



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO.E392 OF 2019

KENYA HOSPITAL ASSOCIATION.....1ST PLAINTIFF
JOHN SIMBA.....2ND PLAINTIFF
COUTTS OTOLO.....3RD PLAINTIFF
ALLAN GACHUKIA.....4TH PLAINTIFF
SAM NCHEERI.....5TH PLAINTIFF
MARGARET MUIGAI.....6TH PLAINTIFF
JOSEPH WATHOA KIGWE.....7TH PLAINTIFF

VERSUS

MAXWELL OTIENO ODONGO1ST DEFENDANT
DR. CHRIS M. BICHAGE.....2ND DEFENDANT
DR. STEPHEN OCHIEL.....3RD DEFENDANT
DR. WILDRED IRUNGU NDIRANGU.....4TH DEFENDANT

(Sued as representatives of the Requisitionists pursuant to Order 8 Rule (1) of the Civil Procedure Rules)

RULING

1. The 1st plaintiff herein (KHA) is a company limited by guarantee and is managed by a board of management constituted pursuant to Article 38 of its Articles. KHA is engaged in the business of Health Care Management and is the proprietor of many institutions including Nairobi Hospital, a health institution in Nairobi.
2. The 2nd to 7th plaintiffs are adults of sound minds and the current directors and members of the Board of Management of KHA.
3. The defendants are adults of sound minds and are sued in their own personal capacity and as the representatives of the requisitionists named in a letter dated 27th September 2019.
4. On or about 30th September 2019, the 1st plaintiff's Company Secretary was served with the defendant's Requisition calling for an Extra Ordinary General Meeting (EGM) for the removal of the 2nd to 7th plaintiffs as directors of KHA. The plaintiffs contend that even though the letter forwarding the Requisition for the meeting indicated that the list of the nominees for the election together with their profiles would be forwarded to the plaintiffs nearer the time of the meeting or within the timelines stipulated in the Articles of Association, no such list was sent to the plaintiffs on time or at all. The defendants then proceeded to advertise a notice calling for the meeting in the Daily Nation Newspaper of 4th November 2019 thereby triggering the filing of the instant suit in which the applicants seek the following orders:

(a) A declaration that the notice published on 4th November 2019 and any resolutions passed at any meeting held consequent upon it are null and void.

(b) A permanent injunction restraining the defendants either jointly and severally from convening any meeting of the 1st plaintiff's members pursuant to the notice published on 4th November 2019 or giving effect to any resolutions passed at the meeting to be held on 27th November 2019.

(c) A permanent injunction restraining the defendants either jointly and severally from assuming the office of the director of the 1st plaintiff and or interfering with business and or the management of the 1st plaintiff following any meeting held under the notice of 27th November 2019.

(d) Costs of the suit.

(e) Any other or further order that the court may find fit to grant.

5. Concurrently with the plaint, the plaintiffs/applicants also filed the application dated 7th November 2019, which is the subject of this ruling, seeking the following orders.

1. Spent

2. Spent

3. That pending the hearing and determination of this suit an injunction be issued restraining the defendants jointly and severally from convening the extraordinary meeting of the first plaintiff's members on 27th November 2019 pursuant to the notice published on 4th November 2019 in the Daily Nation or convening any other extra ordinary general meeting of the first plaintiff's members.

4. That pending the hearing and determination of this suit an injunction be issued restraining the defendants jointly and severally or any other person elected at the meeting to be held on 27th November 2019 from assuming the office of a director of the first plaintiff and or in any manner whatsoever interfering with the management and operations of the first plaintiff.

5. That the costs of this application be provided for.

6. The application is primarily brought under Order 40 Rule 2, and Section 287(1) of the Companies Act 2015 (hereinafter "**the Act**"). It is supported by the affidavit of the 1st plaintiff's Company Secretary and is premised on the grounds that the defendants published an invalid Notice in the Daily Nation Newspaper of 4th November 2019 (hereinafter "**the Notice**") proposing to convene a an Extraordinary General Meeting (EGM) of the 1st plaintiffs members on 27th November 2019. That the said Notice calls for the reconstitution of the first plaintiff's board by removing the 2nd to 7th plaintiff's and to elect in their place, eight directors named in the Notice including the 1st to 4th defendants.

