



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 94 OF 2014

IN THE MATTER OF COMPANIES ACT (CHAPTER 486 LAWS OF KENYA)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE BY LARI NYAKINYUA (SOLAI FARM) LIMITED JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION.

HANNAH MWIHAKI MUTURI.....1ST
APPLICANT

ZACHARIA K. KAHARI MUTHAMBURE.....2ND
APPLICANT

GEORGE KAMAU MACHARIA.....3RD
APPLICANT

FRANCIS JOHN WANYANGE MWANGI.....4TH
APPLICANT

DAVID MAINA GACHANJA.....5TH
APPLICANT

MARY WANJIKU GICHANGA.....6TH
APPLICANT

LYDIAH WANGARI MWANGI.....7TH
APPLICANT

LARI NYAKINYUA (SOLAI FARM) LIMITED.....8TH
APPLICANT

VERSUS

THE REGISTRAR OF COMPANIES
.....RESPONDENT

COLLETA MAWEU(ASS. REGISTRAR

RULING

1. This ruling was to be delivered much earlier in April 2017 but the court was engaged in extremely urgent cases related to pre-election disputes coupled with my proceeding on leave in June and the recess that followed hence the delay in the delivery of the judgment.
2. The ruling determines three applications dated 18th May 2016; 17th July 2014 and 24th June 2014 which were ordered to be heard together vide court order of 19th December 2016. The three applications were canvassed orally together on 27th February 2017.
3. The applications dated 18th May 2016 and 17th July 2014 were filed by the applicants represented by Mr Achoki advocate whereas the application dated 24th June 2014 was filed by the respondent represented by Mr Njuguna advocate.
4. The parties also filed written submissions which they wholly adopted in their oral submissions.
5. In the notice of motion dated 24th June 2014 and filed in court on 25th June 2014, the applicants seek from the court orders:
 - a. that the persons elected as directors of the 8th applicant, Lari Nyakinyua (Solai Farm) Ltd on 16th May 2014 namely: Fredrick Kahia Thugi; Joseph Kamau Ngugi; Peter Muchume Gachuki; Rose Njeri Munoru; Teresia Mukami Thairu; Fredrick Njuguna Gichuki and George Macharia Kariuki by themselves, their agents or persons claiming under them or through them be restrained from taking over the office running and or management of the affairs of the 8th applicant company until this application is heard and determined; b. That the elections held on 16th May 2014 and all subsequent actions purporting to be pursuant to the order issued on 13th March 2014 be declared null and void;
 - b. That the interim Board of Directors elected on 5th December 2013 be allowed to continue in office pending proper elections;
 - c. That the orders made herein on 13th March 2014 be reviewed to the extent that they appear to give the Registrar of Companies a carta blanche to determine who are eligible to participate in the Annual General Meeting of the 8th applicant regardless of their membership statue therein;
 - d. That the court do give proper directions regarding the conduct of the Annual General Meeting of 8th applicant having regard to its membership thereof and the fact that it is and remains a private company limited by shares as opposed to a public company.
6. The application was predicated on grounds that:
 - a. The respondent in purported pursuance of orders of 13th March 2014 has allowed persons who are not members of the 8th applicant to participate in its Annual General Meeting and election of Directors'
 - b. That the list of the 774 members who participated at the Annual General Meeting are not members of the 8th applicant company and consequently any persons elected by them were ineligible for election and as such strangers to the 8th applicant.

c. The elections held on 16th May 2014 are invalid and they will legitimize the illegal alienation, wasting and squandering of the assets of the 8th applicant.

7. The motion was supported by the affidavit sworn on 24th June 2014 by Francis John Wanyange Mwangi deposing that the 8th applicant is a private company and that its initial directors all died. That on 5th December 2013 the company appointed the 2nd -7th applicants as an interim Board of Directors and Form 203A was completed and filed with the respondent's Registrar's office. That pursuant to the order of 13th March 2014 the respondent Registrar of Companies purported to conduct elections for the 8th applicant on 16th May, 2014 in an Annual General Meeting. That the list of persons who participated in the elections is 774 whereas there was only a team of 7th members of the Board of Directors and 4 shareholders eligible to participate. That the persons elected were also not eligible to vote or to be voted as neither of them is a member. That therefore the Annual General Meeting of 16th May 2014 is null and void and so is any business conducted on that day.

8. That the purported directors has moved in to take over possession of the company assets and management of its affairs to the detriment of its proper members hence this application; and that unless the court intervenes the applicants would suffer irreparable loss and damage.

