



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO 14 OF 2018**

**SOLAI RUIYOBEI FARM LIMITED ..... EXPART APPLICANT**

**VERSUS**

**REGISTRAR OF COMPANIES ..... RESPONDENT**

**JUDGEMENT**

1. The Judicial Review Application under consideration was filed pursuant to leave granted by the Court on 11/06/2018. It seeks two substantive prayers as follows:

*a. That an order of prohibition be and is hereby issued to restrain the Respondent from acting upon its motion/decision dated 18<sup>th</sup> May, 2018 to revoke the CR12 dated 19<sup>th</sup> December, 2017.*

*b. That an order of certiorari be and is hereby issued to bring to the court and quash the motion/decision dated 18<sup>th</sup> May, 2018 to revoke the CR 12 dated 19<sup>th</sup> December, 2017.*

2. The Application was supported by the Affidavit of Simon Kipchumba Kandie. By the leave of the Court, Charles Olare Chebet and Richard Kipkoech Bundotich were enjoined as Interested Parties in the suit. They filed a Replying Affidavit sworn by Charles Olare Chebet in opposition to the Application. There is also a Replying Affidavit filed by Ms. Joyce Koech, a State Counsel, on behalf of the Respondent (the Registrar of Companies).

3. By the Court's directions, all the three parties filed Written Submissions. I have read them keenly and referred to the cases cited therein.

4. The uncontested facts that can be gleaned from the materials filed before the Court are as follows. The *Ex Parte* Applicant is a duly registered company (the "Company"). By March, 2015, the two Interested Parties were directors of the Company. There were leadership wrangles at the Company. This culminated in the Company (at the instance of the two Interested Parties) filing a suit against Philip S. Cheptumo and Simon Kipchumba Kandie. These two are now named as the directors of the Company and are in support of the present Application.

5. It is unclear what the substratum of the suit – *Nakuru HCCC No. 18 of 2015* – was but what is uncontested is that on 19/03/2015, interim orders were granted by the Learned Justice Mshila barring the defendants in that suit (Philip S. Cheptumo and Simon Kipchumba Kandie) or their servants or agents from "further advertising, holding and/or purporting to hold the proposed illegal Annual General Meeting of the Plaintiff [Company] scheduled for the 23<sup>rd</sup> day of March, 2015 at Ruiyobei Chief's Camp and/or any other place in the Republic of Kenya and/or purporting to hold any other meeting on behalf of the Plaintiff [Company]."

6. It is not contested that that Court order was served on both Philip S. Cheptumo and Simon Kipchumba Kandie as well as the Registrar of Companies. However, despite the Court Order, by the Company's own pleadings, the AGM scheduled for 23/03/2015 proceeded and elections were held. At those elections, Philip S. Cheptumo and Simon Kipchumba Kandie were elected as directors of the Company.

7. Stung by this action, the two Interested Parties brought a Judicial Review Application being *Nakuru Judicial Review Application No. 10 of 2015* to, among other things, prohibit the Registrar of Companies from "making any changes in the records of [the Company] and in particular registering the purported new directors..." On 09/04/2015, the matter was heard *ex parte* by the Learned Justice Maureen Odero. The Learned Judge granted leave to the Interested Parties to bring the substantive application. The Learned Judge, also, ordered that the leave so granted do operate as "stay of any and/or further proceedings by the Registrar of Companies towards effecting any changes in the records of [the Company] and in particular registering the purported new directors..." The order proceeds to name the "purported" new directors. They include Philip S. Cheptumo and Simon Kipchumba Kandie.

8. Again, it is not contested that this order was served on both Philip S. Cheptumo and Simon Kipchumba Kandie as well as the Registrar of Companies.

9. On 28/09/2017, at the instance of Philip S. Cheptumo and Simon Kipchumba Kandie, **Nakuru HCCC No. 18 of 2015** was struck out in its entirety by the Learned Justice Mulwa.

10. On 19/12/2017, the Registrar of Companies issued a CR 12 which confirmed that Philip S. Cheptumo and Simon Kipchumba Kandie and the new slate of directors elected at the contested 23/03/2015 meeting were the directors on record with the Registrar of Companies.

11. On 18/05/2018, the Registrar of Companies wrote a letter announcing the revocation of the CR 12 dated 19/12/2017. In pertinent part, the letter read as follows:

*It is clear that there was a Court order by Lady Justice A. Mshila dated 19<sup>th</sup> March, 2015 that stopped the Annual General Meeting held on 23<sup>rd</sup> March, 2015 hence the changes in directorship and any resolutions passed are null and void.*

*Pending the resolution of this matter between yourselves the CR 12 dated 19<sup>th</sup> December, 2017 is hereby revoked until the matter is resolved by the Company via an AGM in accordance with the provisions of the Companies Act, 2015.*

12. It is this letter by the Registrar of Companies which has provoked this suit.

13. The parties have, in their submissions, offered their wildly varying interpretation of this set of facts and whether the action by the Registrar of Companies was justified in the circumstances.

14. The Registrar of Companies insists that it was the correct action to take given the Court orders of 19/03/2015 which, the Registrar claims were brought to her attention later. The Registrar insists that since there was an existing Court order, any actions taken on 23/03/2015 was null and void.

15. The *Ex Parte* Applicant thinks otherwise. They say that it was unlawful for the Registrar of Companies to revoke the CR 12 for at least three reasons:

a. First, because the Registrar of Companies did not afford Philip S. Cheptumo and Simon Kipchumba Kandie an opportunity to be heard before she took the adverse action against them.

b. Second, the *Ex Parte* Applicant argues that it is unreasonable and illegal for the Registrar of Companies to have relied on a Court order issued on 19/03/2015 yet the entire suit was dismissed in July, 2018.

c. Third, the *Ex Parte* Applicant argues that the Registrar of Companies is estopped from revoking the CR 12 since the AGM and elections were held on 23/03/2015 with her blessings and imprimatur. Further, the *Ex Parte* Applicant argues that the AGM was widely publicized and that most shareholders of the Company participated in the AGM and elections.