7. The plaintiffs further state that this court had in its ruling delivered on 13th June 2019 in HCC No. 132 of 2019 (hereinafter "**the earlier case**") held that the Notice to convene the meeting required to have both the names of the directors and the proposed nominees. They contend that the defendants withheld vital information that they required in order to convene the meeting in disregard to the ruling in the earlier case and in breach of the provisions of the Act especially Sections 278(1) and 139(2) thereof. They further state that the Requisition calling for the removal of the 1st plaintiffs' directors did not indicate the names of the nominees to replace the said directors and that they only became aware of the nominees on 4th November 2019.

8. It is the plaintiffs' case that the Notice published by the defendants on 4th November 2019 is incurably defective for the reasons that:

a) It does not state which proposed nominee is to replace which director.

b) It names 6 directors to be replaced by eight nominees.

c) The Requisition did not call for additional directors.

d) The Notice is inconsistent with the Requisition.

9. The plaintiffs contend that it will be a gross violation of the 1st plaintiff's members' rights and that of the 2nd to 7th plaintiffs if a meeting is called and conceived under an invalid notice. They argue that unless the defendants are restrained by orders sought in this motion, there will be serious disruption to the 1st plaintiff's management and operations.

10. The plaintiff also relied on the three (3) supplementary affidavits sworn by the 1st plaintiff's members namely; **David Waweru Kinyanjui, John Kibuchi and Ernest Waithaka Mureithi** who aver that they had not, as at the time of swearing the further affidavits on 19th November 2019, received the reasons for the intended resolutions to enable them make informed decisions on the matter.

11. At the hearing of the application, **Mr. Ngatia S.C.** for the applicants submitted that the directors could only consider convening a General Meeting for removal of directors upon satisfying themselves that the notice fulfils all the requirements of the law. He argued that the Notice breached mandatory requirements of the law for failing to provide the names of the nominees to the directorship of the 1st plaintiff. According to the plaintiffs, the members of the company are therefore being asked to attend a meeting without any information touching on the decisions to be made. For this argument, counsel cited the case of **Patrick Kaseki Mutisya (suing as the personal representative of the estate of Nzomo Mutisya (deceased) v K.B. Shangani Sons Ltd & Another** Civil Appeal No. 52 of 1991, where the court cited the well known passage in **Macfoy v United Africa Ltd** [1961] 3 ALL ER 1169 where Lord Denning stated that:-

“ . . .if an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

12. The respondents/defendants opposed the application through the 4th respondent’s replying and further affidavits sworn on 14th November 2019 and 20th November 2019 respectively. He avers that members of the Company issued an initial Requisition for the removal of the Directors of the Company in February 2019 and when the Directors failed to convene a meeting, the members Requisitionists convened and held an Extraordinary General Meeting on 15th May 2019, ousting the Directors and installing Board of Directors for three (3) months for transition and programs to install a long-term Board. He adds that following the said meeting, the Directors filed the earlier case seeking invalidation of the Resolutions of 15th May 2019, together with an application seeking a temporary injunction to restrain implementation of the Resolutions pending suit.

13. He avers that in the Ruling of 13th June 2019, the court issued the temporary injunction pending suit, on the ground that the Requisitionists had not served the Directors proposed to be ousted with reasons for the removal to enable them prepare their defense in accordance with Section 141 of the Act. It is the defendants’ case that the three (3) months installation of the Directors in accordance with the Resolution of 15th May 2019 lapsed on 15th August 2019, and that since the same prejudice to the Company and the Nairobi Hospital still persists, the members were constrained to re-issue the Requisition which was done on 30th September 2019.

14. He further avers that the Directors failed to convene the meeting as provided for by the Articles and the Act, 2015, and accordingly, the Requisitionists issued a notice convening the Special General Meeting for 27th November 2019. He adds that a total of three (3) Directors have vacated office since the issuance of the Requisition on 30th September 2019.

15. In the supplementary affidavit, the 4th defendant avers that the Notice specifically states that members of the 1st plaintiff could obtain the full requisition bearing reasons for the resolution for removal of the directions. He states that having been duly advised on where to get the requisition, which contains the reasons for removal of the Directors, the members had a duty to visit the Company Secretary’s Office for a copy of the requisition if they needed to know the reasons for the removal. He accuses the plaintiffs of suppressing and/or withholding information regarding the 3 Directors who have, since the delivery of the Requisition, vacated their positions through resignation and states that this non-disclosure of material facts disentitles the plaintiffs to the equitable relief of injunction.

