



Mwongera & 2 others (Suing on their behalf and on behalf members of the Kenya Hospital Association) v Board of Management of the Kenya Hospital t/a Nairobi Hospital & 2 others; Kenya Hospital Association t/a Nairobi Hospital (Interested Party) (Civil Case E270 of 2020) [2024] KEHC 11918 (KLR) (Commercial and Tax) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11918 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E270 OF 2020
FG MUGAMBI, J
SEPTEMBER 27, 2024

BETWEEN

DR FRANK K MWONGERA 1ST PLAINTIFF
DR EDWIN RONO 2ND PLAINTIFF
DR DAVE OTIENO 3RD PLAINTIFF
SUING ON THEIR BEHALF AND ON BEHALF MEMBERS OF THE KENYA HOSPITAL ASSOCIATION

AND

THE BOARD OF MANAGEMENT OF THE KENYA HOSPITAL T/A NAIROBI HOSPITAL 1ST DEFENDANT
THE CHAIRMAN OF THE MANAGEMENT KENYA HOSPITAL ASSOCIATION T/A NAIROBI HOSPITAL 2ND DEFENDANT
THE CHIEF EXECUTIVE OFFICER, KENYA HOSPITAL ASSOCIATION 3RD DEFENDANT

AND

THE KENYA HOSPITAL ASSOCIATION T/A NAIROBI HOSPITAL INTERESTED PARTY



JUDGMENT

1. The plaintiffs are bonafide members of the interested party (“Nairobi Hospital”). The 1st defendant is a Board established under Article 38 of the Articles of Association of Nairobi Hospital and mandated to effectively manage the affairs of the hospital for the benefit of its members (“the Board”). The 2nd defendant is the Chairman of the Board with specific mandate of leadership and decision making relating to Nairobi Hospital (“the Chairman”). The 3rd defendant is the Chief Executive Officer of Nairobi Hospital mandated with executing the resolutions of the Board and managing the secretariat on behalf of Nairobi Hospital (“the CEO”).
2. The facts giving rise to the present dispute are common cause. At the height of the Covid-19 pandemic, Nairobi Hospital applied to the court vide HC Misc. App. E757 OF 2020 for leave under section 280 of the *Companies Act* (Chapter 486 of the Laws of Kenya) to hold a Special General Meeting (SGM) and an Annual General Meeting (AGM) by way of virtual platform.
3. By an order dated 9/5/2020, the court allowed the Hospital to hold virtual meetings as per guidelines published by the Registrar of Companies and published on the Business Registration website, www.brs.go.ke.
4. By a letter dated 14/6/2020, that was sent out to members via email on 15/6/2020, the Chairman informed the members that at a meeting of Nairobi Hospital’s open day in January 2020, members had expressed the need to amend the Memorandum and Articles of Association. This was with a view to protecting the interests of Nairobi Hospital and harmonizing them with the *Companies Act*.
5. In view of this, the Board tasked its Governance and Legal Committee to scrutinize the Memorandum and Articles of Association and suggest amendments that would be proposed to the members for approval. The Board had received proposals from the Committee and Admitting Staff Association and sought to table them for approval by members in an SGM. The Chairman attached the original Memorandum and Articles of Association and a summary of the proposed amendments for the members’ perusal.
6. The Chairman’s letter further informed the members that the Board had resolved to convene an SGM on 30/7/2020 and AGM on 3/9/2020, virtually.
7. On 3/7/2020, the CEO forwarded a Notice to the members for the virtual SGM scheduled for 30/7/2020, at 2:30pm, pursuant to the leave granted in Misc. App. No. E757 of 2020. The SGM was for purposes of considering and approving the proposed amendments to the Memorandum and Articles of Association. Members were required to register for the SGM from 3/7/2020. Registration would stop at 11am on 28/7/2020.
8. In accordance with section 298(1) of the *Companies Act*, members were entitled to attend and vote at the SGM by way of proxies. The proxy was required to fill a proxy form signed by the appointer or his attorney duly authorized in writing or by seal if the appointer is a body corporate. The completed forms of proxy were required to be emailed to kha@nbihosp.org or delivered to the CEO’s office no later than 28/7/2020 at 5.00 pm.
9. These forms would be vetted, and any rejected forms would be communicated to the affected members by 29/7/2020 at 5.00 pm to allow time to address any issues. The SGM would be streamed live via a link to be provided to all registered members.



