REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO 14 OF 2018

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

VERSUS

REGISTRAR OF COMPANIES.....RESPONDENT

AND

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

RICHARD K. BUNDOTICH.....2ND INTERESTED PARTY

RULING

1. The Applicants herein brought a Judicial Review Application seeking, in the main, the quashing of the decision by the Registrar of Companies revoking the CR12 dated 19/12/2017 *vide* the Registrar's letter dated 18/05/2018.

2. The Applicants succeeded in that prayer. In a judgment dated 30/05/2019, this Court granted that prayer. However, in that judgment, after learning that there was, in existence, another Court order which made the previous action by the Registrar to register the Applicants as officials of Solai Ruiyabei Farm following a meeting which was illegally held on 23/03/2015, the Court made the further order 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.*

3. The Court made that order because upon perusal of the material filed in Court, it became evidently clear that there were extant Court orders issued in in ***Nakuru Judicial Review Application No. 10 of 2015*** on 09/04/2015 barring the Registrar of Companies from registering those elected on 23/03/2015 as the *bona fide* directors of the Company.

4. The Applicants have now returned to Court seeking the review or setting aside of that order. In the main, in the Application dated 19/10/2019, the prayer they seek in the instant Application is:

> *That this Honourable Court be pleased to review and/or set aside the orders made in a judgment delivered on 30th May, 2019 quashing the entry into the records of the registrar of Companies of the slate of directors elected at the meeting of the Company held on 23rd of March, 2015 and the order directing persons who were on the management Board of the Company as at 23rd of March, 2015 to call for a special general meeting of the Company within 30 days of the judgment solely to elect officials of the Company as the Company's charter.*

5. The main reason the Applicants offer for seeking the review of the Court's judgment is that the judgment was based on existence of an injunctive order in ***Nakuru Judicial Review Application No. 10 of 2015***. The Applicants argue that that suit has now been dismissed and that, therefore, the injunctive orders therein have lapsed.

6. The Applicants further argue that judgment should be reviewed because it has the effect of giving the mandate to convene the Special General Meeting and run elections to a slate of persons

> "*are not and have never been directors, but are fraudsters who forged their way into having their names registered as directors as at 23rd of March, 2015*."

7. The Applicants have based their Application on section 80 of the Civil Procedure Act and Order 45, Rule 1 of the Civil Procedure Rules. The Applicants cited ***Francis Origo & Another v Jacob Kamali Mung'ala [2005] 2 KLR 307*** – a Court of Appeal decision – to support their application.

8. Section 80 of the Civil Procedure Act provides as follows:

Any person who considers himself aggrieved—

> *(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit*.

9. On the other hand, Order 45, Rule 1 of the Civil Procedure Rules provides that an application for review must be premised on any one of only three grounds:

> *a) The discovery of new and important matter or evidence which is important, was not within the knowledge of the party or could not be produced by her at the time when the decree was passed or order made;*
>
> *b) Mistake or error on the face of the record; and*
>
> *c) Any other sufficient reason.*

10. In the decision cited by the Applicants, (***Francis Origo (supra)***), the Court of Appeal stated:

> *In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the Applicant must make the application for review without unreasonable delay.*.

11. In the present case, the Applicants argue that the new and important matter that has been "discovered" which was not in the knowledge of the Applicants and could not have been in their knowledge even with the exercise of due diligence is the determination in ***Nakuru Judicial Review Application No. 10 of 2015*** dismissing the suit. Of course, the dismissal of the suit in that case happened after the judgment in this case was entered. Judgment in this case was delivered on 30/05/2019. As per the Applicants, ***Nakuru Judicial Review Application No. 10 of 2015*** was dismissed on 27/06/2019 *vide* a ruling by Lady Justice Ng'etich.

12. The Application is opposed principally by the Interested Parties. Through their counsel, they filed Grounds of Opposition as well as submissions. In the main, the Interested Parties contest that this is a fit case for review under the relevant provisions of the law. The Interested Parties argue that there has been no discovery of new and important matter or evidence but that the instant application is, in fact, an appeal disguised as a review application.