9. On 22nd July 2014, the 3rd respondent filed an application dated 17th July 2016 seeking to:

a. restrain the applicants from purporting to act as officials of Lari Nyakinyua (Solai Farm) Ltd;

b. that the applicants be orders to hand over documents in their possess to newly elected officials;

10. That application was ordered to be heard jointly with the one dated 24th June 2014 above and by consent of parties who were allowed to file affidavits and supplement any affidavits and written submissions exchanged.

11. However, before the above two applications were heard and or determined, the application dated 18th May 2015 filed on the same day was filed by the main applicants herein seeking to compel the respondents to surrender title deed Nos IR 109 20/15157/1 and 1095/1 in the name of the 2nd applicant in their possession, to the 2nd applicant or its directors or that in the alternative the said title documents be presumed lost and the Lands Registrar be ordered to issue fresh title documents to the 2nd applicant.

12. In support of the application dated 17th July 2014 is an affidavit sworn by Fredrick Kahia Thugi deposing that after the parties freely consented to the orders that the elections be held and an application to stay elections having been withdrawn, which elections were held on 16th May 2014, the new officer bearers on several occasions had requested the former office bearers to hand over essential company documents in their possession to enable the new office bearers run the affairs of the applicant company which request had been refused, rejected and or ignored. That the documents include the company seal, certificate of registration, title deeds of land, register of members and other documents in their possession. That the company 8th applicant had a membership of over 3,000. That the applicants had been illegally in office and that no transactions could take place without the documents in issue.

13. In a rejoinder further affidavit sworn by Francis John Wanyange Mwangi on 10th September 2014 it was deposed that the private company could not have more than 50 members let alone a purported 3000 members hence the illegality of those who participated in elections with the complicity of officers from the Registrar of Companies hence the elections of 16th May 2014 should be nullified.

14. On the application dated 17th July 2014 the respondents filed a preliminary objection on 12th September 2014 contending that; the 8th respondent had not and could not carry out business including changing of advocates as the purported Board of Directors is challenged by the application dated 24th June 2014 which had not been determined; The purported Board of Directors for the 8th applicant have not and cannot make any resolution and if they did, the same would be of no legal effect; That the application is an abuse of court process as it was filed after service of the earlier application seeking nullification of elections conducted on 16th May 2014; that the applicants have no locus standi in the application dated 17th June 2014 hence the application is invalid from its inception.

15. On 21st January 2016 a further affidavit was filed sworn by Francis Wanyange Mwangi emphasizing that they were appointed as interim Board of Directors by Hannah Mwihaki Muturi when she was alive and Lari Nyakinyua Company (K) Ltd who is the majority shareholder of the 8th applicant as shown by returns filed on 31st December 2003 hence they were appointed in accordance with the Memorandum and Articles of Association of the applicant, as a caretaker Board of Directors.

16. On 18th May 2016 the applicants filed another application dated the same day seeking for the same orders as those sought in the application dated 17th July 2014 for release of title deed documents in the possession of the respondents to allow the handing over to the over 6,000 members of their titles by way of transfer.

17. In the replying affidavit sworn by Macharia Kahari Muthambure on 21st June 2015, it is deposed that the 1st applicant's directorship in the 2nd applicant is what was challenged in the application dated 24th June 2016 which was still pending and that if the applicants were to succeed in having the respondents vacate office then the latter would surrender the documents as may be in their possession such as title documents hence the application dated 18th May 2016 is a duplication of the previous one and is merely intended to cloud the issues.

18. That the 2nd applicant is one of the applicants in the application aforesaid hence there is no way it can be represented by the firm of Achoki & Company Advocates; That there was no resolution made by the 2nd applicant to be represented by Achoki & Company Advocates or to present the aforesaid applications. That this dispute will only be resolved when the Honourable court deals with the fact that Lari Nyakinyua (Solai Farm) Ltd and Lari Nyakinyua (K) Ltd are distinct legal entities and sort out the issues of the directorship of both companies hence the application dated 18th May 2016 should be dismissed.

19. Simultaneous with the filing of replying affidavit to the application dated 18th May 2016 the respondents also filed notice of preliminary objection dated 21st June 2016 contending that the application as presented is fatally defective; that the application as presented is subjudice; that the 2nd applicant is not represented by Achoki & Company Advocates and the issue of its representation is yet to be determined. That the 2nd applicant has not authorized the making of this application; The two previous applications of 24th June 2014 and 17th July 2014 which have a bearing on who among the parties herein are the proper directors of the 2nd applicant are yet to be determined despite the parties having filed their respective submissions in 2015; that to proceed with this latest application is an abuse of the court process and a strategy intended to cloud the issues and defeat the course of justice and that the latest application is mischievous and ought not to be entertained in light of the pending applications as alluded to herein above.

