



Mbogo & another v Registrar of Companies; Roberty Njoka Muthara (Interested Party) (Civil Case E820 of 2020) [2021] KEHC 51 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)

Neutral citation: [2021] KEHC 51 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E820 OF 2020
DAS MAJANJA, J
SEPTEMBER 23, 2021**

BETWEEN

MARGARET RACHEL MBOGO 1ST APPLICANT

WALTER NYAMU KARIUKI 2ND APPLICANT

AND

REGISTRAR OF COMPANIES RESPONDENT

AND

ROBERTY NJOKA MUTHARA INTERESTED PARTY

RULING

1. The Applicants have moved the court by the Notice of Motion dated 28th June 2020 made, inter alia, under sections 103, 122 and 123 of the *Companies Act*, No. 17 of 2015 (“the *Companies Act*”) for the following order:
 - (2) THAT the Honourable Court be pleased to issue an order directed at the Respondent, the Registrar of Companies to appoint Margaret Rachel Mbogo, John Murangi Muchiri, Asnath Wanjira, Charles Kimata Karari, George Ndwiga Kariuki, Walter Nyamu Kariuki, Benjamin Wanjohi Karamere, Nicasio Muriithi Njoka, Joseph Njagi Kagau, Arthur Munene Mbogo and Ebrahim Ndiritu Muriithi as directors of New Embu Garage Limited.
2. The application is supported by the affidavit of Margaret Njeru Mbogo and Walter Nyamu, sworn on 26th June 2020. They state that they are the administrators of the estate of the deceased directors of the Company and have authority from the other administrators of the deceased directors of the Company.



There is a replying affidavit of Walter Nyamu Kariuki sworn on 17th January 2021 in which he states that he did not sign the affidavit purportedly sworn by him on 26th June 2020 and that the application was filed without his consent. The Interested Party has also filed an affidavit sworn on 4th June 2021. He states that he is an heir and beneficiary of one of the deceased shareholders of the Company.

3. It is not in dispute that the Company was incorporated in 1980. All the directors and shareholders are now deceased and their respective estates are working their way through the court system. According to the 1st Applicant, members of the deceased respective estates held a meeting on 3rd December 2019 and nominated various persons to be directors of the Company. Thereafter, they caused the persons to be registered as directors of the Company. However, upon a complaint by one of the affected parties, the Registrar of Company wrote to the putative directors a letter dated 27th May 2020 as follows:

Upon rectification of the register that was undertaken on 6th December 2019, the Company ought to have undertaken transmission of shares from the estates of the deceased shareholders before any meeting could be held. For this reason, the registrar notifies you that the register is hereby rectified with the effect that the documents lodged pursuant to meeting held on 3rd December 2019 have been expunged from the register. You are also advised to undertake transmission of shares before any meeting can be done.

4. The Applicants now seek to have the court direct the Registrar of Companies to be registered as directors of the Company.
5. The 2nd Applicant and Interested Party have raised various objections to the application but I think the substantial issue is whether this court has the authority to appoint directors in the circumstances of this case. When I asked Counsel for the Applicants to highlight the power of the court to appoint directors of a company, he cited sections 103, 122 and 123 of the Companies Act. Section 103 contains the general power of the court to order rectification on the following terms:

Power of the Court to rectify register

103. (1) If —

- (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
 - (b) the cessation of membership of a person who has ceased to be a member of the company has not been entered in that register, the person affected, or the company or any member of the company, may apply to the Court for rectification of the register.
6. It is worth noting the power of rectification is in respect of members which under section 3 of the Companies Act means, “Member of the Company”. The 1st Applicant and the persons, she purports to represent are not members of the company as they admit that the deceased shareholders’ shares have not been transmitted to them. They therefore do not have any right to be members of the Company or exercise the rights of members which include the right to elect directors in accordance with the Articles of Association. The appointment of directors is a preserve of the shareholders and since the Applicants and the persons they represent are not shareholders they cannot purport to appoint directors.
 7. The Registrar of Companies was right to point out that the transmission of shares must be done before a meeting of the company is held to appoint directors. There is no authority for the court to bypass the company structure in this case. The parties must complete administration of the estates of the deceased shareholders in order to exercise the rights of shareholders.
 8. The application dated 28th June 2020 is therefore dismissed with no orders as to costs.



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

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Nyangoro instructed by Atuti and Associates Advocates for the Applicants.

Mr instructed by Githui and Company Advocates for the 1st and 2nd Respondents.