16. At the hearing, counsel for the defendants submitted that the application does not meet the threshold for grant of orders of injunction. It was submitted that the case concerns the democratic rights of the 1st plaintiff’s members to make critical decisions affecting the company through a General Meeting which is the highest organ of the company. Counsel argued that the plaintiffs’ application seeks to have the court intervene, interfere and obstruct members from discussing matters of the Company at the General Meeting.

17. It was submitted that the Directors failed in their fiduciary and statutory duties to convene the Special General Meeting (SGM). For this argument, counsel cited the decision in **Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (in Liquidation)** [2016] eKLR wherein it was held:-

“To describe as trustees seems today to be either strictly correct not invariably helpful. (see City Equitable Fire Insurance Co. (1925) Ch 407 per Romer J. at P. 426). In truth, directors are agents of the company rather than trustees of it or its property. But as agents, they stand in a fiduciary relationship to their principal, the company. The duty of good faith which this fiduciary relationship imposes are virtually identical with those imposed on trustees and to this extent, the description “trustee” still has validity. The duties of directors can conveniently be discussed under two heads: (a) fiduciary duties of loyalty and good faith (analogous to the duties of trustee’s strict sensu) and (b) duties of care and skill.” (See “Fiduciary Relationships” (1962) C.L.J. 69 and 91963) C.L.J. 119 and “The Director as Trustee” (1967) C.L.J. 83.)’

18. It was the defendants’ case that the plaintiffs case if founded on transgression of the law and should therefore be dismissed.

19. I have carefully considered the instant application, the submissions by counsel for the parties together with the authorities that they cited. The main issue for determination is whether the applicants have made out a case for the granting of the orders of injunction sought in the application.

20. The principles governing the courts in determining whether or not to grant an injunction are well known. The said principles were set out in the case of **Giella v Cassman Brown & Company Ltd** [1973] EA 353 and restated, together with their mode of application in **Nguruman Limited v Jan Bonde Nielsen & 2 Others**, CA No. 77 Of 2012, as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. (Emphasis added).

21. I will now turn to consider if the application meets the threshold set for the granting of temporary orders of injunction.

Prima facie case

22. The Court of Appeal pronounced itself on what constitutes to a prima facie case in *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] KLR 125 as follows:-

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later"

23. I am alive to the fact that at this stage, I am not determining the main suit as my role is to determine whether the applicant has established a *prima facie* case against the Respondents so as to qualify for the orders sought in the application under consideration. In determining whether the plaintiffs have established a prima facie case, it is necessary to examine the pleadings filed herein, the arguments advanced by both parties, the provisions of the Act and the 1st plaintiff's constitution.

24. It is instructive to note that this is not the first time that the plaintiffs herein are approaching this court for orders of injunction over the same subject matter of a Requisition for an EGM by the defendants, albeit under different set of circumstances. The relevant sections of the Act and the 1st plaintiffs Articles of Association were discussed, at length, by Tuiyott J. in the earlier case but I still find it necessary to highlight some of those provisions in this ruling for purposes of clarity and emphasis.

25. It was common ground that on 13th June 2019, this court, differently constituted, delivered a ruling in the earlier case allowing the plaintiff's prayer for injunction as follows:-

"That pending the hearing and determination of this suit an injunction be issued restraining the defendants jointly and severally from assuming the office of the director of the first plaintiff and or in any manner whatsoever interfering with the management and operations of the first plaintiff."

26. In the said earlier case, as in the present case, the defendants made a Requisition for an EGM to deliberate over the issue of the removal of the 1st plaintiff's directors. In his ruling, the learned justice Tuiyott found, *inter alia*, that the rights of the 2nd to 8th plaintiffs to fair hearing, which right is protected under Section 141 of the Act and Article 47 of the Constitution, had been violated as the said plaintiffs and members of the company were not supplied with sufficient information or reasons for the directors' removal.

27. At the time of the said ruling, the challenge on the notice of removal of the directors was that it was invalid for failing to state the grounds for removal of the 2nd to 8th plaintiffs. The notice gave rise to a meeting in which the defendants were elected as directors thereby leading to the issuance of orders of injunction that I have referred to hereinabove.

