



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 512 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**EX-PARTE**

**AHMED CHEGE GIKERA**

**JUDGEMENT**

1. On 22<sup>nd</sup> December, 2015 the ex-parte Applicant, Ahmed Chege Gikera approached this Court and obtained leave to commence these judicial review proceedings. The grant of leave was to operate as stay of the registration or recognition by the 1<sup>st</sup> Respondent, the Registrar of Companies (“the Registrar”) of any officials elected in the Annual General Meeting of the 2<sup>nd</sup> Respondent, Githunguri Ranching Co. Ltd (“the company”) held on 17<sup>th</sup> December, 2015.
2. Subsequently the Applicant filed the notice of motion application dated 26<sup>th</sup> January, 2016 seeking an order of certiorari to remove to this Court and quash the proceedings of the meeting held on 17<sup>th</sup> December, 2015 at Spinners Boys High School relating to the election of the directors of the company. The Applicant also prays for costs of the proceedings.
3. From the statutory statement and the verifying affidavit of the Applicant, which were filed together with the application for leave, the Applicant’s case is that in an extraordinary meeting of the company held on 16<sup>th</sup> April, 2015 at Kwihota Primary School a resolution was made to appoint a caretaker committee. The returns were filed with the Registrar on 19<sup>th</sup> August, 2014. I note that the returns for a meeting allegedly held in 2015 could not have been filed in 2014. I have however reproduced the dates as found in the Applicant’s verifying affidavit.
4. It is the Applicant’s case that he later filed Miscellaneous Application No. 7 of 2015 at Kerugoya High Court and on 13<sup>th</sup> February, 2015 obtained orders directing all former directors to cease transacting any business for and/or on behalf of the company and further to cease altering the documents of the company.
5. The Applicant avers that on 1<sup>st</sup> April, 2015, a shareholder sued the caretaker committee demanding elections and on 23<sup>rd</sup> May, 2015 elections were held as ordered by Hon. Onsarigo in Thika CM ELC No. 30 of 2015.

6. It is the Applicant's case that on 23<sup>rd</sup> July, 2015 Hon. D.N. Ireri issued further orders in Thika CM ELC No. 30 of 2015 which suit had already been withdrawn. It is the Applicant's averment that Joseph Kamunya who was the plaintiff in that suit filed Nairobi H.C. JR No. 245 of 2015 and obtained leave to quash the said decision of Hon. D. N. Ireri.

7. It is the Applicant's case that on 20<sup>th</sup> August, 2015 the Registrar wrote to all the parties asking them to await the final determination of Thika CM ELC No. 30 of 2015.

8. It is the Applicant's case that as JR No. 245 of 2015 was awaiting hearing and determination, one John Maina Mburu in cahoots with the Registrar convened an annual general meeting on 17<sup>th</sup> November, 2015 in which the group led by John Maina Mburu was elected. It is the Applicant's case that the Registrar's officer by the name Doris Githu had declared the stay order in JR No. 245 of 2015 fake and threatened to register the officials elected on 17<sup>th</sup> December, 2015. Again the conflicting dates on which the annual general meeting is said to have been held is as reflected in the verifying affidavit of the Applicant.

9. From the statutory statement it is clear that the only ground upon which the Applicant seeks orders is that **"the action and conduct of John Maina Mburu and the intended action of the agent of the respondent is clearly, expressly and/or impliedly in contempt of this honourable court and indeed the same are subjudice."**

10. The Registrar opposed the application through grounds of opposition dated 8<sup>th</sup> February, 2016 namely:

**"1. THAT the Application is frivolous, vexatious and an abuse of court process.**

**2. THAT the applicant has no *Locus Standi* as he is neither a shareholder nor a director of Githunguri Constituency Ranching Company Limited.**

**3. THAT the application is made in bad faith and is grounded on non-disclosure of material facts, case in point Nairobi Milimani ELC Misc. Application No. 12 of 2014, Henry Wainaina Kihoro & 2 others vs John Maina Mburu & Board of Directors of Githunguri Constituency Ranching. Hon. Justice Mutungi in his order dated 10<sup>th</sup> November 2014 ordered the defendants (not the applicants herein) as directors of the Company:**

