REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NO. 13 OF 2020

SOLAI RUIYOBEI FARM LIMITED.....*EX PARTE* APPLICANT

VERSUS

REGISTRAR OF COMPANIES .....RESPONDENT

AND

CHARLES OLARE CHEBET .....1ST INTERESTED PARTY

RICHARD K. BUNDOTICH .....5TH INTERESTED PARTY

JUDGMENT

1. The Applicant Company – Solai Ruiyobei Farm Limited – has kept our Judiciary busy since its formation. It is no overstatement to say that it's existence has been characterized by conflict than good governance. One of the reasons it has been difficult to resolve the dispute one way or the other is that the original founders and shareholders of the Company are long dead. Their successors have been left to fight through proxies and silent warriors. Oddly, the choice of forum for those battles have been – not in the boardrooms as one would expect or even in commercial litigation involving shareholders and their assigns – but through Judicial Review Applications aimed at government functionaries charged with the task of administratively recording resolutions of Company meetings. This is yet another chapter in the un-ending saga of Solai Ruiyobei Farm Limited.

2. Even though the parties have impleaded torturously and submitted voluminously, the chapter represented in this particular litigation – one of at least eight involving the Company – is a fairly short one by my reckoning. Here is the short version.

3. The Company was incorporated on 17/01/1992. It would appear that the Company was formed as a Special Purpose Vehicle to purchase land, and, in particular 8000 acres Oljorai ADC Farm and then distribute it to the shareholders after paying for its liabilities. All the parties to the dispute accept this premise. They also accept that the Company formed its Memorandum and Articles of Association. There is also no dispute that the original Chairman and Secretary of the Company died either in 2012 or before. The consensus among the parties seem to end there.

4. The parties dispute whether a valid meeting was held in February, 2012 in which some of the Interested Parties were elected as members of the Board. Indeed, there has been quite some litigation to that end. There is also evidence that since 2015, there have been endless board leadership conflicts. A number of suits were filed by the various protagonists – each trying to outdo the other. It would appear that the real issue is who the bona fide shareholders are following the demise of the original founders of the Company. That dispute has never been presented before any Court of law for determination frontally as a company law dispute. Instead, parties have duelled incessantly on what appropriate CR12 the Registrar of Companies should register.

5. In ***Nakuru JR No. 14 of 2018***, the Applicant sought the quashing of the decision by the Registrar of Companies revoking the CR12 dated 19/12/2017. The CR12 in question had confirmed that Philip S. Cheptumo and Simon Kipchumba Kandie and the new slate of directors elected at a contested 23/03/2015 meeting of the Applicant Company were the directors on record with the Registrar of Companies. The Registrar of Companies had, then, turned around and written a letter dated 18/05/2018 revoking that CR12. The Court found the actions by the Registrar of Companies unlawful and quashed them.

6. However, the Court did not stop there. The Applicants in Nakuru JR No. 14 of 2018 had hoped that the quashing of the Registrar's actions would mean that the directors elected at the meeting held on 23/05/2015 would, by operation of the judgment, be left standing as the slate of directors of the Applicant Company. The Court was not that gullible. Noting that the meeting held on 23/03/2015 had been held illegally and against express Court orders issued by Odero J. in an earlier suit involving the parties (to wit ***Nakuru Judicial Review Application No. 10 of 2015***), the Court ordered that:

The entry into the records of the Registrar of Companies of the slate of directors elected at the meeting of the Company held on 23/03/2015

*is equally quashed***.**

7. Anxious not to leave the affairs of the Applicant Company in limbo, however, the Court made the order that:

The persons who were on the Management Board of the Company as at 23/03/2015 are hereby directed to call for a Special General Meeting of the Company within thirty days of the date hereof. The sole agenda of the Special General Meeting shall be to elect new officials of the Company as per the Company's Charter.

8. Following the judgment in ***Nakuru Judicial Review No. 14 of 2018***, the 1st Interested Party ran an advertisement for a Special General Meeting. The meeting was to be held on 29/06/2019 at Acacia Grove Resort, Kikopey, Gilgil with the sole aim of conducting election of new officials as per the Court judgment.