28. The court observed as follows at paragraphs 50,51 and 53 of the said ruling:

"[50] It is in this regard that the notice of 23rd April, 2019 falls short of the expectation of the law. It does not give any reason whatsoever why it is proposed that the 2nd and 8th plaintiffs be removed from directorship. It has not been explained by the defendants why the notice did not contain the reason or why a notice with the reasons could not have been sent to the directors. This court is not told that the giving such notice was impractical or so onerous that it would be unreasonable to expect or require the requisitionists to do so. In a word it has not been demonstrated that on this aspect, the meeting proceeded "as nearly as practicable" in the manner contemplated by the Articles of the Company and the Act.

[51]In reaching a decision that the EGM was convened in breach of the provisions of Section 141, this court bears in mind that the plank of the defence case, as set out earlier, was that the petition of 19th February 2019 was simply a requisition for a meeting and should be treated as such. But even if the court was to find that the petition contained the removal motion there is no evidence that the petition was sent to the concerned directors as required by Section 141. Service of the petition on the company cannot be deemed to be sending of the notice to its directors as the Act provides specific procedure for service of documents upon directors.

[53]For that reason the contention by the 2nd and 8th plaintiffs that their right to fair hearing protected by Section 141 of the act has been infringed is not a trifle. But that would not be all to the matter because this court believes that, from the perspective of company law, there is a greater objective of the provisions of Section 141 which transcends the rights of the director. Members of a company are entitled to information that will assist them make informed decisions at a General Meeting. If it is about the removal of a director before the end of his tenure, members may be interested to hear what the concerned director has to say about it or the director's answer to any adverse reasons advanced against the director. It is possible that upon considering such representations members may vote to retain the concerned director. The provisions of Section 141 can facilitate a meaningful discouragement as to the suitability or otherwise of a director to continue in office. From that vantage the provisions of Section 141 are as good for the concerned director as they are for the members and the company."

29. Following the ruling of 13th June 2019, the defendants went back to the drawing board and issued a fresh Requisition for an EGM detailing the names of the directors proposed to be removed, the reasons for their removal and the names, the identification and signatures of all the requisitionists.

30. The dispute herein concerns the validity of the Requisition and the Notice convening the EGM slated for 27th November 2019. The applicants contend that they could not act on the Requisition as it did not contain the names of the nominees to replace the directors listed for removal. They further challenge the Notice on the grounds that:-

a) It does not state which proposed nominees is to replace which director,

b) It names six directors to be replaced by eight nominees.

c) The requisition did not call for additional directors,

d) The notice is inconsistent with the requisition.

31. The applicants also challenge the Requisition on the basis that it did not contain the names of nominees to replace the directors. They contend that the defendants kept the said names as a guarded secret until 4th November 2019 when they received the names through a letter from the defendants' advocates dated 22nd October 2019 and the newspaper advertisement of the same date.

32. Article 47(b) of the plaintiffs constitution stipulates as follows:

" Any member of the Association desirous of being elected a Member of the Board of Management shall be proposed and seconded in writing on a form("a Proposal Form") approved by the Board of Management (and to be made available by the Secretary of the Association on request) signed by two members of the Association duly qualified to be present and to vote at the General Meeting at which the election of members of the Board of Management ought to take place and the proposed candidate shall not less than twenty one days before the date of such General Meeting delivered the duly signed Proposal Form attaching his or her personal details, professional qualifications if any and working experience together with a notice in writing to the Secretary informing the Secretary of the fact that he has been proposed as a candidate and that he is willing to stand for election."

33. Section 277(5) of the Act stipulates as follows on requisition for a meeting:-

"(5) A request for the directors to convene a general meeting is only effective if it states the general nature of the business to be dealt with at the meeting. However, such a request may include the text of a resolution that is proposed to be put to the meeting".

34. In the present case, just as in the earlier case, the plaintiffs argued that the names of the nominees ought to have been disclosed in both the Requisition and the Notice calling for the EGM. For this argument, the plaintiffs relied on the findings made in the earlier case and the provisions of section 139 of the Act.

35. I find that as opposed to the earlier case where the plaintiffs successfully challenged the defendants' Requisition on the basis that the reasons given for the meeting were too general thereby breaching the rights of the 2nd to 8th Plaintiffs to fair administrative action under Article 47 of the Constitution and section 141 of the Act, the instant challenge is on the basis that the Requisition did not contain the list of the nominees to replace the directors earmarked for removal.

