



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 25 OF 2017

(FORMERLY ELC NO. 97 OF 2017)

NYANDARUA PROGRESSIVE AGENCIES LIMITED.....PLAINTIFF

VERSUS

FRANCIS WAINAINA MUGO

CHARLES MOMO MAINA

PETER MACHARIA NJOROGE

MICHAEL NJOROGE THIONG'O

JOHN KAMAU KUBAI

STANLEY KABACHIA

DAVID MANYARA KARANJA

LAWRENCE MUNGAI NG'ETHE

DANIEL KIMANI KIBE

REGISTRAR OF COMPANIES.....DEFENDANTS

AND

JANE WANJIRU KAMAU

STEPHEN MUCHORI KIRUBI & OTHERS.....INTERESTED PARTIES

JUDGMENT

1. Since the incorporation of the plaintiff, a land buying company situated within Nakuru County, in 1974, there has been numerous leadership and shareholding wrangles, with several cases filed in a bid to resolve the disputes, among them **Nakuru HCCC NO. 767 of 1992** which gave rise to **Nakuru Civil Appeal NO. 213 of 2013**, pitting various shareholders against the directors of the Company, including some of the defendants in the present suit.

2. Of relevance in this suit as stated in the parties pleadings is an **Annual General Meeting (AGM)** of the plaintiff Company held on the 24th October 2016 whereof the 1st – 9th defendants were elected and/or declared themselves as the duly elected Directors of the Company, which action the plaintiff termed as fraudulent and illegal, and by this suit the plaintiff seeks to bar the said fraudulently elected directors from being recognized and registered as the lawful directors of the company who were then in office.

3. By the parties' actions, the plaintiff company operations were negatively interfered with as frustrations, intermeddling and obstruction, including violence were allegedly meter out by the defendants to the officials of the company.

4. By this suit filed by a plaintiff dated 5/7/2017 and Amended on the 5/7/2019, the plaintiff sought for judgment against the defendants thus:

a) An order of permanent injunction restraining the 1st-9th defendants, their servants and/or agents or any other person working under instructions and authority of the defendants from being recognized and registered as the Directors of the plaintiff company.

b) A declaration that the elections held on the 13/4/2018 were carried out in accordance with the Order of the Court and the plaintiff's directors were duly elected by the members of the plaintiff.

c) A declaration that the duly elected directors are the ones currently in office and the ones currently running the plaintiff's office.

d) A declaration that the 10th defendant does not acknowledge and adopt the resolutions passed on the 13/4/2018 electing directors of the company and proceeds to register them as the duly elected officials as directors of the plaintiff and issue CR 12 to the officials and regularize its records.

e) A declaration that the AGM held on the 25/10/2016 was illegal, wrongful, fraudulent and the resultant resolutions adopted are/were null and void abinitio.

5. Contemporaneously with the filing of the suit, the plaintiff filed a Notice of Motion dated 8/3/2017 seeking injunctive orders against the defendants from being registered as directors of the company by the Registrar of companies, the 10th defendant, among other prayers.

6. The application was opposed by the defendants. Upon hearing the application interparties the court (**Korir Langat J**) allowed the application by an Order dated 15/2/2018 in the following effect,

i. That the 1st – 9th Defendants were restrained by an Order of injunction, by themselves or their agents or authorized employees from being registered as Directors of the plaintiff company by the Registrar of Companies.

ii. That the Defendants do cease from carrying out any duties and or responsibilities regarding Nyandarua Progressive Agencies Ltd pending the hearing and determination of the suit; and or until further orders of the court.

Further, the court made an order that there shall be no sub-divisions, sale or dealing in the suit properties determination of the suit or by further orders of the court.

7. In addition, the court appreciating that the dispute in the suit related to election of directors of the plaintiff company, and pursuant to powers granted to the court under **Section 280 (2) of the Companies Act** made a further order *that a general meeting of the company, to be presided over by a neutral party to be identified by the parties and appointed by the court, and whose agenda shall include election of directors, be held within 45 days of the ruling.*

8. Pursuant to the above court orders (of 15/2/2018), and the parties consent dated the 1/3/2020 the mode of the election was agreed upon as:

i. That by consent of the parties the Registrar of members that was prepared and used during the OMOLO Probe Committee to the Registrar Lands Nakuru shall be the operational register, however, persons who have since acquired an interest shall provide records/evidence of transmission, sale/purchase or succession.