9. This prompted Cheruiyot Arap Chemgwony, who is the functional Applicant here despite the intitulement in the instant suit that the Company is the Ex Parte Applicant, to approach the Court vide ***Nakuru Civil Suit No. 24 of 2019*** seeking orders to stop the advertised meeting. The ostensible reason for seeking to stop the advertised meeting was that the 1st Interested Person was not a proper director of the Company as at 23/03/2015. As such, Cheruiyot Arap Chemgwony argued, the 1st Interested Party was the wrong person, as per the judgment in ***Nakuru Judicial Review No. 14 of 2018*** to call for the elections.

10. The Court in ***Nakuru Civil Suit No. 24 of 2019*** (Mulwa J.) issued interim orders stopping the advertised Special General Meeting. The interim orders were severally extended.

11. Meanwhile, at the instance of the 1st Interested Party and/or his lawyers, the Registrar of Companies issued two letters dated 17/06/2019 and 25/06/2019 respecting the planned elections. In the letter dated 17/06/2019, the Registrar of Companies advised that "there are several compliance issues that the Company need[s] to address itself before issuance of an official search of who the directors of the Company were as at 23/03/2015."

12. It would seem that a meeting followed among the then lawyers for the 1st Interested Party and for Cheruiyot Arap Chemgwany and the Registrar of Companies leading to the issuance of the letter dated 25/06/2019. That letter, in essence, listed the "compliance issues" referred to in the letter dated 17/06/2019. In particular, the Registrar pointed out three pertinent issues:

> a. *First*, that the status of the company has never been officially changed from "private" to "public" even though it would appear that it has more than fifty members hence being required to be so changed by statute.
>
> b. *Second*, that according to the official records, only 3 shares had been allocated out of 3,000 shares of sh. 100 each. The Registrar, therefore, had no record of the other shareholding of the remaining 2997 shares.
>
> c. *Third*, that the Company had three original subscribers namely Morogo Chebet; Cheruiyot Arap Chemgwony and Kiprono Chebet. Of the three, Morogo Chebet and Kiprono Chebet were deceased, leaving only Cheruiyot Arap Chemgwony surviving.

13. In that letter dated 25/06/2019, the Registrar of Companies advised the lawyers to advise their clients to address the compliance issues before conducting any AGM otherwise "the outcome of the general meeting will be an extensive exercise in futility…."

14. Following this advice by the Registrar of Companies, perhaps shackled by its weight, the lawyers for the two protagonists in ***Nakuru Civil Suit No. 24 of 2019*** -- Cheruiyot Arap Chemgwony (who is the 1st Plaintiff) and the 1st Interested Party (who is the Defendant in the suit) – agreed to a consent to resolve the impasse. The Consent was conveyed to the Court vide a consent letter dated 01/11/2019 and was adopted as an order of the Court on 04/11/2019 by Matheka J. The consent, as extracted, reads as follows:

> *THAT BY CONSENT of both parties, the matter herein be marked as settled in the following terms:*
>
> *THAT pursuant to the order issued on the 30th May, 2019 in* ***Nakuru HC Judicial Review No. 14 of 2018*** *– R v Registrar of Companies ex parte Solai Ruyobei Farm Ltd requiring a Special General Meeting be called to elect new directors, the 1st Plaintiff and Defendant do call for a Special General Meeting on behalf of the 2nd Plaintiff within 7 days of this consent.*

15. Pursuant to this Consent Order, a Special General Meeting was, indeed, held on 27/07/2020 and new directors elected. It is unclear if Cheruiyot Arap Chemgwony attended the meeting. However, on 29/07/2020, a notification was made to the Registrar of Companies that a meeting was held on 27/07/2020 and a new slate of directors elected. The Notification was in the form of Form CR6 – Notice of Appointment of Directors; CR8 – Notice of Residential Addresses of Directors; and CR20 – Notice of allotment of 1 share each to the appointed directors.

16. The Registrar of Companies says that the notifications and applications were received in her office, reviewed and approved on 03/08/2020. Subsequently, the Registrar says, at the request of some parties, she issued a CR12 on 07/08/2020 confirming the new directors and their shareholding. This is, of course, the document that has caused much consternation to Cheruiyot Arap Chemgwony and which he wants quashed.

17. So, in view of the recorded Consent Order in ***Nakuru Civil Suit No. 24 of 2019*** why is Cheruiyot Arap Chemgwony opposed to the new changes?