- **To arrange and have the annual general meeting of the company within 90 days.**
- **The office of the Registrar of Companies to supervise the meeting and to be the returning officers of the meeting.**
- **The representative of the Registrar General will in consultation with the respondents certify the shareholders register to be used during the annual general meeting.**

**4. THAT the application is an abuse of the principles of Judicial Review and is meant to ground the operations of a registered Limited Liability Company which has legally elected directors.**

**5. THAT the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any Judicial Review determination."**

11. The 1<sup>st</sup> Respondent also opposed the application through the replying affidavit of Alice Mwendwa, a Senior Assistant Registrar of Companies. Through the said affidavit, the 1<sup>st</sup> Respondent avers that it is the regulator of companies under the Companies Act, 2015.

12. The 1<sup>st</sup> Respondent states that Githunguri Constituency Ranching Company Limited is a land buying company whose main objective was to purchase parcels of land and subdivide the same among its shareholders. It is the Registrar's averment that the company has not convened annual general meetings for the last four years due to leadership wrangles and various court matters.

13. It is the Registrar's case that the Applicant has no *locus standi* to institute these proceedings as he is neither a shareholder as per the shareholders register dated 12<sup>th</sup> January, 2015 nor a director.
14. It is the Registrar's case that on 10<sup>th</sup> November, 2014 Hon. Justice Mutungi in Nairobi **Milimani HCC ELC Misc. Application No. 12 of 2014 Henry Wainaina Kihoro & 2 others v John Maina Mburu & Board of Directors of Githunguri Constituency Ranching** ordered the board of directors to arrange and have an annual general meeting within 90 days. The meeting was to be supervised by the 1<sup>st</sup> Respondent who was to certify the shareholders register in consultation with the respondents.
15. The Registrar avers that acting on the said order a letter was written to the board of directors of the company on 13<sup>th</sup> January, 2015 calling for a proper register of the members.
16. It is the Registrar's case that the Applicant herein went and filed **HCC Misc. Application No. 7 of 2015 Ahmed Chege v John Maina & 6 others** at Kerugoya High Court but on 6<sup>th</sup> March, 2015 the Court directed the transfer of the matter to Nairobi for consolidation with ELC No. 12 of 2014.
17. It is the 1<sup>st</sup> Respondent's case that it was then that the Applicant herein moved to Thika Magistrate's Court and filed CMC ELC No. 30 of 2014.
18. It is further the 1<sup>st</sup> Respondent's case that the Applicant forged a list of directors purporting to have originated from its office and as a result the Applicant has been charged in Thika CM Criminal Case No. 403 of 2015 R v Ahmed Chege. It is also the 1<sup>st</sup> Respondent's case that the Applicant has also been charged in Milimani CMC Criminal Case No. 1577 of 2014 for giving false information that the directors of the company had misappropriated Kshs.360 million which had allegedly been given by the World Bank for the construction of a sewerage system in Ruiru.
19. The Registrar avers that on 11<sup>th</sup> November, 2015 it wrote to the directors of the company advising them to convene an annual general meeting and the company issued a notice accordingly. Subsequently an annual general meeting, which was attended by about 550 shareholders, was held on 17<sup>th</sup> December, 2015. During the meeting, directors were elected. The Registrar discloses that on 21<sup>st</sup> December, 2015 the elected directors were confirmed.
20. It is the Registrar's position that the meeting was conducted in accordance with the laws of meetings, was fair and transparent.
21. The company opposed the application through a replying affidavit sworn by John Maina Mburu on 16<sup>th</sup> February, 2016. The deponent went to great length to highlight the history behind the multiplicity of suits touching on the affairs of the company.
22. Mr. Maina avers that in a general meeting of the company held on 12<sup>th</sup> September, 2009, he was elected to the board of the company which in turn elected him as the chairman. Since then, the company has held annual general meetings, filed all returns and strictly adhered to the requirements of the laws, rules and regulations governing the operations of companies.
23. It is his averment that a few former directors attempted to stop the annual general meeting for the year 2010 and the company moved to court and obtained orders in Nairobi HCCC No. 798 of 2010 leading to the holding of the meeting.
24. It is the company's case that in the year 2012, the former directors filed Nairobi H.C.C.C. No. 153 of 2012 against the company but the same was dismissed.
25. Mr. Maina avers that prior to the planned annual general meeting of 2013 Mr. Henry Wainaina Kihoro who was a director and secretary to the board was removed by the board after it was discovered that he was secretly colluding with land brokers and disposing members' plots. The resolution of the board was

served upon the Registrar. An annual general meeting was then scheduled for 18<sup>th</sup> January, 2014.