They also contest the factual characterization of the company affairs by the Applicants. Through a Replying Affidavit deponed by Charles Olare Chebet, the Interested Parties say that they entered into a Consent which was adopted as an order of the Court on 04/11/2019 through which the parties agreed to have a Special General Meeting for purposes of electing officials of the Company. The Interested Parties are persuaded that the Applicants are hell-bent on disrupting the normalization of the affairs of the Company through the filing of frivolous applications and suits either directly or by using proxies. They contend that they are not fraudsters or strangers to the Company as alleged being original subscribers to the Company and being *bona fide* shareholders and directors. They, indeed, impugn the *bona fides* of the Applicants as shareholders of the Company.

14. I should begin by pointing out that the Court's jurisdiction to review is heavily circumscribed – and for good reasons. As the Court of Appeal stated in ***Evan Bwire v Andrew Nginda*** (***Kisumu Civil Appeal No. 103 of 2000; [2000] LLR 8340***) "*an application for review will only be allowed on very strong grounds' particularly if its effect will amount to re-opening the application or case a fresh."*

15. Our decisional law is clear that review is only allowed where there is an error apparent on the face of the record or where new and important matter is discovered which could not have been discovered with the exercise of due diligence or for some other sufficient reason which must be *ejusdem generis* with the first two. See ***National Bank of Kenya Ltd v Ndungu Njau [1996] KLR 469***.

16. I should begin by pointing out an issue not raised by the parties: there is there is a question whether review is an appropriate relief in Judicial Review Applications/suits. There are decisions of persuasive authority which suggest it is not. For example, in ***Republic v Clerk County Council of Meru [2012] eKLR,*** the Court held that a party cannot ask for a review in a Judicial Review suit. The argument is that Judicial Review Applications are suits *sui generis* and that the logic of the cause of action militates against multiple applications of the sort one sees in ordinary civil law suits.

17. Assuming that section 80 of the Civil Procedure Act and Order 45, Rule 1 of the Civil Procedure Rules apply to Judicial Review suits, would this Application be a good candidate for it? I have come to the easy conclusion that it does not.

18. As aforesaid, review jurisdiction applies to correct obvious errors or to alter judgment due to the discovery of new and important matter. In the present case there is no discovery of new and important matter. Instead, there is the happening of an act *ex post*: a ruling dismissing ***Nakuru Judicial Review Application No. 10 of 2015*** on 27/06/2019. An action which happens after entry of judgment cannot be the basis

for reviewing that judgment by the terms of section 80 of the Civil Procedure Act and Order 45, Rule 1 of the Civil Procedure Rules: the fact did not exist at the time of entry of the judgment. To invoke a post-judgment event or action as the basis of an application for review is to misapprehend the review jurisdiction of the Court and to encourage endless litigation.

19. There is another reason to reject the present application. The horrible consequence the Applicants fear if the relief is not granted is that some "fraudsters" who were never *bona fide* directors of the Company will end up organizing the elections of the Company. Assuming that is, indeed, a most insalubrious occurrence, does the judgment of 30/05/2018 facilitate such a remarkable occurrence? It does not. All the judgment states is that those who were the *bona fide* directors of the company as at 23/03/2015 should call for a Special General Meeting for purposes of electing new officials of the Company. The judgment does not name who the bona fide directors as at 23/03/2015 were; and the Court did not have sufficient material before it to make that determination. If the Applicants feel that the Interested Parties were not the *bona fide* directors as at 23/03/2015, they are at liberty to approach Court for determination of that question. However, invoking the review jurisdiction of the Court on this question is akin to appealing the judgment of the Court. If the Applicants are dissatisfied with the decision of the Court, the correct procedure is, of course to appeal that decision not seek for its review by the same Court.

20. **I need not belabour the point. The Application dated 19/10/2019 is without merit. It is hereby dismissed with costs.**

21. Orders accordingly.

Dated and delivered at Nakuru this 18th day of June, 2020

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JOEL NGUGI

JUDGE

NOTE: This ruling was delivered by video-conference and email pursuant to the various Directives by the Honourable Chief Justice urging Courts to consider use of technology to deliver judgments and rulings where expedient due to the COVID-19 Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conference and email in cases where all the parties have consented to dispense with the requirements of Order 21 Rule 1 of the Civil Procedure Rules. In this case, both the Counsel for the Applicants, Gordon Ogola, Kipkoech & Co. Advocates and Counsel for the Interested Parties, A. Mukira & Co. Advocates, consented in writing to the delivery of the ruling by email