10. Duly registered members and proxies were instructed to vote on each resolution when prompted by the Chairman via the live stream platform. A poll was to be conducted for each proposed amendment to the Memorandum and Articles of Association with results of the poll sent via email to the members and also published on Nairobi Hospital's website within 48 hours following conclusion of the SGM.
11. On 27/7/2020, Nairobi Hospital's office communicated to the members that registration would close on 28/7/2020 at 11am and that after the close of registration, voting would open and members could vote for the attached resolutions using their phones as prompted. Members voted for 12 resolutions from an earlier 26 resolutions that had been circulated with the initial Notice. The resolutions were allegedly passed and the Memorandum and Articles of Association accordingly amended as per the said resolutions.
12. Aggrieved by this turn of events, the plaintiffs, through a further amended Plaint dated 27/1/2021 filed the present suit. Contemporaneously with the Plaint, they filed an application seeking leave to continue and prosecute the foregoing suit as a derivative action against the defendants. The defendants and Nairobi Hospital responded to the Plaint through their joint statement of defence dated 13/6/2022.
13. At the hearing, the 1st and 2nd plaintiffs testified on their own behalf and that of the plaintiffs as PW 1 and PW 2 respectively. The defendants called the Senior Legal Officer, Maxwell Mwangi Maina who testified as DW1. I have carefully considered these testimonies, the evidence, caselaw and the submissions by all the parties. I do not wish to rehash the same but I will make relevant references in my analysis and determination below.
14. I do however note that in a ruling of the court dated 1/9/2020, leave was granted to the plaintiffs "... to continue with this suit but only in respect to the cause of action relating to changes made by the communication of 27th July 2020 to the proposals of the amendments earlier sent on 3rd July 2020". (emphasis mine)
15. I agree with the defendants that this ruling narrowed the court's focus to determining the validity of the notice dated 27/7/2020, issued prior to the SGM. However, I also observe that both parties presented extensive testimony and arguments on the legitimacy of the SGM itself, as well as the amendments to the Articles of Association. Therefore, in the interest of justice, and for the sake of both completeness and finality, I will address the following issues, as raised by the parties in their respective pleadings and submissions.
 - i. Whether the notices issued for the SGM were sufficient and lawful?
 - ii. Whether the Articles of Association of the interested party were properly amended?
 - iii. Whether the Plaintiff is entitled to reliefs sought?
 - iv. Who should bear the Costs of this suit?

Analysis and Determination

Sufficiency and legality of the Notices issued:

16. The gist of the plaintiffs' argument is that the notice dated 27/7/2020 amended the earlier notice of 3/7/2020 and greatly prejudiced members. This is due to the short timelines given to review the 12 new amendments and resolutions which were sent to them at 10:20pm on 27/7/2020. The plaintiffs contend that most members of Nairobi Hospital are senior doctors and lawyers and most saw the email late in the morning of 28/7/2020 or even after the voting commenced at 11am due to the nature of their work.



