



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

PETITION NO. 17 2013

ELIZAPHAN NYAKUNDI NYATUGA.....PETITIONER/RESPONDENT

VERSUS

DAVID OMBUKI MOTANYA.....1ST RESPONDENT/APPLICANT

NELSON GICHANA MABEYA.....2ND RESPONDENT/APPLICANT

CHARLES ONDARI ACHOKI.....3RD RESPONDENT/APPLICANT

MESHACK OCHENGO.....4TH RESPONDENT/APPLICANT

DR. STEVE ORINA OKERIO.....5TH RESPONDENT/APPLICANT

RULING

1. The respondents filed a Notice of Motion dated 17th November 2016 and sought the following orders:
 1. **THAT this application be certified as extremely urgent and be heard ex-parte at the first instance.**
 2. **THAT there be an extension of time to comply with orders made on 17th October, 2016 by ninety days.**
 3. **THAT costs be in the case.**
2. The application was premised on a supporting affidavit sworn by the 2nd applicant in which he stated that on 17th October 2016 this court ordered that an annual general meeting be held within sixty days but that upon going through the register of share holders, he found that one hundred and twenty five (125) members have passed away out of two hundred. he attached a copy of the list of deceased members marked as DOM1. He therefore observed that the company needed to update its register and have nominees to vote in place of the deceased members. He therefore prayed that there be an extension of time by another ninety days to upgrade the register.
3. The application was opposed by the petitioner through his replying affidavit dated 2nd December 2016 in which he stated that deaths of shareholders have been happening since the inception of the company and every time they go for elections, nominees of the deceased persons or their personal representatives have been allowed to vote during the Annual General Meeting without any difficulties and upgrading of

the register is an exercise that will not take more than three days. He thus termed the prayer for a ninety days extension as an unjustified excuse Intended to circumvent the consequences for non compliance of the court order on 17th October, 2016.

4. He further contended that the main reason why the respondents were seeking for more time is to perpetuate their stay in office and deny him (petitioner) and other share holders the power to vote. He stated that having gone through the list of alleged deceased person, and found that Jason Lori listed as Number 44 Edward Orango listed as number 49 and Gichana Maobe listed as number (66) respectively are all alive whereas they had been listed as deceased persons. Similarly, James Obobe, listed as number (70), Ongera Isanga listed as number(73), Motanya Ndigiti listed as number (76) and Joseph Makone listed as number (102) are all non members of Mogusii Farmers Company Limited.

5. When the above matter came up for hearing before me on 6th December 2016, Mr. Nyagwencha learned counsel for the respondents submitted, while relying on the affidavit of the 2nd respondent that there seems to be two registers and some names are contested. He further contended that his client needs to upgrade the register so that eligible members are not locked out when the Annual General Meeting is called. He thus prayed for an extension of time to comply with the orders of 17th October 2016.

6. Mr. Migiro for the petitioner opposed the application for extension of time while submitting that since inception of the company in 1969, deaths had occurred but elections had been held wherein deceased members are represented by nominees or representatives. He further submitted that compilation of members' list is one of the duties of directors and thus the 60 days granted by the court was sufficient. He submitted that the prayer for more days to comply with the court order was a lame excuse, only meant to circumvent the consequences of the judgement of this court.

7. After considering the above application by the respondents, the affidavit in reply sworn by the petitioner and the oral submissions made in court, I note that the main issue that presents itself for determination is:

1. Whether the respondents have presented sufficient reasons to warrant their application for more time to comply with orders made by this court dated 17th October 2016?

8. It is an undisputed fact that on 17th October 2016, this court made the following orders:

1. That the plaintiff company holds its annual general meeting in the next 60 days from today and elections of new directors be an item of agenda in that annual general meeting.

2. The petitioners shall have costs of this petition.

9. It is also undisputed that the respondents rushed to court immediately after the above judgement was read for a review of the above judgment. The said review application was dismissed summarily by Karanjah J hence the respondents being aware that the sixty day period was fast elapsing and having not prepared for the annual general meeting , have now come back before this court seeking extension of time by ninety days to hold the said annual general meeting.

10. **Section 131 of the company's Act** clearly stipulates that:

" Every company shall in each year hold a general meeting as its annual general meeting in addition to any other meetings in that year and shall specify the meeting as such in the notices calling it; and not more than fifteen months shall elapse between one annual general meeting of a company and that of the next.

Provided that so long as a company holds its first annual general meeting within eighteen months of its incorporation, it need not hold it in the year of its incorporation or in the following year."

11. The petitioner, to my mind, has already proved that the plaintiff company, Mogusii Farmers Company Limited, has not held its annual general meeting since 2009 which is a clear contravention with section 131 of the Company's Act. The respondents seek extension of time to hold the said annual general meeting arguing that they need more time to rationalise their register as some of their members in the register are already deceased. The respondents' application was opposed by the petitioner who stated that the respondents are seeking more time to continue being `directors of the company. The bottom-line is that the company needs to hold its annual general meeting without any further delay. This court is also aware that since the company has not held its annual general meeting for a period of 7years now, the need for transparency and credibility in the elections for directors of the plaintiff company cannot be underestimated. In view of the above foregoing and in the interest of the company and its share holders, I make orders as follows:

1) That the plaintiff company holds its annual general meeting in the next 30 days from today's date and elections of new directors be an item of agenda in the annual general meeting.

2) The petitioner shall have costs of this application.

Dated, signed and delivered in open court this 14th day of December, 2016

HON. W. A.OKWANY

JUDGE

In the presence of:

- Mr. Nyagwencha for the Petitioner
- Mr. Migiro for the Respondent
- Omwoyo court clerk