20. On 24th February 2017 the applicants in the applications dated 17th July 2014 and 18th May 2016 filed another supporting affidavit sworn by Peter Gachie the Vice Chairman and director of the 2nd applicant. He deposes that elections of the 2nd applicant company were conducted by the consent

of all parties recorded by the court and adopted as an order of the court on 13th March 2014.

21. That pursuant to the said orders the 2nd applicant company conducted elections and the 1st applicant and other directors were elected as directors and were registered by the Registrar of Companies as per the annexed letter of 19th May 2014 .

22. That on 24th April 2003 the 2nd applicant company entered into an agreement with Ruyobei Farm Ltd whereby the 2nd applicant exchanged Solai Farm with Oljorai Farm which was owned by Ruyobei Farm, which agreement was confirmed by the District Commissioner, Gilgil District vide his letter of 6th August 2012. That albeit the agreement was executed and Ruyobei Farm Ltd took possession of the Solai Farm, the 2nd applicant has never taken possession of Oljorai Farm due to long standing leadership wrangles.

23. That the directors of Ruyobei Farm and the 2nd applicant have agreed to transfer the parcels for the issuance of titles but the current directors are unable to transfer the three parcels exchanged with Ruyobei Farm Ltd because the respondents have refused to surrender title deeds No. LR 10920/1,5157/1 and 1095/1 which are still in their possession hence the court should order the surrender thereof to facilitate transfers into the name of the 2nd applicant; and that in the alternative, the court do direct the Registrar of Lands to issue the title deed numbers above to the 2nd applicant for purposes of transfer the same in the respective names of two companies.

24. As earlier indicated, both parties advocates filed their respective submissions reiterating the averments and or depositions in their respective applications/affidavits and which submissions were highlighted on 27th February 2017.

25. The applicants in the application dated 24th June 2014 filed and or relied on the submissions filed on 14th December 2016 adding that for review of a consent order, the case of **Kimita & Another V Wakibiru [1986] KLR 578** sets out grounds for review of consent orders. They maintained that the application was properly brought within the rules for review because enforcement of the order caused them an injustice hence the court should review the orders it made on 13th May 2014.

26. According to the said applicants, the court directed the 8th applicant company to hold elections but that in carrying out the said elections, the respondents acted unlawfully in that the 8th applicant being a private company limited by shares could not have had 774 shareholders as its membership does not exceed 50. That in this case, over 700 people participated in the elections and that those people were strangers hence the applicants refused to participate in those elections.

27. That since the applicants had initially been appointed an interim Board of Directors in a meeting of 5th December 2013 the idea of non filing of returns on their part is a mere statement from the bar.

28. That as the elections of 16th May 2014 were illegal and that therefore the letter from the Registrar of Companies confirming registered officials is invalid since strangers cannot direct affairs of a private company.

29. That the advocates filed a notice of change of advocates on behalf of the 8th applicant in place of the former advocate Mwangi and Mwangi Associates but that Achoki & Company Advocates had no authority to file applications on behalf of the 2nd applicant hence the latter's application should be dismissed.

30. In response, Mr Achoki relied on the filed submissions contending that the court has no jurisdiction to entertain the application dated 26th June 2014 since the order which was being sought to be reviewed was out of a consent order entered by all parties to the dispute and the elections

complained of arose from the consent order.

31. That the Articles and Memorandum of Association does not show the applicants as members of the company and that there are no returns filed with the Registrar.

32. That there was no fraud or mistake hence the consent cannot be challenged and that the application for review is intended to delay the resolution of the dispute and should be dismissed.

33. It was submitted that if elections were not properly conducted the remedy is not in this court which granted Judicial Review orders but is found in filing a civil suit in the Commercial Division since there is no allegations of an error on the face of the record.

34. Further, that even if the elections were conducted contrary to the law, the remedy is not here. That in **Kimita & Another V Wakibiru** (supra) the dispute was over survey and acreage of land hence there is no connection with this matter.

35. It was submitted that elections were held in accordance with the orders of the court and that the applicants stayed away hence they cannot blame the respondents.

36. That registered officials of the company should have possession of the company and hence it is illegal and irregular for the former officials to hold onto the documents of the company hence the prayer for surrender of the same to the new officials. That Achoki & Company were appointed by new officials and hence the former officials have no power to appoint an advocate as they were not in office. Counsel urged the court to dismiss the applicant's application and allow the motions of 18th May 2016 and 17th July 2014 with costs because the applicants had come to court severally.

DETERMINATION

37. I have considered all the foregoing rival positions of the parties to the three applications dated 24th June 2014; 17th July 2014 and 18th May 2016 and the main issue for determination is whether the applications as presented have any substance and if so what orders should this court make.

