditure predating 2017 were not handed over to the deponent and he is only able to give an account for the records as from January 2018 and that the monthly rent was about Kshs 80,000/= by then and rent was irregularly paid; the board decided to renovate the building and put into effect measures to increase the rental income and borrowed Kshs 1,200,000/= from an individual for the purpose, repayable with interest at the rate of Kshs 10,000/= from May 2018 – April 2019; the renovation was completed and the rental income increased; Samuel Muigai Ngure also refused to exit as a signatory to the bank account and the defendant was unable to access the account. The deponent attached income and expense statements for the period during which he was in charge. He



stated that the amount held by the defendant as at August 2018 was Kshs 680,666/=; the distribution of the income to members has increased and some have actually been given welfare grants; that some of the members have disposed of their shares to the deponent and others are waiting to follow suit; that most members are neighbours as well as relatives whose blood or marital relations he narrates at paragraph 43 of the replying affidavit; that lack of grants of representation to the estates of some deceased members and competition among family members in obtaining such grants has occasioned the defendant problems regarding distribution of income.

### **The Applicant's Supplementary Affidavit**

9. In response to the defendant's replying affidavit the plaintiffs filed the sworn affidavit of the 3<sup>rd</sup> plaintiff. In that fresh affidavit he critiqued the response of the defendant by pointing out that no information on the number of tenants and the monthly rent payable by them is provided, or where the rent actually collected is deposited, that there are no leases or tenancy agreements attached, that the accounts are unverifiable as there is no CPA number of the accountant provided and that the accounts do not cite the sources of information including any bank statements or mode of payment. He also states the number of shops in the plot is not provided; that the deponent of the replying affidavit: was introduced merely as a selling agent/broker at the time it was intended to dispose of the suit property and share proceeds thereof; together with others diverted the rent from the partnership account to the defendant's account and to their personal accounts and also, together with those others, tried to subdivide the property whereupon he would get half of it thus prompting the present suit and the lodging of a caveat against the title; deliberately designed a strategy to impoverish the members so as to acquire their shares at throwaway prices; approached them with proposals to buy off their shares at a loss value; that indeed some families have resorted to selling their shares for survival owing to desperation; that for the period the defendant has been in control, the 3<sup>rd</sup> plaintiff is of the opinion that it must have collected rent to the tune of Kshs 15.78 million; that the directors do not consult owners including while borrowing and there was no resolution to borrow and the owners did not know of the credit facility purportedly advanced to the defendant on their behalf; that it is strange that the deponent offered his motor vehicle as security, that the present dispute is fostered by the defendant in order to enable it to continue denying the owners income; that no annual general meeting of the defendant has been held since December 2017 and no notices of general meetings inviting members have issued and so decisions taken are irregular and illegal; that the director swearing the replying affidavit collects rent by mobile money means to his phone and no receipts are issued; that tenants are threatened with eviction should they divulge any information as to monies they send him; that the reply has also failed to disclose the rental income tax paid to the Government or rates to the County Government and that the deponent has also threatened the plaintiffs with dire consequences including death to the 3<sup>rd</sup> plaintiff (which he has allegedly formally reported to the police) should they insist on continuing with the suit.

### **The Respondent's Supplementary Affidavit**

10. The defendant states in its supplementary affidavit that the 3<sup>rd</sup> plaintiff and his sons among other members have been interfering with the suit premises in a violent manner leading to tenants being reluctant to sign written tenancy agreements and also the institution of criminal cases against the offenders (some of which are particularized at paragraph 24 of the supplementary affidavit) that the accounts are prepared by qualified auditors; that he can not transfer the property to himself without the participation of the owners or the administrators of estates of deceased owners; that the deponent and the other directors never impoverished the owners; that the shares to the premises are not being acquired at throw away prices; that those disposing of their shares are not vulnerable; that the court may visit the premises or sent an inspector to verify the erratic occupation; that the memorandum



and articles of the defendant empower it to borrow and that the defendant has held regular general meetings.

### **Determination**

11. This court has set out in full the analysis of the affidavit evidence above only for the purpose of making each party's grievance more lucid. However, at this point, the principal thing to be noted is that the defendant has opened up and declared all it says it can; it is indeed sworn that what it has availed is all the information that it can regarding the suit property. It must be remembered at this interlocutory stage that this is a suit destined for hearing by way of *viva voce* evidence. The defendant is yet to face the plaintiffs in the main hearing of the suit. The application dated October 5, 2022 only sought that information be provided and no more. I consider that if some relevant information has not been provided the plaintiffs will have opportunity to issue the appropriate discovery notices or cross-examine the witnesses, or even demonstrate deliberate non-disclosure through the usual manner and invoke adverse presumptions of such default while the hearing of the main suit is going on. I would be unable to confirm that the defendant has failed to disclose any relevant information for now unless it is so demonstrated by the plaintiffs. I therefore deem the application dated October 5, 2022 as spent. The defendant should have volunteered that information in the first place when the present suit was filed as part of its disclosure; it shall therefore bear the costs of the instant application.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