36. My finding is that the above cited section 277(5) of the Act does not make it mandatory that the information regarding the names of the nominees be contained in the Requisition. As I have already stated in this ruling, the Requisition set out, in detail, the reasons for the removal of the directors. I further note that the names of the nominees were disclosed by the defendants in their letter to the plaintiffs dated 22nd October 2019 and the Notice. I therefore find that the Requisition issued by the defendants herein met the legal threshold envisaged under section 277(5) of the Act.

37. I note similar question regarding the timing and the point of disclosure of the names of the nominees was discussed in the earlier case. Tuiyott J. held as follows on the import of Article 47(b) and section 277 of the Act:

"Again, it is a question of timing. On a plain reading of the requirements of that sub-article, the proposal form together with all personal details and acceptance notice ought to be delivered to the Company Secretary not less than 21 days before the date of the General Meeting. There is no requirement that the said documents be delivered together with a request under the provisions

of section 277 even where the meeting sought is to conduct an election to the Board.” [Emphasis added].

38. The court further stated as follows regarding the plaintiffs’ contention that the names of the nominees ought to be disclosed in both the requisition and the notice:

“It is common ground that the special notice required by section 139(2) obligates the giver of the notice to identify, by name, both the director sought to be removed and the proposed nominee. Although, Mr. Ngatia appearing for the Plaintiffs had argued that the notice with both sets of names should have been in the requisition, this Court agrees with Mr. Bwire that the information would be in the notice convening the meeting. That in fact is really the requirement of section 139 of the Act.” [Emphasis added].

39. The above findings fortify my position that there is no deficiency in the Requisition and that the plaintiffs should have acted on the request by calling for the meeting as provided for under section 278(1) of the Act which requires the directors to consider a Requisition within 21 days from the date of the request and to hold the general meeting within 28 days thereafter. It is noteworthy that the Directors did not call for the EGM within the stipulated period thereby prompting the defendants to invoke the provisions of section 279 of the Act and call for the meeting. The said section stipulates as follows:

“(1) If, after having been required to convene a general meeting under section 277, the directors fail to do as required by section 278, the members who requested the meeting, or any of them representing more than one half of the total voting rights of all them, may convene a general meeting.

(2) If the requests received by the company included the text of a resolution intended to be moved at the meeting, the members concerned shall include in the notice convening the meeting the text of the intended resolution.

(3) The members concerned shall ensure that the meeting is convened for a date not more than three months after the date on which the directors were requested to convene a meeting.

(4) The members concerned shall convene the meeting, as nearly as practicable, in the manner in which meetings are required to be convened by directors of the company.

(5) The business that may be dealt with at the meeting includes a resolution of which notice is given in accordance with this section.

(6) The company shall reimburse the members concerned for all reasonable expenses incurred by them because the directors failed to convene a meeting as required by section 278.

(7) The company shall deduct from the remuneration payable to the directors who were in default the amount of expenses reimbursed to members under subsection (6)”.

40. I find that by convening the meeting, after the plaintiffs failed to do so within the stipulated period, the defendant acted lawfully and in compliance with the provisions of section 279 of the Act. I further find that this court, having found in the earlier case, that section 139(2) requires the information on the nominees to be contained in the Notice calling for the meeting, the plaintiffs needed to have acted with reasonable care, diligence and good faith in order to ensure the success of the company as is expected under sections 143, 145 and 146 of the Act.

41. The plaintiffs also challenged the Notice on the basis that it was not consistent with the Requisition, did not specify which nominee was to replace which Director, named six directors to be replaced by eight nominees and did not call for additional directors. The Notice published by the defendants was as follows:

TO: ALL MEMBERS & DIRECTORS OF THE KENYA HOSPITAL ASSOCIATION.

NOTICE OF EXTRA ORDINARY GENERAL MEETING OF KENYA HOSPITAL ASSOCIATION.