38. Before delving into the merits and demerits of the respective applications, it is important to provide some brief history of this seemingly unending convoluted dispute.

39. The original issues were presented to this court on 11th March 2014 by way of chamber summons dated 11th March 2014 seeking for leave to institute Judicial Review orders of certiorari to bring and quash the decisions of the Registrar of Companies made on 3rd February 2014 calling for Annual General Meeting of the 8th applicant Lari Nyakinyua (Solai Farm) Ltd and an order of prohibition prohibiting the said Registrar of Companies from continuing, hearing and conducting Annual General Meeting of the 8th applicant Lari Nyakinyua (Solai Farm) Ltd pursuant to the notice issued by it.

40. The learned Judge (Korir) J certified the matter as urgent and directed the applicants to serve the respondents for interpartes consideration.

41. The applicants complied and the respondents and interested parties filed replying affidavits challenging the application for leave.

42. However, on 13th March 2014 the parties unanimously entered into a consent which was adopted as the order of the court to the effect that:

1. The 8th applicants Annual General Meeting scheduled for 14th March 2014 be and is hereby stood over to the 16th May 2014.

2. That the 8th applicant's Annual General Meeting shall be held at the Traditional Venue of the company at Kimende.
3. That the Registrar of Companies to convene and conduct the Annual General Meeting of the 8th applicant's company.
4. That costs of conducting the meeting to be met by the 8th applicant.
5. That there shall be no orders as to costs.

43. The elections were held on 16th May 2014 as scheduled by the consent of the parties.

44. It should be noted that no substantive notice of motion was ever filed in this matter for the purposes of Judicial Review proceedings.

45. In other words, the consent order as recorded by the parties allowing for elections which were initially being sought to be stopped, was meant to resolve the dispute and this not being a civil suit, it was hoped that after elections, parties would be satisfied with the outcome; or whoever was dissatisfied thereof would take an appropriate route to remedy the situation.

46. In the instant case, it clearly appears that it is the elections of 16th March 2014 which have given rise to this never ending dispute as there have been, subsequent to the consent order of 13th March 2014, applications counter application by the varying parties.

47. The record bears the minutes of 16th March 2014 at 10.00a.m. for the 8th applicant Lari Nyakinyua (Solai Farm) Annual General Meeting presided over by the representatives of the Registrar of Companies Mr Cyrus Ngatia, Colleta Maweu, Joseph Mwangi and Felis Mutethia. Agenda No 5 of the said minutes is election of directors.

48. After elections, the minutes show that the following persons were elected as directors:

1. Fredrick Kahia Thugi - Chairman
2. Peter Muchume Gachie- Vice Chairman
3. Joseph Kamau - Secretary
4. Veronica Wanjiru Chege – Treasurer
5. Rose Njeri Munoru – Trustee.

49. The minutes show that all the 774 members voted for the said directors.

50. On 19th May 2014 the Registrar of Companies received the Annual Returns and form 203A containing the names of directors of the 8th applicant company and issued the CR 12C 18934 dated the same day to the directors of the 8th applicant company.

51. On 16th June 2014 vide a notice of motion dated the same day, the Chairman of the company (Fredrick Kahia Thugi and the 8th applicant company filed an application against Nyambura Muturi and Ngige Muturi seeking to stop them from removing the body of Hannah Mwiwaki Muturi(their mother) from Uplands Funeral Home for burial until the company documents which were said to be in her custody are released to the company. That application was withdrawn.

52. On 25th June 2014 an application was filed by Francis John Wanyange Mwagi the 4th applicant

seeking to restrain the persons purportedly elected as directors of the 8th applicant on 16th May 2014 from taking over the running or managing the affairs of the 8th applicant office; nullification of those elections and seeking that the interim Board of Directors elected on 5th December 2013 be allowed to continue in office pending proper election. It is the same application dated 24th June 2014 which is also subject of this ruling that also sought that the consent orders of 13th March 2014 be reviewed because they gave the Registrar of Companies a carta blanche right to determine who was an eligible member to participate in the Annual General Meeting of the applicant, regardless of their membership status.

53. According to the applicant(s) in that application of 24th June 2014 the Registrar of Companies allowed strangers who were non members of the 8th applicant private company to participate in elections pursuant to the orders of 13th March 2014 .