26. It is the company's case that Mr. Kihoro moved to Court and filed Nairobi HC Misc. Application No. 12 of 2014 and obtained an interim order staying the annual general meeting. The matter was decided on 6<sup>th</sup> November, 2014 when Mutungi, J issued directions on the holding of an annual general meeting.

27. According to the company, Mr. Maina proceeded to organise for a parallel annual general meeting. The company proceeded to court and obtained orders on 8<sup>th</sup> January, 2015 staying the parallel annual meeting and the notice convening the meeting. At the same time the Judge granted leave to the company to commence contempt proceedings against Mr. Kihoro for breaching the orders of Mutungi, J.

28. It is the company's case that on 25<sup>th</sup> December, 2014 it issued a notice for an annual general meeting for 15<sup>th</sup> January, 2015.

29. The company's averment is that the Registrar later cancelled Mr. Kihoro's planned parallel annual general meeting. It was then that the Applicant herein proceeded to the High Court at Kerugoya in HC ELC No.7 of 2015 and obtained an ex-parte order from the Deputy Registrar directing the board of directors of the company not to transact any business on behalf of the company until 6<sup>th</sup> March, 2015 when the matter would come up for inter-partes hearing. When the matter came up before Olao, J on 6<sup>th</sup> March, 2015, he directed that the same be transferred to Nairobi for consolidation with HC ELC No. 12 of 2014. It is the company's case that the ex-parte orders were never extended. Kerugoya HC ELC. No. 7 of 2015 was registered in Nairobi as HC ELC No. 80 of 2015, Ahmed Chege Gikeria v John Maina Mburu and 7 others.

30. The company states that upon realising that the orders had lapsed, the Applicant herein fronted Joseph Kamunya who then filed Thika CM ELC. No. 30 of 2015 against an amorphous outfit called the caretaker committee of the company. The parties in that matter then proceeded to record a consent dated 15<sup>th</sup> May, 2015 before Onsarigo, RM as follows:

**“1. THAT the suit filed by the plaintiff/applicant be and is hereby withdrawn.**

**2. THAT the respondent herein convenes an annual general meeting for purposes of electing directors of the GITHUNGURI CONSTITUTENCY RANCHING COMPANY LIMITED WITHIN the next 30 days.**

**3. THAT shares certificates be used to identify bonafide shareholders for purposes of participating in the aforesaid meeting.**

**4. THAT the registrar of companies to supervise and be the returning officer during the conduct of the aforesaid elections.**

**5. THAT OCS Ruiru and the OCPD Kiambu shall provide security and ensure that good order is observed at the aforesaid elections.**

**6. THAT each party to bear its costs for this suit.”**

31. It is the company's case that a magistrate's court had no jurisdiction to handle the matter and further that a caretaker committee cannot convene a meeting of a company where there are elected directors in office.

32. It is further the company's case that since the matter had been marked as withdrawn, no binding orders could issue from it.

33. The company contends that the orders in Thika CM ELC No. 30 of 2015 gave rise to JR No. 245 of 2015.

34. The issue that requires the determination of this Court is whether the order sought can be granted to the Applicant in light of the material placed before this Court. It is now trite law that for judicial review orders to issue under Order 53 of the Civil Procedure Rules, 2010, there must be evidence of illegality, irrationality or procedural impropriety on the part of a public body-see council of **Council of Civil Service Union v Minister for the Civil Service [1985] AC 2** and **Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300**.

35. When the Applicant approached this Court for grant of leave, his main ground was that the annual general meeting held on 17<sup>th</sup> December, 2015 was held in defiance of court orders as there was a stay order in JR No. 245 of 2015 which was then proceeding before Odunga, J.