17. The plaintiffs contend that these proposed amendments together with changes on the voting process caused confusion more so because voting was to commence the next morning, contrary to the earlier notice and expectations of the members.
18. They also contend that between 3/7/2020 and 27/7/2020, 24 days had lapsed and, in the circumstances, members should have been given a fresh 21 days' notice from 27/7/2020 to consider the new proposed amendments.
19. In response, the defendants contend that following the notice of 3/7/2020, a total of 723 members registered to participate in the SGM either directly or by proxies. This includes the plaintiffs who are listed as No. 382, 88 and 5 on the list of registered members.
20. Article 19 of Nairobi Hospital's Articles of Association, as read with section 281(1) of the [Companies Act](#), are both clear that all general meetings are preceded by a 21 days' notice in writing. It is not in dispute that the formal notice for the SGM scheduled for 30/7/2020 was issued on 3/7/2020 and therefore well within the timelines of the Articles of Association and section 281(1) of the [Companies Act](#).
21. There is also no contestation that the notice of 3/7/2020 was a valid notice by dint of section 285 of the [Companies Act](#). It specified the time, date, place of the meeting, means of joining and participating in the meeting and the general nature of the business to be dealt with at the meeting. The notice sufficiently identified the substantive business of the day as the consideration and approval of the proposed amendments to the Memorandum and Articles of Association by voting for each proposed amendment.
22. Given that these are the only statutory requirements for a valid notice under the Act, I am convinced that there is no express requirement for the notice to be accompanied by specific annexures. The primary purpose of such notices is to inform members of the general nature of the business to be conducted at the meeting. Thus, it was sufficient for the defendants to circulate the proposed amendments with the notice and through subsequent communications to the members as good practice and not as a legal requirement.
23. The further issue that arises is whether the communication of 27/7/2020 was in contravention of the Articles of Association and the [Companies Act](#) and whether it resulted to an amendment of the notice previously issued on 3/7/2020. I do not think so for a number of reasons.
24. First, this notice was not convening any new meeting of the Nairobi Hospital within the meaning of sections 281 and 285 of the [Companies Act](#). The communication simply confirmed the SGM slated for the 30/7/2020 with the only change being that voting would commence after close of registration and not on the day of the meeting. There was thus no need for the defendants to issue a further 21 days' notice as contended by the plaintiffs.
25. Second, the contention that a longer notice was necessary for the members to acquaint themselves with the new proposed resolutions is negated by the Articles of Association themselves and the admission by PW 1. PW1 confirmed that there was no such requirement for the Board to circulate proposals of the resolutions to be voted on by the members before the SGM.
26. Third, and in any event, I find that the defendants attached these proposed amendments in the notices of 3/7/2020, 14/7/2020 and 27/7/2020. There is no provision in the Articles of Association stipulating the time for these specific proposals to be presented to members prior to voting.
27. Given the circumstances, I am satisfied that the notice and accompanying communications provided adequate notification of the proposed amendments, allowing the members to make informed voting



decisions. It is also my finding that the notice of 3/7/2020 was sufficient and legal and that the communication of 27/7/2020 did not alter the notice of 3/7/2020.

From 26 to 12 proposed amendments:

28. There is no dispute that the letter dated 14/6/2020 and the notice issued on 3/7/2020 were both accompanied by 26 proposed amendments to the Memorandum and Articles of the Hospital. The plaintiffs take issue with the defendants for introducing 12 new amendments on 27/7/2020, down from the initial 26. The plaintiffs argue that this new set of proposals required an additional 21 days' notice for proper consideration. They also contend that members expected a clause-by-clause review of the amendments, followed by voting at 2:30pm. Instead, many members were left uncertain about how to proceed.
29. The defendants have explained that a review of the proposed amendments, which condensed them from 26 to 12, did not introduce any new changes. They assert that the reduction was based on feedback and suggestions received from members regarding the initial 26 amendments. This feedback prompted the Board to prudently review and streamline the proposed amendments. According to the defendants, the 12 proposals were identical in both substance and wording to the original 26, and no new amendments were introduced. Therefore, they argue, the plaintiffs suffered no prejudice.
30. The defendants further confirm that the notice of 27/7/2020 included a detailed schedule that itemized each proposed resolution. This schedule juxtaposed the current Articles and Memorandum with the proposed amendments, allowing members to vote YES or NO on each item. These proposals were also integrated into the virtual voting platform, enabling members to cast votes electronically for each individual amendment.
31. I find the response by the defendants to the clause-by-clause review during the meeting to be credible. The argument is that the same was not feasible, as voting had already begun on 28/7/2020, and was ongoing during the meeting. The defendants assert that such a review would have prejudiced those members who had already voted or were not present and did not wish to participate in a re-vote.
32. In any case, it is clear that the members had engaged with the proposed amendments on multiple occasions prior to the meeting and were kept informed of the updates to the resolutions. For this reason, I agree that the members had sufficient time to review the amendments, especially considering that voting was scheduled to begin on 28/7/2020 and close at the end of the SGM on 30/7/2020. Given the three full calendar days for voting, along with their prior exposure to the proposed amendments, I am of the view that the notice was reasonable under the circumstances. The case for a further 21 days after the notice of 27/7/2020 fails.
33. I also note that the plaintiffs have not contested the defendant's assertion that the 12 proposed amendments were substantively similar to the original 26, with the sole exception of the amendment on Article 1(b). Upon reviewing the proposed amendment in the notice of 3/7/2020 and the communication of 27/7/2020, the only notable difference lies in the phrasing: "...in collaboration with the Medical Advisory Committee" versus "...under the mandatory collaboration with the Medical Advisory Committee".
34. This difference is insignificant in nature. Consequently, I conclude that the defendants have successfully demonstrated there were no substantive changes between the 26 resolutions circulated on 3/7/2020 and those on 27/7/2020, and thus no prejudice has been caused to the plaintiffs to occasion an invalidation of the notice of the SGM.



