



Angwenyi v Nairobi Cosmopolitan Conference Limited & 3 others (Miscellaneous Application E095 of 2021) [2023] KEHC 2421 (KLR) (Commercial and Tax) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E095 OF 2021**

**A MABEYA, J
MARCH 24, 2023**

BETWEEN

EZEKIEL OSUGO ANGWENYI APPLICANT

AND

NAIROBI COSMOPOLITAN CONFERENCE LIMITED 1ST RESPONDENT

HUMPHREY MACHARIA NGUMA 2ND RESPONDENT

SAMUEL KIYUKA MASARA 3RD RESPONDENT

THE REGISTRAR OF COMPANIES 4TH RESPONDENT

RULING

1. Before court is an application dated November 15, 2021 by the 4th respondent. It was brought under sections 1A, 1B & 3A of the *Civil Procedure Act*, and Orders 45 Rule 1 and 51 Rule 1 of the *Civil Procedure Code*.
2. The application sought the review or setting aside of the orders of this Court's made on October 8, 2021. The grounds for the application were set out on the face of it and in the supporting affidavit sworn by Sarah Wainaina on November 15, 2021.
3. It was contended that the orders were obtained through material non-disclosure by the applicant therein and that the Court did not consider the 4th respondent's replying affidavit to that as the same was not on the Court's 'CTS' system. It was also averred that changes had been made to the company pursuant to the meeting held on September 22, 2020 wherein the applicant resigned from the company and 4 different persons were appointed as directors.



4. That the 4th respondent subsequently rescinded his removal and he was reinstated as director after establishing that the letter and affidavit of resignation were a forgery. That the 4th respondent again removed the applicant from the company's directorship after establishing that the company resolved to remove him as director and the applicant was notified vide letter dated December 10, 2020 of the intended removal through a 28 day notice under section 139 & 287 of the Companies Act and finally through a special resolution dated January 7, 2021. That at the time of filing the application dated August 10, 2020, the applicant was not a director of the company.
5. That compliance with the court orders would attract protracted litigation and undermine fair administrative action as the parties appointed as directors vide the AGM held on September 22, 2020 were not parties to the suit and ought to have been heard before they were removed from directorship. That compliance with the court orders would also go against the company's meeting of September 22, 2020.
6. That there existed a court matter in the subordinate court being HC E294 of 2019 on legality of the company and any other litigation on that matter was an abuse of court process. For those reasons, the 4th respondent contended that he was facing legal and practical difficulties in complying with the court orders.
7. The applicant opposed the 4th respondent's application vide his replying affidavit sworn on January 7, 2022. He contended that the 4th respondent's affidavit was not filed thus the court could not be faulted for not considering it. That there was no material non-disclosure on his part and if any party was aggrieved by the orders of October 8, 2021, it ought to have appealed against the decision. That apprehension of potential litigation was not a ground for review.
8. That the special resolution for removal of director dated December 10, 2020 was invalid as it was issued by one Enock O Kinara who was neither a director or board secretary. Further, the notice called for a board meeting and not a member's meeting thus removal under sections 139 and 287 of the Act was invalid.
9. That the meeting of September 22, 2021 was unlawful and the pending case in the lower court quoted by the 4th respondent related to the use of the SDA Church trademark and not the legality of the company. It was thus contended that the application was an appeal in disguise and lacked merit.
10. The 4th respondent filed submissions dated June 14, 2022 in compliance with the court's directions of March 23, 2022. The applicant did not comply and his written submissions were not available on the court's 'CTS' system. This court has however considered the pleadings, evidence and submissions before it. The main issue for determination is whether the orders of October 8, 2021 ought to be reviewed, varied or set aside.
11. It is trite that review proceedings are not an appeal but have to be strictly confined to the scope and ambit of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act.
12. Order 45 Rule 1 of the Civil Procedure Rules, is clear on how the review jurisdiction is to be exercised. An applicant has to establish discovery of new and important matter or evidence which was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. Further, a review would be ordered on account of some mistake or error apparent on the face of the record or for any other sufficient reason. In addition, such an application should be made without unreasonable delay.
13. The 4th respondent contended that the basis of the application for review was that there was non-disclosure of material facts on the part of the applicant. The 4th respondent did not however disclose



which material facts were undisclosed at the time the orders of October 8, 2021 were made. There was also no disclosure of any new and important evidence or facts that could have altered this court's decision on the applicant's motion.

14. Though the 4th respondent complained that its replying affidavit to that motion was not considered by the Court, it was admitted that the affidavit was missing from the Court's 'CTS' system. Where else could have the court obtained the affidavit from? Be that as it may, this court has now seen that affidavit. Suffice it to say that there is now new and important information or evidence arising from it that would justify any review.
15. Further, the 4th respondent heavily relies on the AGM meeting allegedly held on September 22, 2020 as a ground why it cannot change the company's register as per the Court orders. That such change will be contrary to that meeting, and that the affected persons are not before court to defend themselves. The second ambit was already pleaded by the other respondents and determined upon, that issue is *res judicata*.
16. On the first ambit, this Court has seen its ruling of October 8, 2021. At paragraphs 13, 14, and 15, the Court found that there was no evidence of any such meeting held on September 22, 2020 as alleged and that there was nothing to indicate that the resignation and removal of the applicant was authentic.
17. The 4th respondent himself admitted in its application that it reinstated the applicant to directorship after realizing that his resignation letter and affidavit were forged. Consequently, the appointment of the four persons as directors in that meeting was similarly null and void.
18. The Court has considered the 4th respondent's assertion that he finds it 'legally and practically' impossible to remove those four persons from directorship whereas the Court has already made a finding that the AGM which purportedly appointed them was fake and non-existent! The same has been nullified yet the 4th respondent is in Court trying to argue their case.
19. Further, this Court already found that the 2nd purported removal of the applicant from directorship on account of sections 139 and 289 of the *Companies Act* was invalid, as removal under those sections is required to be by the Company and not by the board.
20. This Court cannot now sit on that finding and seek to review it. Any dissatisfaction ought to be by way of appeal to the Court of Appeal. Any attempt by this Court to relook into that decision without existence of any ground for review would be tantamount to sitting on appeal on its own decision.
21. This Court agrees that apprehension of future litigation cannot be a ground for review. There is nothing to stop the 4th respondent from complying with the orders of October 8, 2021 to reflect the true directorship and membership of the company.
22. Further, the 4th respondent did not explain how the existence of any other court matter involving the company including HC E294 of 2019 affected his ability to comply with the Court's orders. The pleadings in that suit were not produced for the Court to ascertain the nature of that case. He alleged that the case concerned the legality of the Company.
23. With greatest respect, that is not the subject matter in this suit. There is no nexus between that suit and the instant one such that compliance with the court orders would be a gross abuse of court process as alleged by the 4th respondent. It is an excuse to be contemptuous of the Court. Court orders are not issued in vain and compliance thereof is mandatory.
24. In any event, the applicant deposed that the case before the lower court was about the use of the SDA Church trademark. That was an assertion that was not challenged or denied.



25. From the foregoing, this Court finds the application dated November 15, 2021 to be unmerited and the same is dismissed with costs to Ezekiel Osugo Angweni. The 4th respondent is hereby ordered to comply with the orders of October 8, 2021 within 21 days of this ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2023.

A MABEYA, FCIArb

JUDGE