36. The respondents have posed a very pertinent question: if indeed there was contempt of the order of Odunga, J in JR No. 245 of 2015, why didn't the Applicant herein file an application in that case? I think the answer is that there was no defiance of the stay order issued by the learned Judge. That means the ground upon which leave was sought and granted in this case was false. There were thus no grounds for grant of leave in this matter in the first instance. There is no evidence that the Applicant herein was a party in JR No. 245 of 2015. He was also not one of the parties in Thika CM ELC No. 30 of 2015. There is no evidence that the orders in Thika CM ELC No. 30 of 2015, for whatever they were worth, had stayed the holding of elections as ordered by Mutungi, J.

37. I do not wish to make any comment as to whether valid orders could issue in Thika CM ELC No. 30 of 2015 after the same had been withdrawn. I also do not find it appropriate to state whether the magistrate's court had jurisdiction to entertain the proceedings before it. Those questions ought to have been placed before Odunga, J in JR No. 245 of 2015.

38. There is however a disturbing pattern which the members of the company must bring to a halt for their own benefit. The many cases before the courts are indeed clear evidence of how parties can abuse the court process. The main thing about these matters is a fight over the management of the affairs of the company. I think that fight was clearly resolved by Mutungi, J through the order dated 10<sup>th</sup> November, 2014 in Nairobi ELC Misc. Application No. 12 of 2014 when he gave orders directing the holding of an annual general meeting of the company. The elections were to be supervised by the Registrar. In my view, the order was complied with when the elections were held on 17<sup>th</sup> December, 2015. Any person dissatisfied with the manner in which the elections were held ought to revert back to Nairobi ELC Misc. Application No. 12 of 2014. Filing of a multiplicity of suits in an attempt to go round that order is simply a waste of the courts' time and the resources of the company.

39. Judicial review is not a technical tool but a flexible tool of justice. It cannot be used in the manner proposed by the Applicant. What the Applicant is essentially doing in this matter is to seek the aid of this court in defeating the orders issued by a court of equal jurisdiction in Nairobi ELC No. 12 of 2014. That cannot be allowed.

40. It is clear that the order of stay issued by Odunga, J in JR No. 245 of 2015 did not in any way stop the orders issued in Nairobi HC ELC No. 12 of 2014. What the Judge had stayed were orders issued on specified dates in Thika CM ELC No. 30 of 2015.

41. The elections of 17<sup>th</sup> December, 2015 were held by the persons and in the manner directed in Nairobi ELC Misc. Application No. 12 of 2014 and any issue concerning the holding of such elections could only be scrutinised in the matter in which the orders were issued. Of course any person could have faulted the process of holding the elections through judicial review proceedings. It is however noted that these proceedings do not attempt to challenge the process of those elections. They are aimed at overturning the orders dated 10<sup>th</sup> November, 2014 issued by Mutungi, J. Those orders cannot be overturned by this court and neither could they be overturned through proceedings before a subordinate court.

42. I have said that the Applicant did not establish grounds for grant of orders. However, had the Applicant demonstrated that he is deserving of the orders, I would still, not have granted any orders in the

circumstances of this case. The reason being that Applicant failed to disclose the existence of Nairobi ELC Misc. Application No. 12 of 2014. Non-disclosure of material facts is a ground for denying orders.

42. In **Brink's-Mat Ltd v Elcombe and Others [1988] 3 All ER 188** the court stated that:

**“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac* [1917] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the *Kensington Income Tax Comrs* case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing *Dalglish v Jarvie* (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289 at 295 per Browne-Wilkinson J. (iii) The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v Robinson* [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *Bank Mellat v Nikpour* [1985] FSR 87 at 92-93 per Slade LJ. (v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains ... an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty ... ': see *Bank Mellat v Nikpour* (at 91) per Donaldson LJ, citing Warrington LJ in the *Kensington Income Tax Comrs* case. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see *Bank Mellat v Nikpour* [1985] FSR 87 at 90 per Lord Denning MR.”**

43. The Applicant appears to be so conversant with the affairs of the company that it cannot be said he was not aware of the existence of Nairobi ELC Misc. Application No. 12 of 2014.

44. There was also an averment by the respondents that the Applicant herein is neither a shareholder nor director of the company. That averment has not been disputed by the Applicant. I however do not wish to say more as the issue of membership of the company will be better addressed by the Registrar.

45. For all the reasons stated above, the Applicant's application fails and the same is dismissed. There will be no orders as to costs.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of May, 2016

**W. KORIR,**

**JUDGE OF THE HIGH COURT**