18. As far as I can tell, Cheruiyot Arap Chemgwony proffers two related reasons for opposing the new changes:

a. *First*, he says that the new changes in directorship were made contrary to the Court's orders in

b. *Second*, he says that the CR12 was issued without his knowledge yet he is the only "recognized" official of the Company.

19. To understand Cheruiyot Arap Chemgwony's logic, motivation and actions, one has to bring into focus the on-goings in ***Nakuru Civil Suit No. 24 of 2019***. On the same day that the Consent Order was registered in the case, Cheruiyot Arap Chemgwony changed lawyers – to his present lawyers – and instructed them to set aside the Consent. It would appear that there was a tussle over representation that delayed the hearing of the Application to set aside that Consent Order. Eventually, however, the Application was listed for hearing. A ruling on the matter is yet to be delivered by Matheka J. Suffice it to say that the basis of the Application seems to be that the Consent Order is "contradictory and unreasonable to orders and judgment in ***Nakuru HC Judicial Review No. 14 of 2018.***

20. In the present Application, Cheruiyot Arap Chemgwony urges the Court to grant the Judicial Review Orders he wants for at least three reasons:

a. *First*, he insists that the Consent Order entered into in ***Nakuru Civil Suit No. 24 of 2019*** was illegal and unlawful because it contradicted the judgment and orders in ***Nakuru HC Judicial Review No. 14 of 2018.***

b. *Second*, Cheruiyot Arap Chemgwony says the actions by the Registrar to accept the Notifications by the Interested Parties despite her letters dated 17/06/2019 and 25/06/2019 is irrational and administratively unfair.

c. *Third*, Cheruiyot Arap Chemgwony says that the Form CR6 and CR8 lodged before the Registrar of Companies bearing his signature is forged and is, therefore, fraudulent.

21. The Application is vehemently opposed by the Registrar of Companies and the Interested Parties. The position of the Registrar of Companies is straightforward. It can be stated in two premises:

a. *First*, the Registrar says that while she had, indeed, been served with the judgment in ***Nakuru HC Judicial Review No. 14 of 2018*** and while she, indeed, issued the two letters dated 17/06/2019 and 25/06/2019, she was, subsequently, served with the Consent Order settling the matter. This was followed by the Notifications filed on e-citizen upon which the Registrar acted. To this extent, the Registrar denies that she acted unlawfully or capriciously in any way. Instead, the Registrar insists, the Applicant is, in fact, asking the Court to review the merits of her decision

b. *Second*, the Registrar says that the orders sought – to register certain persons as interim directors – are premature anyway because the Applicant has not presented the application to the Registrar in the required format for consideration. By asking the Court to act on those names, the Registrar argues, the Applicant is asking the Court to exercise the functions reserved for the Registrar.

22. The Interested Parties, on the other hand, raise three major arguments in opposition to the Application:

a. *First*, the Interested Parties insist that the law does not allow the Court to involve itself in the dispute at hand. The dispute, they argue, is an about the internal operations of the Company and cannot be brought within the remit of Judicial Review. They rely on various decisions of the Court for the position that where issues involve factual contestations, that is not an appropriate subject for judicial review.

b. *Second*, the Interested Parties rely on the exhaustion doctrine: they argue that the matter should properly be seen as a corporate dispute to which the Companies Act, 2015 provides the various avenues for redress. Framing the dispute as a Judicial Review matter runs afoul the requirement that where a statute provides an avenue for resolution of disputes, parties should utilize that dispute (see ***Speaker of the National Assembly v Karume [1992] eKLR 2.)***

c. *Third*, the Interested Parties argue that the Registrar of Companies acted in compliance with the orders of the Court once a Special General Meeting was called and the issue of directorship resolved. What the Applicant is pleading, the Interested Parties argue, is dissatisfaction with the majority decision – and that is a matter, they argue, not suitable for determination through Judicial Review.

23. As I earlier pointed out, the issues for determination in this suit are fairly straightforward despite the attempts by the parties to enmesh the whole torturous history of the Company in the suit. The questions are as follows:

a. *First*, is the Consent Order recorded in ***Nakuru Civil Suit No. 24 of 2019*** illegal and unlawful because it contradicted the judgment and orders in ***Nakuru HC Judicial Review No. 14 of 2018*** and if so can that question be resolved by way of the present proceedings?

b. *Second*, was the action by the Registrar of Companies to allow the registration of new directors despite and in spite of the letters dated 17/06/2019 and 25/06/2019 irrational, oppressive, unreasonable or otherwise administratively unfair to the Applicant?

c. *Third*, what is the implication of the claims by the Applicant that his signature was forged in the Notifications presented to the Registrar of Companies?

d. *Fourth*, can the orders for registration of certain persons as acting directors of the Company be granted as requested by the

Applicant?