ii. That a neutral party to preside over the general meeting of the company

iii. That the County Commissioner Nakuru County to preside over the meeting

iv. That the verification of shareholders be done by the presiding officer with the assistance of four officers being public officers, to be appointed for the purpose by the presiding officer.

v. That the costs shall be made by the company

vi. That the identification documents shall be the original identity cards, share certificate or title deeds, in addition ownership documents eg sale agreement, transmission, succession or assignment.

vii. That the notices shall indicate clearly the meeting is being convened pursuant to a court order and shall be through print and electronic media to be placed in two papers of national circulation and in vernacular radio stations, notices to be pinned in public places.

viii. That the primary agenda of the meeting shall be election of directors and the agreed date shall be the 13/4/2018 at Arutani Secondary School, subject to the agreement of the school management.

ix. That the OCS Solai Police Station to provide adequate security.

x. That mention shall be on the 25/4/2018.

9. Pursuant to the consent order (terms stated above), the meeting was duly held at the Arutani Primary School on the agreed date, the 13/4/2018. The Nakuru County Commissioner presided over the meeting. Directors and officials of the company were elected. The County Commissioner prepared and filed a report as directed by the court on the 9/3/2018.

10. The Defendants and Interested Parties were not satisfied with the Results of the election, leading to the Application dated 16/5/2018.

11. THE NOTICE OF MOTION DATED 16/5/2018.

The Applicants (The defendants and Interested parties sought an order to stay and suspend the resolutions passed in the meeting held on 13/4/2018, and to restrain the officials elected from taking office or holding themselves as directors of the company; and calling for another meeting for election of other Directors; citing failure by the Presiding Officer, the County Commissioner from complying with the consent orders on the mode and procedure of the election.

The plaintiff in opposing the application filed a Replying affidavit and a further Replying Affidavit filed on the 5/4/2019 and 11/6/2019.

12. On the 18/9/2019, the Court, with agreement of the parties to this suit, made an order that this suit ought to proceed to full hearing, and all parties withdrew their then pending applications to pave way for the hearing.

It was further agreed that suit would be determined on the parties affidavits on record and documents. They also filed submissions to urge their rival positions, on the issues they proposed and filed.

13. In the interim, the court made an order that the elected directors in the meeting held on the 13/4/2018 to take office and manage the affairs of the company, with a rider that the orders of injunction dated 15/2/2018 and 16/5/2019 remain in force, to the extent that the Directors were restrained from dealing in any way with the company plaintiff's properties pending the hearing and determination of the suit.

Thus the Status quo as at 13/4/2018 remains in force; the directors are in office.

14. By the proceedings and court orders, and in particular Korir J's orders dated the 15/2/2018 and 1/3/2019 including the parties consent dated 1/3/18 and adopted as a court order, the dispute over the Annual General Meeting held on the 25/10/2016 and the resolutions passed thereof have been overtaken by events, in view of the court orders for holding of a fresh election on the 13/4/2018. That election is therefore a none issue in this judgment.

15. ISSUES FOR DETERMINATION

1) Whether the meeting held on the 13/4/2018 was in breach of court orders issued on the 8/3/2018, and the parties consent, adopted as a court order on the 1/3/2018.

2) Whether the officials elected the meeting held on the 13/4/2018 were validly elected, and if so,

3) Whether the Registrar of Companies should be directed to register them as the duly elected officials of the Company by issuing a CR 12 Form.

16. The plaintiff filed its submissions on the 12/11/2019 while the Defendants & Interested Parties filed theirs on the 13/11/2019.

The plaintiff is represented by Mr. Waweru Kihara Advocate instructed by M/s Waweru & Co. Advocates.

The Defendants & Interested parties are represented by the firm M/s Mirugi Kariuki & Co Advocates.

17. I have considered the parties submissions, the pleadings and filed affidavits and documents.

Analysis and Determination.

18. The main complaints by the Defendants & Interested Parties are fourfold, in my view;

1) The OMOLO Probe Committee Register

2) Lack of proper verification of members of the Company

3) Failure by the presiding officer to manage the election leaving it to partisan individuals thus comprised the election.

4) Failure by the Presiding Officer to allow bonafide members who identified themselves by sale agreements, succession and transmission to participate in the election.

19. Before I start interrogation of the above issues, it is necessary to refer to the Election Report filed by the Nakuru County Commissioner on the 9/7/2018 vis-à-vis the complaints. It is dated the 20/4/2018. The two opposing parties were dully served with the Report.

The Nakuru County Commissioner Nkanatha J.M. presented himself to court. None of the parties Advocates had questions on the said report. It is a detailed report as to how the election was conducted, including personnel who were assisting the County Commissioner, and the voting process and declaration of the election results. Copies of the vetting card and Election Ballot Paper are attached, so is the Declaration of Election Results form.

I shall refer to the report in the analysis as and when necessary.

20. The Omolo Probe Committee Register.

As per the consent order, this register of members was to be the operational register, together with subsequent persons who may have acquired interest in the company by sale agreements, transmissions or succession.

The defendants/Interested Parties complaint is that the register used was not the Omolo register, but a 2014-2015 register and further that it was not verified by the defendants, thus blocked genuine members and allowed non members to vote.

21. In the Affidavit sworn by one **Stephen Muchori Kimbi** on the 16/5/2018, whereas he depones that the Omolo report was not used but the 2014/2015 register, he tendered no evidence on the allegation, nor did he produce what he stated as the genuine Omolo report, no any evidence that the said report was never given to the Nakuru Land Registrar.

22. In response to this complaint, the plaintiff in a Replying affidavit sworn by **Eliud Samuel Maina Waweru** on the 5/4/2019 refuted that the Omolo register was not used and re iterated that it is the said register used, and that members whose names appeared therein were allowed to vote, including those who produced records and evidence of transmission, sale purchase or succession.

23. This deponent prepared a table of members who alleged t have been denied to vote as stated in the complainant's affidavit. These are 140 in number, and reasons are stated thereto.

In his Supplementary Affidavit, sworn on 7/5/2019, **Stephen Muchori Kimbi** did not talk of the table or answer to the same.

24. I have looked at the **Election Report** as filed. The election was held at the Arutani Primary School on the court appointed date.

The County Commissioner states that prior to the meeting, he convened an inter-party meeting attended by five representatives from each group to the case. Also in attendance were the Nakuru Land Registrar, Five County Security Committee Members, and the Attorney Generals representatives among others including the Legal Officer who discussed the modalities of complying with the court orders. During these meetings,

25. The Election materials were agreed upon, including the

- **Vetting Cards**
- **Ballot Papers**
- **Omolo Register**
- **Transparent ballot papers**
- **Stationery.**

26. From the above, it is evident that the **Omolo Register** was discussed, and agreed upon. The Land Registrar was present in those pre-election meetings; so was the Legal Officer and representatives of the parties.

If the genuine Omolo Register was not used as the Defendants & Interested Parties would wish the court to believe, they ought to have produced sufficient evidence to that effect, and produce both the genuine Omolo register and the fake one for the period 2014/2015.

There representatives were in the verification pre-election meetings with other members. The defendants representative did not raise the issue; even during the voting process when in the election Report states clearly that the

27. Verification of the document was done using the Omolo register. I am not satisfied that the complaint over the Omolo register has any weight.

I dismiss the complaint, and hold and find that the genuine Omolo Probe Committee Register was used during the voting process.

28. Lack of Proper Verification of members of the plaintiff Company.

According to the Election Report, the Vetting team was

- 1) **The CID officer**

2) The Deputy County Commissioner's Office Personnel

3) The Land's Registrar's Office

4) The Social Development officer

The above were selected in line with the Court Orders. The Presiding Officer, the County Commissioner was not expected to work alone, a fact the court took notice.

29. I do not agree with the defendants' submission that the Court Order provided expressly that the presiding officer would personally verify every member.

Order of 8/3/2018, Clause (iv) states

That, the verification of shareholders be done by the presiding officer with the assistance of four other officers being public officers to be appointed for the purpose by the presiding officer.

30. The above order is clear and needs no further elaboration. Presiding over, in my view, means, giving directions and supervising the exercise.

That in my view was the intention of the court when it gave the said orders. The process is well stated, and the presiding officer, being a neutral party was in attendance. It is worth noting that during the exercise (Verification), no disputes were raised or noted. The parties agents who were present during the exercise did not raise or note any disputes during the vetting, verification and or voting.

31. I do not agree, as submitted by the defendants & Interested Parties that the Presiding Officer abdicated his duties and left the Deputy County Commissioner to take charge of the meeting. Further, none of the members who purport to have been locked out of voting swore affidavits to state their case. Attaching a list of the persons purportedly locked out, by the deponent Stephen Muchori Kimbi to his Affidavit, stating that he believed the said parties to be members of the plaintiff is not evidence that they were.

32. None of them (over 8 pages list of names) raised their voices if indeed, they were denied to vote, during the election process. I decline to accept their complaints and hold that there was adequate and proper vetting process, and genuine members of the plaintiff were allowed to vote.

33. Failure by presiding officer to manage the election leaving it to partisan individuals thus compromised the election.

I have already rendered myself on this issue, above. The presiding officer was not expected to manage the election done, but with a team, named above. It is team work. No evidence was tendered that any of the officers stated were biased, and if so, in which manner, and what action the complainants took when they discovered that there were partisan officers who were biased. Each candidate's agents were present all through the election process.

34. In the case **Kenya Airways PLC Vs. Cabinet Secretary to the National Treasury & 11 others, (2017) e KLR**(a case cited by the complaints), in relation to voting by shareholders, Stated:

“Ultimately, when it comes to casting of votes, in order to determine the way forward, I believe that Democracy is the way to go.....everybody must have their say, and that is what the prosed meeting is intended to achieve”.

35. **Failure by Presiding Officer** to allow bonafide members who to vote. The court order, clause (VI) states that identification documents shall be original identity card, share certificate or title deed, sale agreement, transmission, succession or assignment.

36. I have considered the vetting process, against the complainant's averments. At the election report, it is stated that:

a) Members required to produce their documents of land ownership and I/D cards.

b) Verification of documents using the Omolo register.

c) Upon verification and satisfaction of the vetting team, a member is issued with a vetting card, clearing him/her to proceed to the hall for voting.

d) Upon clearance by the County Commissioner, he/she is issued with Ballot papers and proceed to vote.

- Voting proceeded throughout the day and was closed at 7:00pm when all eligible to vote had done so.

- The parties had their agents present both at the verification and voting centers.

37. In face of the above, and there being no complaints recorded by the candidates agents (if they were, none was presented to the court) it follows that the complaints are but after thoughts. They cannot be sustained in the circumstances.

38. As stated in the Kenya Airways

“-----Democracy is the way to go-----democracy demands that those with numbers carry the day-----”

Upon completion of counting the votes, the Presiding Officer announce the results that

1) Mr. Francis Mugo got 264 votes

2) Eliud Samuel Waweru got 382 votes.

Mr. Eliud Samuel Waweru was thus declared the winner. The Declaration of election results form was prepared, and signed by the Nakuru County Commissioner and the winner’s agent. The losers’ agent, together with the losing side walked out of the hall. The presiding officer presented the Election Certificate to Eliud Samuel Maina Waweru, as the Chairman of the Board of Directors of Nyandarua Progressive Agencies Limited.

39. Together with the Chairman, the following other officials were elected:

1) Peter Kinyanjui Ngugi – Vice Chair

2) Jesse Kamera Ngwiri – Secretary.

3) Josphat Mureithi Muruthi – Vice Secretary

4) Peter Wanjohi Karanja – Treasure.

40. By the foregoing, I find and hold that the court initiated election, with Orders as to the process of election of the officials of the plaintiff company, was conducted in accordance with the court orders, under the supervision of the then **Nakuru County Commissioner as the Presiding Officer (ISSUE NO. 1).**

41. Further, I declare that the officials so elected in the meeting dated 3/4/2018 were validly elected **(ISSUE NO. 2).**

42. Consequently, the Registrar of Companies is directed and ordered to register the officials as the duly elected officials of the Plaintiff Company, and accordingly issue CR 12 Form in respect thereof.

The above is in line with the plaintiff’s prayer’s in its **Amended Complaint, dated 5/7/2019.**

43. The upshot is that the plaintiff succeeds in this case, and its prayers, by **Declarations No.**

(a) (b) (c) and (d)

44. The costs of this suit shall be borne by the Defendants and Interested Parties.

45. Orders accordingly

Delivered, Signed and Dated electronically at Nairobi this 27th day of May 2020.

J.N. MULWA

HIGH COURT JUDGE.