Approval of the amendments:

35. The plaintiffs have also criticized the amendment process, arguing that it did not receive approval from the Minister of Government responsible for legal affairs, as required by Clause 5 of the Memorandum of Association. Clause 5 states:
- “No addition, alteration, or amendment shall be made to the provisions or regulations contained in the Memorandum of Articles of Association, unless it has been previously submitted to and approved by the Minister of the Government of Kenya responsible for legal affairs.”
36. The defendants, through DW 1, acknowledged that they did not seek approval from the Cabinet Secretary, as there had been no such Cabinet Secretary responsible for legal affairs for an extended period.
37. For clarity, I note that this issue was not initially pleaded by the plaintiffs in their pleadings and was only raised during the trial and their submissions. Nonetheless, the plaintiffs argue that, under the circumstances, the Attorney General, who serves as the Government's Legal Adviser, could have been consulted for guidance.
38. While it is true that the Attorney General is the principal legal adviser to the Government, by dint of Article 156 of *the Constitution*, I take judicial notice that, at the material time, the Attorney General was not designated as the Cabinet Secretary responsible for legal affairs. In *Law Society of Kenya V Attorney General*, [2021] KEHC 436 (KLR), this court expressly held that the Attorney General is not a Cabinet Secretary.
39. The plaintiffs have not disputed that compliance with Clause 5 was unachievable given the absence of the relevant government authority. Under these circumstances, it would be both impractical and unreasonable to hold the defendants accountable for a procedural requirement they could not fulfill due to government shortcomings beyond their control. Such an approach would run contrary to the principles of fairness and the best interests of the Hospital.

The virtual/hybrid meeting:

40. The plaintiffs contend that the SGM was not fully virtual, as indicated in the notice sent to members on 3/7/2020, but was instead conducted as a hybrid meeting. The defendants do not dispute this fact. The plaintiffs argue that members should have been provided with an explanation for this deviation from the notice.
41. In response, the defendants submit that at the time of the meeting, the world was grappling with the Covid-19 pandemic, and restrictions on public gatherings were in place under the *Public Health Act* (Chapter 242 of the Laws of Kenya). These regulations limited any gathering to a maximum of 15 persons.
42. The defendants further explain that it was impractical to have the conveners and essential support staff in different locations, and thus it was agreed that they would attend the meeting from a single location. Nevertheless, all other members participated in the meeting virtually, as per the notice. The hybrid aspect of the meeting was limited to these logistical necessities.
43. To me, the central issue for determination is whether this deviation was sufficient to invalidate the SGM and the resolutions that were passed. Upon reviewing the *Companies Act*, I find that it envisages virtual



and hybrid meetings, and no provision explicitly prohibits the kind of hybrid meeting necessitated by extraordinary circumstances such as the pandemic.