24. Fortunately, the answers to all these questions readily recommend themselves from the analysis above. I will begin by pointing out that the Consent Order recorded in ***Nakuru Civil Suit No. 24 of 2019*** can only be challenged in that suit and not in this suit or any other suit. It is incumbent upon the Applicant to approach the Court which has conduct of that suit (as he has indeed done) and raise the arguments he raises here there. This Court, sitting as a Judicial Review Court, cannot purport to sit in supervision of the Court that adopted the Consent Order. The principles for setting aside Consent Orders are well established and can only be applied by the Court that recorded that order. Until that Consent Order is set aside, unfortunately for the Applicant, the Consent Order remains legally valid and enforceable. In short, it is not for this Court to parse the Consent Order to determine if it was technically consonant with the order of this Court in ***Nakuru Judicial Review No. 14 of 2018***.

25. Turning to the second question, can it, then, be said that the actions by the Registrar of Companies to "change" her mind and register the new directors despite having pointed out numerous compliance issues in her two letters dated 17/06/2019 and 25/06/2019 is irrational, unreasonable or otherwise administratively unfair? I have no evidence that it is so. In a bid to prove the unfairness or unreasonableness of the decision, the Applicant has gone into the rich factual history of the Company to demonstrate how the decision is unfair. Unfortunately, as rightly pointed out by the Registrar and the Interested Parties, this is not the function of Judicial Review. A Judicial Review Application is not concerned with the merits of a decision save in two instances – Wednesbury unreasonableness and proportionality. Neither of these is pleaded or demonstrated here. The real question presented is whether it is permissible for the Registrar to "change" her mind as she seemed to have done.

26. I find nothing wrong with the Registrar's "change of mind" in the circumstances of this case. Following the Court's decision in ***Nakuru JR No. 14 of 2018***, the Registrar formed the view that the wrangling parties needed to take certain steps to bring the Company into statutory compliance. When those wrangling parties recorded a consent in another suit and resolved, as part of that consent, to call for a Special General Meeting to elect directors who will, then, bring the Company into compliance, I see no ill-will, irrationality or unreasonableness in the Registrar of Companies accepting both the Consent Order and its aftermath – the new slate of directors. It would have been incumbent upon the Applicant to demonstrate to the Registrar that the new slate of directors were illegally elected. As analysed above, as long as the Consent Order has not been set aside, such an argument is not feasible. Consequently, the argument that the actions by the Registrar of Companies were irrational, unfair, oppressive, illegal, un-procedural or otherwise administratively unfair fails.

27. What about the allegations that the Applicant's signature was forged? I can only point out that the Applicant failed to present both here and before the Registrar of Companies any evidence that his signature had been forged. Indeed, the Applicant readily admitted that this is an argument or request he had presented before the Registrar of Companies. Even before this Court, it was an argument that came much later in the day. It is simply not enough to move the Court for Judicial Review Orders. If the Applicant ever marshals evidence that his signature was, indeed, so forged, the recourse would be to present such evidence before the Registrar of Companies for appropriate action – in addition to any criminal angle the case might take. As things stand the bland allegations of fraud are not enough to quash the CR12 issued.

28. The answers to these three questions really dispose of the case. However, it bears stating that the request by the Applicant that the Court issues an order of Mandamus to compel the Registrar of Companies to register certain persons to "help the *ex parte* applicant comply with the conditions of the Companies registrar (sic) in the letter dated 25/06/2019" is not a tenable one in the present proceedings. It is an invitation by the Applicant to the Court to take over the primary functions of the Registrar of Companies in the first instance. Needless to say, the Court cannot substitute its decisions for that of the Registrar of Companies. The Applicant must approach the Registrar of Companies in the appropriate forum with the request, and, if legally permissible, the Registrar would act on the request. If aggrieved, the Applicant may, then, file an appropriate suit in Court.

29. **The upshot is that the Judicial Review Application dated 03/12/2020 is dismissed in its entirety with costs to the Respondents and Interested Parties**.

30. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF FEBRUARY, 2022

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic