



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 15 OF 2012

NYANDARUA PROGRESSIVE AGENCIES & OTHERS.....PETITIONER

VERSUS

DISTRICT COMMISSIONER RONGAI & OTHERS.....RESPONDENT

JUDGEMENT

The amended petition dated 02/05/12 summons seeks orders to:

- (1) declare as illegal, the actions of the District Commissioner Rongai District (1st Respondent) and the Registrar of Companies (2nd Respondent) which warned, threatened, cautioned or otherwise advised the shareholders of Nyandarua Progressive Agencies Ltd (1st Petitioner), not to attend the Annual General Meeting (AGM) convened by the directors on 23/04/12.
- (2) Permanent injunction orders to issue restraining the Respondents from interfering or stopping the said shareholders from assembling and participating in the AGM.
- (3) A declaration that election and registration of any person as a director of the Petitioner following the AGM held on 27/04/12 is illegal and contemptuous of this court's orders.
- (4) Cancellation of all those persons registered as directors of the 1st Petitioner subsequent to the AGM held on 27/04/12.

The grounds for seeking the orders, is that the 2nd - 9th Petitioners (ie Francis E. W. Mugo, George M. Nganga, Peter M. Njoroge, Charles Momo, Michael Thiongo and Stanley Kabacia) being members of the company's Board of Directors, met and resolved that the AGM was to be held on 21/04/12. The shareholders were to be notified of the AGM through Inooro radio and written notices. They also issued printed notices of the intended AGM to the DO and the Chief, and a statutory notice was issued to the 2nd Respondent.

The Respondents are accused of interfering with the publications of the intended AGM, and the 1st Respondent cautioned, warned, threatened and advised shareholders not to attend the proposed AGM of 21/04/12. These actions are termed as unconstitutional as they interfered with the shareholders freedom of association including the right to join or participate in the activities of an association of any kind. No reasons were given for the steps taken by the Respondents.

On 12/04/12, this court issued orders authorizing and protecting the intended AGM of 21/04/2012, which orders were served on the Respondents, and upon order of this court, the AGM was held on 21/04/12 and the directors were elected.

At the end of that meeting, the chairman of the Board of Directors was served with orders obtained through CMC Misc application No. 58 of 2013, nullifying the orders issued by the court. The Petitioners immediately sought to stay the orders made by the magistrate's court - these stay orders were granted by the Chief Magistrate's court and were served on the interested parties (i.e Eliud Samuel Maina Waweru, Josephat Mureithi Muruthi, Peter Kinyanjui Ngugi, Peter Wanjohi Karanja and Jesse Kimera). However, with the aid of the 2nd Respondent (Registrar of Companies), the Interested Parties convened a purported AGM on 27/04/12 for the election of Directors-this being done in total disregard of the existing court orders.

The interested parties in opposing the petition state in a replying affidavit that the 2nd - 7th petitioner have held irregular AGM, the last one being on the year 2000, when the last annual returns were filed. Despite requests by several shareholders (including the Interested Parties), through the District Officer Bahati Division, for an AGM to be convened, none was ever forthcoming - letters to demonstrate such requests dating back to 20/05/03, upto May 2006 are annexed.

The 2-7th petitioners have held office for a period of 12 years without being elected into office through an AGM, and by virtue of their illegal office, they made it impossible for the company to transact any profitable business or hold any meeting, and denying the members their freedom of expression because the petitioners were using police to disrupt the meeting - a newspaper citing from Daily work of 23rd November 1999 captures the scene in an article titled "Society's Meeting Flounders, and three photographs showing police officers intervening to stop since chaos in the year 2003.

The interested parties, having no recourse in their attempts to break the impasse and rescue the company, applied to and petitioned the Registrar of Companies on 25/08/11, requesting to hold an AGM under a neutral chairman-this is what culminated on the meeting held on 27/04/12, after notices dated 20/03/12 was issued by the Senior Deputy Registrar General of Companies.

The respondents ensured that the notice was served on the 2-7th Petitioners plus all members and shareholders of the company. Despite being aware of the intended meeting, the petitioners issued a notice dated 30/03/12 to call for and hold an AGM on 21/04/12. Realising the mischief the petitioners were bent on exercising, the Interested Parties obtained orders from the Chief Magistrate Court Nakuru, under certificate of urgency which restrained any party conducting the intended AGM of 21/04/12, because this meeting was intended to counter and pre-empt the one scheduled for 27/04/12. They deny being served with any order stopping their AGM and the petitioners even attempted to disrupt the meeting and spread misinformation in vain.