16. The Interested Parties support the Registrar of Companies' position. They further point out that in addition to the order by Justice Mshila in **Nakuru HCCC No. 18 of 2015**, there is the order by Justice Odera issued 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. Therefore, the Interested Parties argue that the action taken by the Registrar of Companies to revoke the CR 12 was the only legally appropriate thing for her to do.

17. From these facts and arguments presented, the two questions which recommend themselves for resolution are whether the action by the Registrar of Companies to revoke the CR 12 issued on 19/12/2017 was lawful; and if not, whether the prayers sought by the *Ex Parte* Applicant should issue.

18. I will begin with the easy part. Once a suit has been struck out or dismissed, it is trite law that all interlocutory orders – including injunctions – issued in the case lapse by operation of the law. A temporary injunction or order cannot, by definition, outlive the suit. In this case, **Nakuru HCCC No. 18 of 2015** was struck out on 28/09/2018. As at that day, all interlocutory orders given in that case automatically lapsed. This included the orders granted by Justice Mshila on 19/03/2015. It was, therefore, improper for the Registrar of Companies to purport to found her decision to revoke CR 12 dated 19/12/2017 on the Court order issued on 19/03/2015. This is because by the time the Registrar of Companies was acting on the order – on 18/05/2018 – the entire suit had been struck out and the order relied on was non-existent.

19. In any event, in the circumstances of this case, I would have invalidated the action by the Registrar of Companies to revoke the CR 12 for failure to give the directors who were elected on 23/03/2015 an opportunity to be heard yet the decision adversely affected them. Fair administrative action standards require that a person who would be adversely affected by any administrative decision to be given an opportunity to present his case before that decision is taken. It is clear here that the Registrar of Companies acted on the basis of representations made to her by Charles Olare Chebet and Richard Kipkoech Bundotich in reaching her decision to revoke the issued CR 12 form. If the Registrar of Companies had invited representations from both sides, perhaps she would have realized that the matter is a little more complicated than represented by the one side she heard.

20. Yet, the quashing of the decision by the Registrar of Companies does not resolve the matter in this case. This is because there is, in existence, another Court order – the one issued by Justice Odera in **Nakuru Judicial Review Application No. 10 of 2015** on 09/04/2015. That order is still alive as that suit is still pending and the order has never been set aside. What are the implications of this? This Court

cannot pretend that order does not exist after having sight of it as an annexure to the affidavit of the 1<sup>st</sup> Interested Party. The existence of that order has not been contested by the *Ex Parte* Applicant. Its validity is, therefore, not in question. That order bars the Registrar of Companies from registering the directors who were elected in the AGM held on 23/03/2015. In the face of that clear Court order, the entry into the Registrar of Companies' records of the directors who were elected on 23/03/2019 as the *bona fide* directors of the *Ex Parte* Applicant was illegal.

21. Where does that leave things? As they were as at 09/04/2015 when the Court order was issued in ***Nakuru Judicial Review Application No. 10 of 2015***. However, this is not an entirely satisfactory way to leave things. This is so for two reasons.

22. First, although I have not had sight of the pleadings for ***Nakuru Judicial Review Application No. 10 of 2015***, it seems likely that the suit was based on the existence of the Court order issued in ***Nakuru HCCC No. 18 of 2015***. As aforesaid, that suit has since been struck out. This means that although the Court order dated 09/04/2015 is still alive because ***Nakuru Judicial Review Application No. 10 of 2015*** is still pending, it is only technically alive. It only remains alive because the Respondents in that suit -- Philip S. Cheptumo and Simon Kipchumba Kandie -- have not sought its dismissal. With the dismissal of ***Nakuru HCCC No. 18 of 2015***, the substratum of ***Nakuru Judicial Review Application No. 10 of 2015*** seems to have vanished.

23. Second, it is readily obvious that as at 09/04/2015, the status of directorships at the Company was, at best, murky. It is clear that there were deep-seated leadership wrangles that had driven the Registrar of Companies, as early as 04/02/2015 (in a letter annexed to the Supporting Affidavit of Simon Kipchumba Kandie), to advise the Management Board as well as the shareholders to hold an urgent AGM to settle the issue of leadership. Four years, two suits, and one precipitous action by the Registrar later, the issue is yet to be resolved.

24. In the circumstances of this case, therefore, I am called upon to fashion appropriate reliefs which travel outside the traditional mode. The Court is empowered to do so by Article 23(3) of the Constitution. What is considered an "appropriate relief" was defined by the South African Constitutional Court in ***Minister of Health & Others vs Treatment Action Campaign & Others*** (2002) 5 LRC 216 at p. 249. thus:

*.....appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal.*

25. In the present case, I have already held that the decision by the Registrar of Companies contained in her letter dated 18/05/2018 must be invalidated for the reasons given above. Rather than leave things festering at the Company as they have for the past few years, the Court will fashion what it considers an appropriate relief in the circumstances. The orders are as follows:

**a. The decision by the Registrar of Companies contained in the letter dated 08/05/2018 revoking the CR 12 issued on 19/12/2017 is hereby brought into this Court and is quashed.**

**b. 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.**

**c. 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.**

**d. All the parties will be at liberty to apply for any further reliefs or directions.**

26. **Given the nature of the suit and the disposition I have reached, each party will bear its own costs.**

27. Orders accordingly.

**Dated and delivered at Nakuru this 30<sup>th</sup> day of May, 2019**

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**JOEL NGUGI**

**JUDGE**