In accordance with Section 282(1), 285 and 287(a) of the Companies Act No. 17 of 2015, Laws of Kenya and in accordance with Article 18 of the Kenya Hospital Association Constitution and Section 278 of the Companies Act, No 17 of 2-15, Laws of Kenya, Notice is hereby issued for an Extra Ordinary General Meeting of the Kenya Hospital Association, to be held:-

Date: 27th November 2019;

Venue: The Convention Centre, Nairobi Hospital;

Time: 3.00pm

Notice is hereby given that the Agenda for the meeting shall be:

1. Resolution for reconstitution of the Board of Directors of the Kenya Hospital Association, by removal from the following persons from membership of the Board:

- a) *Dr. John Simba – Chairman;*
- b) *Mr. Coutts Otolu – Vice Chairman;*
- c) *Mr. Allan Gachukia – Director;*
- d) *Mr. Sam Ncheeri – Director;*
- e) *Mrs Margaret Muigai – Director;*
- f) *Mr. Joseph Wathoa Kigwe.*

2. Resolution for election to the Board of Directors of the Kenya Hospital Association, of the following nominated/proposed persons:

- a) *Dr. Wilfred Irungu Ndirangu;*
- b) *Hon. Dr. Chris M.N. Bichage;*
- c) *Dr. Stephen Ochiel;*
- d) *Eng, Maxwell Otieno Odongo;*
- e) *Mr. Victor Opiyo Miseda;*
- f) *Mr. Robert Shaw;*
- g) *Mr. Charles K. Wambugu;*
- h) *Amb. Charles Amira;*

This notice convening the meeting has been signed by over 50% of the members of Kenya Hospital Association who signed the petition for Regulation for the Extra Ordinary General Meeting delivered to the Company Secretary of the Kenya Hospital Association on 30th September 2019.

The notice with full names and details of Members Requisitionists has been deposited with the Company Secretary of the Kenya Hospital Association for transmission as per Articles 71 of the Constitution of the Kenya Hospital Association and Section 282(1) of the Companies Act, No 17 of 2015, Laws of Kenya.

Issued for and under instructions of the Member Requisitionists, through retained counsel:

Echessa & Bwire Advocates LLP

17th floor, 4th Avenue Towers,

P.O. BOX 50307-00100, NAIROBI

42. After considering the contents of both the Requisition and the Notice, I am unable to find that there is any inconsistency in the two documents. Of critical importance is that the documents relate to the defendants' request for the meeting and its general purpose which is the removal of the directors. I note that in the Notice for the EGM, the defendants have disclosed the particulars of the nominees for the position directors.

43. I find that the plaintiffs did not establish that there is a mandatory statutory requirement obligating the defendants to identify, in the Notice, which nominee is to replace which director or that the nominees must be the exact same number as the directors sought to be replaced. In any event, I note that the respondents explained that as at the time that they issued the Requisition, the 1st plaintiff had 8 directors 3 of whom have since resigned hence explaining the reason for listing 8 nominees. I find the defendants' explanation to be reasonable and plausible.

44. In their supplementary affidavits, the plaintiffs 3 members complained of lack of knowledge of the reasons for the removal of the Directors. A plain reading of the Notice shows that it advised the members of the 1st plaintiff on where to get the Requisition which contains the reasons for the removal of the Directors. For this reason, I am not persuaded by the averments made in the said supplementary affidavits to the effect that the said members were, as at the date of swearing the said affidavits, not aware of the reasons for the removal of the Directors.

45. My take is that if the said 3 members did not make any efforts to obtain copies of the Requisition from the 1st plaintiff's Company Secretary, then they only have themselves to blame for this lapse. I further find that there is no mandatory statutory requirement that the

Requisitionists effect personal service of the Notice every single member of the Company so as to justify the claim that they have not been informed of the reasons for the Directors' removal.

46. I find that the Notice satisfies the provisions of the law as besides providing the names of the directors to be elected, it also gives the names of the directors to be removed. The Notice also discloses the information regarding the venue, time of the meeting and complies with Article 19 of the 1st plaintiff's Articles regarding the 21 days period from the date of issue to the date of holding the meeting. In sum, I am not satisfied that the reasons advanced by the plaintiffs for challenging the notice are plausible. I do not find that there are any statutory breaches in the manner in which the Requisition and the notice were issued.

47. Having regard to my findings on the twin issues of the validity of the Requisition and the notice I am not satisfied that the plaintiffs have made out a prima facie to warrant the granting of the orders of injunction sought in the instant application.