44. It is my finding that the hybrid format of the SGM does not render it invalid. The court is persuaded by the defendants' submission that the hybrid format was a reasonable and practical response to the extraordinary circumstances at the time. The restrictions on public gatherings, imposed under the *Public Health Act* (Chapter 242 of the Laws of Kenya), limiting in-person attendance to a maximum of 15 persons have not been denied. Given these constraints, the defendants' decision to gather the essential personnel in one location while allowing all members to attend virtually ensured compliance with both public health laws and the spirit of the notice.
45. Moreover, the plaintiffs have presented no evidence to suggest that the hybrid arrangement prejudiced any members or affected their ability to attend or participate in the meeting. The members were still able to attend the meeting virtually, as indicated in the notice, and their rights to participate and vote were not compromised in any way. The deviation from a fully virtual format was minor.
46. In the court's view, the hybrid format constitutes substantial compliance with the notice requirements and the guidelines issued on the conduct of hybrid and virtual general meetings whose core purpose was ensuring full member participation was achieved.

The conduct of the SGM; quorum and voting:

47. The plaintiffs contend that the conduct of the SGM was contrary to what was presented in the notice. More particularly, there was no certification of quorum, adoption of agenda or otherwise and members were allowed to start voting on agenda items before such certification by the secretary.
48. The plaintiffs submit that the failure to satisfy that there was requisite quorum before consideration of crucial agenda such as amendment of Articles is a direct breach to the Memorandum and Articles of association of Nairobi Hospital and the court order directing that the SGM be held in accordance with the law and Articles of Nairobi Hospital.
49. The defendants on the other hand assert that on 30/7/2020 at 2:30pm, the SGM was called to order by the Chairman and upon certification that the required quorum was present, the agenda of the meeting was adopted. That the business of the day was undertaken in accordance with the Articles and Memorandum of Nairobi Hospital. At the close of the allowed time for voting, voting stopped and tallying of the votes per proposed resolution commenced.
50. The defendants aver that the results disclosed that members had voted in favour of the proposed amendments by an average of 90% in favour, and as such with the wishes of the members having been conveyed by their votes above all the resolutions of the SGM were passed. At the end of the SGM, the resolutions were drawn, confirmed and duly signed by the Chairman.
51. The plaintiffs have also impugned the resolution that adopted the proposed amendments on the basis that there was no quorum at the SGM. They invite this court to adopt an interpretation of quorum as referring to "members available and ready to vote" at the commencement of the voting exercise. According to the plaintiffs, the quorum could not be confirmed at the point of registration as alleged by the defendants.
52. In support of their position, the plaintiffs contend that this failure to follow proper procedure, especially the lack of quorum certification, was a serious procedural defect that undermines the integrity of the meeting. They submit that quorum should not be determined merely by physical presence but by members' readiness to participate in the actual voting. They argue that the absence of this verification renders the resolutions adopted at the SGM invalid.