The elections of 27/04/12 were supervised by the Senior Deputy Registrar General where the Interested Parties were elected, and the Deputy Registrar general issued the list of newly elected directors which was served on the 1st respondent and the District Land Registrar, Nakuru.

It is argued that, in any event, the orders issued by the court on 11th April 2012 only restrained the Respondents from warning, threatening, cautioning or otherwise advising the shareholders of the company from attending the AGM called for on 21/04/12, and further, from disrupting or interfering in any way with the petitioner's publications on the intended meeting, but it did not prevent or restrain the interested parties and/or respondents, from holding the AGM on 27/04/12.

The respondents also oppose the application saying that the petitioners failed to disclose to the court their failure to hold an AGM for the past six years and so they lacked authority to present themselves as directors of the company. They lament that although the 2-9th Petitioners were placed on office on 20/08/97 with the sole mandate of continuing with issuance of land titles to individual shareholders and to wind up the company, they have failed to fulfill their mandate.

Mr. Karanja submitted on behalf of the petitioners that the DC Rongai had no authority to request the Registrar of Companies to call for an AGM and he is not a shareholder of company, and that if there was a requisition for an AGM under Sec 131 (2) of the Companies Act, then the Registrar ought to have written to or called the directors of the company to find out whether they had called for an AGM or not.

Although counsel admits that under the Company's Act there is no requirement that a party be heard before a meeting is called, he nonetheless argues that the rules of natural justice apply in every aspect, and urges this court to be guided by the decision of **Mutava V AG and JSC (2014) eKLR** which held that before a recommendation that would adversely affect the judge was made, he ought to have been given a hearing because this is what is required for fair administrative action. Mr. Karanja contends that no one should be condemned unheard.

Both the respondents and interested parties counsel filed written submissions which I shall consider simultaneously. The crux of this matter is the directorship of Nyandarua Progressive Agencies Ltd. The Respondents claim that for over 6 years the 2 - 7th Petitioners have run the company without any accountability to its shareholders. What triggered this petition is the Registrar's statutory notice which called for an AGM set for 27/04/12- in a quick succession of events, the petitioners decided to set a AGM just about a week earlier.

Lest we lose direction, (since all counsel seem to dwell so much on the urgency or otherwise of the two AGM's held on April), this present petition as far as I understand is based on claims that the 2 - 7th Petitioners constitutional rights were violated as they were not given a hearing. The Registrar of Companies called for the AGM and issued the Statutory Notice, in compliance with sec 131 of the Companies Act. The petitioner's counsel concedes that there is no legal provision requiring that the directors be heard before requisition of an AGM is made. I think the attempt to rely on the case of **Mutava** to poke holes at the Registrar's decision is misplaced. There was no adverse action going to be made against the directors per se- the AGM was for the companies benefit - unlike the **Mutava** case where the administrative access talk was gong to personally affect the petitioner therein. I

The Petitioners as shareholders and members of the company had the right to attend the meeting of 27th April - instead they elected to call for another meeting to countermand the proposed one. In my mind, this petition is camouflaged as a constitutional petition, yet the arguments raised are similar to those presented earlier in a Notice of Motion dated 24/09/12 - the complaint being the place of the parallel AGM's. I think I will be repeating myself and entertaining parties who have refused to take heed to what I observed earlier in the ruling dated 27/03/13, that if one camp carried out elections in violation of court orders that were in place, then the solution lies in commencing contempt proceedings, not in hair raising claims based on the Bill of Rights under the Constitution.

In my view bringing this matters as a constitutional petition is an abuse of court process and the arguments raised do not merit being analysed further. It is clear to me that the complaint is that the interested parties and the respondents acted in contempt of court orders in which case - at the risk of repeating myself the solution lies, not in filing multififerous applications and petition, but a simple motion to commence contempt proceedings will address all the concerns raised here. I therefore decline to make any declarations or issue orders of injunction.

The upshot is that the petition herein is dismissed with costs to the respondents and interested parties.

WRITTEN AND DATED THIS 30TH DAY OF DECEMBER 2014 AT BUNGOMA

H. OMONDI

JUDGE

DELIVERED AND DATED THIS 29TH DAY OF JANUARY 2015 AT NAKURU

JANET MULWA

JUDGE

In the presence of

.....for appellant

.....for respondent

.....court clerk.