48. My findings on the issue of prima facie case would have been sufficient to determine this application considering the holding in the *Nguruman Limited* case (supra) that if prima facie case is not established, then irreparable injury and balance of convenience need no consideration. I am however still minded, considering the history of this case, to consider the remaining conditions to be fulfilled by an applicant for orders of injunction.

Irreparable loss

49. Irreparable loss refers to the loss to be suffered by the applicant in the event that the order of injunction is not granted. In order to demonstrate irreparable harm, the applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. Courts have taken the position that the term 'irreparable harm' does not have universal definition and that its meaning takes shape in the context of each particular case.

50. *Halsbury's Laws of England (Third Edition, Volume 21)* states as follows on irreparable loss:-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

51. The applicants' case was that the meeting should not be allowed to take place because it will cause a serious disruption to the 1st plaintiff's management and operations. At the hearing of the application, counsel for the plaintiffs submitted that a General Meeting having been conducted in June 2019 and directors of the 1st plaintiff elected, any member disgruntled with such an election should wait until the next election cycle as it would not be in the interest of the company to shift the board members from time to time. My finding is that the plaintiffs' argument does not present the true position regarding the removal of directors before the expiry of their term as Article 18 of the 1st Plaintiff's Articles of Association anticipates such an eventuality. The said Article stipulates as follows:

“The Board of Management may, whenever they think fit, convene an extraordinary meeting, and they shall, on the requisition of the members of the Association representing not less than one-tenth of the total voting rights of all the members having at the date of the requisition a right to vote at general meetings of the Association, forthwith proceed to convene an extraordinary meeting of the Association and, in the case of such requisition, the provisions of Section 132 of the Act shall apply”.

52. I further find that the parties herein are governed by their Articles of Association's which allows for the shift in the board's membership before the expiry of their term. This court cannot hold that such a shift would occasion irreparable loss as long as it is carried out within the confines of the applicable laws. The court is at a loss as to how the holding a meeting, whose agenda has already been disclosed to the plaintiffs herein and the 1st plaintiffs members through the Notice, can cause irreparable loss to the 1st plaintiff.

53. It is my finding that the plaintiffs will still be able to seek legal redress over any lapse or grievance that may arise from such a meeting which is really what the plaintiffs successfully did in the earlier case. I further find that the holding of a meeting is a statutory event contemplated under both the Act and the 1st plaintiff's constitution.

54. In the present case, I have already found that both the Requisition and the Notice for the meeting met both the statutory requirements and the provisions of the 1st plaintiff's constitution. Section 141 of the Act grants the Directors sought to be removed an opportunity to defend themselves and to make presentations at the meeting while Article 24 of the 1st plaintiff's constitution provides that the Directors may still take charge of the meeting and guide it. I therefore find that loss, if any, that may result from the holding of the meeting cannot by any stretch of imagination be termed 'irreparable'.

Balance of convenience

55. I find that in the circumstances of this case, the balance of convenience tilts in favour of allowing the meeting schedule for 27th November 2019 to take place. It was common ground that the members of the 1st plaintiff have since February 2019, when the initial Requisition for a meeting was made, been clamoring for such a meeting. The first request for a meeting came to a cropper following the ruling in the earlier case stopping the newly elected directors from assuming office and this the second time in a span of about 5 months, that

another Requisition and Notice has been made for the removal of the directors.

56. This court is of the humble view that in the circumstances of this case, stopping the 1st plaintiffs' members from going on with the meeting will be tantamount to denying the said members their rights to resolve their grievances and thus, intermeddling with the affairs of the company. Needless to say, courts have taken the position that they should not interfere with the running of the affairs of the company. This was the position taken in *Paolo Murri v Gian Battista Murri & Another* [200] eKLR wherein it was held:

“...court does not interfere with the internal management of the company acting within its powers.”

57. To my mind, the company's General Meeting slated for 27th November 2019 will present an opportunity to all the 1st plaintiffs members, the directors/plaintiffs herein included, to make democratic decisions on critical issues affecting their company. It is therefore find that granting the plaintiffs' prayer for injunction to stop the meeting will be tantamount to an interference with the members' right to discuss the matters of their company.

58. For the reasons that I have stated in this ruling, I find that the application dated 7th November 2019 does not meet the threshold set for the granting of orders of injunction and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 25th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Gachuhi for the plaintiffs.

Hon. Orenge Senior Counsel & Bwire for the respondents

Court Assistant – Sylvia