53. In response the defendants argue that section 257(1) of the *Companies Act* does not define quorum for company meetings but only sets the requirement for the passage of a special resolution. They further refer to Clause 22 of Nairobi Hospital’s Articles of Association, which specifies that:
- “No business shall be transacted at any General Meeting unless a quorum of members is present when the meeting proceeds to business. Unless otherwise provided, twenty (20) members personally present shall constitute a quorum.”
54. The defendants also highlight that the Articles of Association explicitly exclude the application of Table C of the First Schedule to the now-repealed *Companies Act*, which had a lower quorum requirement of three members. By excluding Table C through Clause 22, Nairobi Hospital raised its quorum requirement to twenty members personally present. The defendants assert that with 299 members present at the SGM, the meeting far exceeded the required quorum.
55. I have reviewed the Articles of Association, particularly Clause 22, as it stood before the amendments. I do not accept the plaintiffs’ argument that quorum should be interpreted as “members available and ready to vote”. The Articles are clear that quorum is determined by the physical presence of members, and there is no additional requirement for readiness to vote. To introduce such a subjective criterion would create unnecessary ambiguity and make the concept of quorum unworkable. The purpose of quorum rules is to ensure a minimum number of members are present to conduct business, not to impose a readiness condition.
56. That said, the plaintiffs argue that the failure to formally certify quorum before the voting commenced is a procedural flaw. In this regard, the plaintiffs may have a point. While the Articles do not condition quorum on the readiness to vote, the procedural formality of certifying quorum serves to ensure that all proper processes are followed before substantive business begins.
57. However, from the evidence on record, the quorum requirement was satisfied by the presence of 299 members who were presented and voted. This was in excess of the minimum threshold of twenty members specified in the Articles of Association. It is therefore my finding that the SGM was quorate.
58. The decision to alter the voting process has been equally challenged by the plaintiffs. The defendants acknowledge that the communication of 27/7/2020 was an amendment to the earlier notice of 3/7/2020, which had informed members that voting would be done during the SGM. The plaintiffs argue that this change should have been adequately explained and that the voting process should have remained as initially communicated.
59. The defendants defend their decision to amend the voting process, explaining that voting was opened on 28/7/2020 and extended through the conclusion of the SGM. This adjustment, they argue, was implemented to mitigate the risk of a system breakdown due to all participants attempting to access the voting platform simultaneously during the SGM. Additionally, the defendants contend that the extended voting period ensured a more efficient and effective use of the voting platform, allowing members sufficient time to cast their votes. The defendants also submit that early voting was optional, as members could either exercise the right to vote early or wait to vote within the allocated time of voting during the meeting.
60. The court finds the defendants’ rationale for altering the voting process to be reasonable and justifiable in light of the technical risks involved and the need to ensure smooth participation. In a virtual setting, especially during a period marked by widespread reliance on digital platforms due to the Covid-19 pandemic, the risk of system overload was a legitimate concern. The decision to extend the voting



window did not prejudice the members; on the contrary, it provided them with additional time to cast their votes, ensuring greater flexibility and accessibility.

61. Furthermore, the court notes that there is no evidence presented by the plaintiffs to suggest that the members were disadvantaged by this adjustment or that their rights to vote were compromised. The amendment was communicated to the members prior to the commencement of voting, giving them adequate notice of the change. As such, the alteration of the voting process does not invalidate the proceedings of the SGM, nor does it constitute a material breach of procedure.
62. Turning to the threshold required to pass the resolutions, the plaintiffs rely on section 257(1) of the [Companies Act](#), which provides:

“A resolution is a special resolution of the members (or of a class of members) of a company if it is passed by a majority of not less than seventy-five percent.”
63. The plaintiffs argue that the numbers that passed the impugned resolutions were only about 40%, of all registered members, falling far short of the required 75% threshold under section 257(1). They suggest that the voting process was flawed and lacked the transparency needed to ensure the accuracy of the voting results.
64. In response, the defendants submit that the majority of members who were present and who participated in the SGM voted in favor of the proposed amendments, with an average of 90% supporting the resolution. DW1 confirmed that a total of 735 members registered and out of these, 299 cast their votes. The defendants further produced a scoresheet of the voting, along with the minutes of the subsequent AGM, which they argue confirm that the resolutions were ratified during the Nairobi Hospital's AGM on 3/9/2020.
65. The central issue in my view appears to be the appropriate threshold required for purposes of passing a special resolution. Whether this refers to 75% of all registered members or 75% of members actually present who are eligible to and who participate in the voting process.
66. In the book *Company Law*, 2nd Edition, Cavendish Publishing at page 126, referring to section 378(5) of the the UK [Companies Act](#) 1985, which is similar in wording to section 257(1) of the Kenyan [Companies Act](#), the author notes that “... In calculating whether or not there is a 75% majority when a poll is demanded, regard is to be paid only to the numbers of votes cast for and against the resolution; (emphasis mine).
67. Equally, in *Elijah Adul & 2 Others v Rift Valley Sports Club*, [2003] eKLR, the court observed as follows:

“For a valid alteration of the Articles of Association, a special resolution of the company is required. That is to say, a resolution passed by a majority of not less than $\frac{3}{4}$ of those members entitled to vote and actually voting, either in person or by proxy where proxy voting is allowed.” (emphasis added)
68. It is therefore both practical and legally sound to base this threshold on those registered members who are physically present at the time of voting and who cast their votes. This reinforces the principle that quorum and voting legitimacy are determined by those members present and actively participating, not by speculative notions of availability or readiness. Ultimately, the physical presence of members who are entitled to vote is what should guide quorum for voting purposes.