54. Soon after the application dated 24th June 2014 was filed and served upon the rest of the parties, on 22nd July 2014, the firm of Achoki & Company Advocates on behalf of the 1st applicant Fredrick Kahia Thugi filed an application dated 17th July 2014 which is also subject of this ruling seeking to restrain the respondents Macharia Kahari Muthambure, George K. Kamau Macharia; Francis John Wanyange Mwangi, David Maina Gachanja, Lydia Wangari Mwangi and Mary Wanjiru Gachanja from purporting to act as officials of Lari Nyakinyua (Solai Farm) Ltd and that the said respondents be directed to hand over to the newly elected officials of Lari Nyakinyua(Solai Farm) Ltd over all documents in their possession to newly elected officials.

55. Comprising the two motions, it is clear that the 1st application was seeking to nullify the elections held on 16th May 2014 whereas the 2nd application was seeking to assert authority following elections of 16th May 2014 because the elected officials were unable to take charge without a handing over to them of office and documents

56. However, those who were opposed to the outcome of elections wanted to have the consent order that allowed elections to be set aside and to restrain the newly elected officials from taking office.

57. By the time the challenge to the elections was being made on 19th May 2014 the Registrar of Companies had already received the Returns and made the changes to the Register as appropriate.

58. The applicants in the first application have not claimed that there was an error apparent on record or mistake or fraud or misrepresentation in the consent order of 13th May 2014. They claim that the consent order which paved way for the elections of 16th May 2014 caused them hardship because it gave to the Registrar of Companies a carta blanche right to decide who was eligible to vote and allowed non share holders of the 8th applicant company, which is a private and not a public company, to participate at the Annual General Meeting and vote for the directors which was illegal hence the directors who were elected were illegally in office and therefore they should not be allowed to run the affairs of the 8th applicant company.

59. With utmost respect to the applicant in the application dated 25th June 2014, this court has no power to review a consent order on account that its implementation was riddled with illegalities or irregularities. There are no Judicial Review orders on record. The consent order was issued on the basis of the chamber summons for leave to institute Judicial Review proceedings for certiorari and prohibition. The decision which was to be prohibited and or quashed was by consent allowed to take effect which is, the holding of elections on 16th May 2014 as rescheduled by consent of the parties.

60. That being the case, the court was left with no other proceedings or cause of action, if the parties were dissatisfied with the elections in the manner in which they were conducted or supervised, it was upon the dissatisfied party to challenge the outcome or process either vide Judicial Review

proceedings or by way of a civil suit.

61. None of the parties did so instead, the applicants returned to this court to review consent orders which allowed the elections to be held. Elections having taken place, the consent order was effectively spent and or fully enforced and therefore there was left nothing capable of being challenged in terms of that consent. It is therefore a misconception on the part of the applicant in the motion dated 25th June 2014 to try to recall the consent order which had fully been implemented.

62. On that ground alone, I find the application dated 25th June 2014 devoid of any merit and substance. I proceed to dismiss it.

63. On the subsequent motions dated 17th July 2014 and 18th May 2016, which seek to restrain the rival parties from purporting to act as officials of the 8th applicant company and to order the said rival parties to hand over the documents in their possession to the newly elected officials (pursuant to elections held on 16th May 2014), there are evidential matters of- which documents and who in particular is holding those documents of the company, which are required to be handed over to the applicants in the subsequent applications.

64. This court exercises Judicial Review jurisdiction and not civil jurisdiction. It is not for this court to superintend over the affairs of a private company where warring factions are claiming the right to possess documents or to occupy or manage the affairs of the private company. That falls within the realm of a court exercising commercial or civil jurisdiction.

65. For those reasons, I find that the jurisdiction of this court was wrongly invoked in all the three applications dated 24th June 2014, 17th July 2014 and 18th May 2016.

66. Once the parties agreed to have elections which were being challenged before this court, this court became functus officio upon implementation of the consent order of 13th May 2014 which allowed the Registrar of Companies to preside over the elections.

67. As there were no Judicial Review orders or proceedings upon which the parties could seek enforcement of refusal to hand over affairs of the private company to the newly elected officials, the aggrieved parties could only challenge the actions of their rivals in a different judicial forum and not in these proceedings.

68. It is therefore unfortunate that this file has remained open since 2014 with parties taking the court round the circles and failing to appreciate the scope of the jurisdiction of the Judicial Review court and seeking to convert the proceedings which lapsed with the consent order of 13th May 2014 into civil or commercial dispute for re adjudication.

69. That is not a practice which is permissible. The myriad of applications in his file have only wasted precious judicial time and resources and it is for that reason that I find all the three application not warranted or merited. They are all dismissed with each party bearing their own costs for misunderstanding the legal process.

70. As there is nothing left on record for adjudication, this file is forthwith ordered closed, for archiving purposes.

Dated, signed and delivered in open court at Nairobi this 16th day of October, 2017.

R.E. ABURILI

JUDGE