69. I have reviewed the evidence provided by the defendants and the interested party. The list at pages 50 to 71 of their documents shows 663 registered and paid up members and 71 registered and unpaid up members. In total, this means that 734 members registered to attend the SGM. Out of these, 299 members cast their votes on the resolutions. A tabular representation of the votes in favour and against each resolution is indicated at pages 88-90 of the defendants' documents.
70. In my view, the percentage of members who voted in favor of the resolutions vis-à-vis the total number of votes cast, satisfies the requirement of section 257(1) of the *Companies Act*. There is no compelling evidence to support the plaintiffs' claim of procedural flaws that would invalidate the voting process.
71. The argument advanced by the plaintiffs that the members represented by proxies had no opportunity to read and understand the resolutions, that there was confusion, that there were any time constraints or that they were not able to participate in the voting activity is unsubstantiated.

Ratification of the SGM resolutions by the AGM:

72. Emphasis has been made by the plaintiffs to section 22 of the *Companies Act*. It provides that a company may amend its articles only by special resolution.
73. The plaintiffs argue that such 'special resolution' can only be at an SGM and not an AGM. This argument is rejected by the defendants who submit that SGMs and AGMs serve as primary forums where special resolutions can be passed and that the only requirements before any such resolution can be passed is found at section 257(6) of the *Companies Act* which provides as follows:

“If a resolution is passed at a meeting, the resolution is a special resolution only if the notice of the meeting—

 - a. included the text of the resolution; and
 - b. specified an intention to propose the resolution as a special resolution. ...”
74. It is the defendants' case that the amendments were in fact passed by the SGM and that the purpose of the AGM was to ratify the said amendments.
75. In sum, the defendants state that the suit has been overtaken by events as the substance of the resolutions of the SGM have already been adopted and subsumed in the resolutions of the AGM of Nairobi Hospital of 3/9/2022. Accordingly, the resolutions of the SGM cannot be indicted and or set aside unless the resolutions of the AGM that ratified them are first set aside and presently, there are no proceedings challenging the resolutions of the AGM.
76. There is no doubt that the amendment of the Articles was passed at an SGM. Turning to the decision in *Elijah Adul & 2 Other,s (supra)*, the court held that in addition to all other requirements for an SGM, the notice of the meeting must have specified the intention to propose the resolution as a special resolution. I have already noted that the requisite 21-day notice period was issued. Additionally, the notice dated 3/7/2020 confirmed that the meeting was a special general meeting.
77. The process of passing resolutions differs significantly from the process of ratification. Ratification refers to the formal confirmation or approval of decisions made during the SGM. In this case, the ratification of the resolutions did not breach the Articles, and no evidence has been presented by the plaintiffs to suggest otherwise. The AGM was merely formalizing an action that fell within the company's legal powers.



78. The unchallenged minutes of the AGM particularly at page 126 of the defendants' documents show that the motion to approve the SGM minutes of 30/7/2020 passed with 347 votes in favor, against 22 opposing. Given that this suit does not pertain to the AGM of 8/9/2020, I shall refrain from addressing that further.
79. On account of the observations that I have made, it is my finding that the Articles of Association of Nairobi Hospital were properly amended and that there was no violation of the law or Memorandum and Articles of Association by the defendants to warrant the court to invalidate the said resolution effecting the proposed changes. The plaintiffs are therefore not entitled to the declaratory reliefs and orders they seek in their further amended Plaint of 27/1/2021.

Disposition

80. Accordingly, the plaintiffs' suit against the defendants lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 27TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE

