REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 277 OF 2010

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF COMPANIES.....RESPONDENT

AND

ONESMUS MWATI.....INTERESTED PARTY

Ex-parte

UKAMBA AGRICULTURAL INSTITUTE

STEPHEN NDAMBUKI MULI

ERIC MUTINDA MUTISYA

MARY NDINDA KIMWELE

JUDGEMENT

Pursuant to leave granted on 20th August, 2010 the ex-parte applicants Ukamba Agricultural Institute (UKAI), Stephen Ndambuki Muli, Eric Mutinda Mutisya and Mary Ndinda Kimwele through the notice of motion dated 9th September, 2010 and filed in Court on the same date pray for orders:

> **"1. THAT an order of CERTIORARI do issue to remove to this Honourable Court and quash the decision of the Registrar of Companies revoking the list of directors of the Ukamba Agricultural Institute as conveyed in her letter of 6th July, 2010.**
>
> **2. THAT an order of PROHIBITION do issue against the Registrar of Companies prohibiting her from calling an annual general meeting for the purpose of electing new directors of the Ukamba Agricultural Institute.**
>
> **3. THAT all necessary and consequential orders be made that meet the ends of justice in the circumstances of this case.**

4. THAT costs hereof be provided for."

According to the statutory statement filed on 19th August, 2010 with the chamber summons application for leave, the grounds upon which relief is sought are:

"1. By her letter dated 6th July 2010 the Registrar of Companies conveyed to the applicants that she has revoked the list of directors presented to her on 26th November 2009.

2. It appears this was done after presentation was made to the Registrar of Companies by a faction of our membership.

3. It further appears the Registrar of Companies sent two (2) letters to us for a meeting but each time the same reached us after the scheduled dates thus we were unable to attend any such meetings. One such letter was sent through a member of the complaining faction.

4. The letters calling us for the meeting did not state the matters in dispute.

5. The revocation was thus done upon hearing one side only.

6. Calling for an Annual General Meeting will be in breach of the Companies Act and the Articles of Association of this company (UKAI)."

The Registrar of Companies ("the Registrar") is the Respondent.

Subsequently, through an application dated 1st November, 2011 and filed in Court on 3rd November, 2011 Onesmus K Mwati and Titus Muthini Nguna and Joseph Mbiti Kilonzi as members of UKAI sought leave to be enjoined as interested parties. There is no specific order allowing this particular application but Onesmus K. Mwati has since participated in these proceedings as an Interested Party. Titus Muthini Nguna and Joseph Mbiti Kilonzi have not featured anywhere in the proceedings. The participation of Onesmus K Mwati in the proceedings cannot be faulted since as a member of UKAI he is likely to be affected by the outcome of these proceedings.

The Respondent did not file any document in response to the substantive notice of motion. The Interested Party's opposition to the application is found in the affidavit sworn in support of his application for enjoinment dated 1st November, 2011.

In his affidavit, the Interested Party averred that no elections had been held since 2007 and all the returns which were filed were false. Consequently the members of UKAI complained to the Registrar and this led to the revocation of the list of directors.

The Interested Party also swore a replying affidavit on 7th November, 2014 in which he averred that the 2nd Applicant had served more than four terms of three years each and he was no longer eligible for election. He averred that the last annual general meeting of UKAI was held on 9th November, 2009 in which the 2nd to 4th applicants were elected as the Chairman, Secretary General and Vice Chairperson respectively. He averred that the 2nd to 4th applicants and twelve other members had been collecting revenue in respect of the company but were not accounting for it. They had also started the process of disposing the company's land parcel No. 209/1035 without the authority of the members. He averred that before the applicants' directorships were revoked, the Registrar had called them for meetings through letters dated 9th March, 2010 and 18th March, 2010 but they had ignored the letters and they cannot therefore be heard to complain that they were condemned unheard. It is the Interested Party's case that a consent was entered into by the parties in this case and elections were held on 20th April, 2012 in which he was elected the Chairman of the company. He urges the Court to find that those elections were lawful.

Without going further, I will address the issue of the elections purportedly held on 20th April, 2012. That

issue was the subject of an application which led to my ruling of 16th July, 2014. In that ruling I found that the consent which led to the holding of the elections was fraudulent and that if any election was held as a result of that consent, then the elections were invalid. My ruling remains unchallenged and the Interested Party cannot purport to have been elected to any office.

Looking at the papers filed in Court, it is clear that the applicants challenge the decision of the Registrar dated 6th July, 2010 on two grounds, namely that the Registrar had no powers to revoke the list of UKAI's directors and that the decision was made without giving the directors an opportunity to be heard.

The remit of judicial review is indeed narrow as was pointed out by Lord Diplock when he stated in the **COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935** case that:

> **"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."……..**
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> **By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.**
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> **By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"**
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> **(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.**
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> **I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."**

For an applicant to benefit from judicial review orders there is need to show that the action taken was either illegal, unreasonable or arrived at outside the rules of natural justice.

Was the decision of the Registrar taken without affording the applicants an opportunity to be heard? The applicants admit that the Registrar did indeed invite them for meetings but the letters arrived after the scheduled dates. The applicants have not however stated whether they tried to find out from the Registrar what the meetings were all about. The two letters are however clear that a dispute had arisen in respect to the company. The applicants ought to have enquired what the dispute was all about. They were given a chance to be heard and they never took the opportunity. The revocation was carried out three months later. The right to a fair hearing was therefore not breached.

The second question is whether the Respondent acted illegally by revoking the directorship of the 2nd to 4th applicants. In the letter dated 6th July, 2010 Doris Githua an Assistant Registrar of Companies gave the reasons for the decision as follows:

"1. The shareholders had requested for a List of Directors on 4th February, 2010 having conducted an Annual General Meeting of the company on 22nd January, 2010 but our office erroneously issued a List of Directors confirming you as Directors on 9th February, 2010.

2. There are no receipts for the application made on 27th November, 2009. The shareholders have brought this to our attention which we believe was issued on a misconception of facts.

3. The shareholders had not requisitioned the directors for the meeting as required by law.

4. No meeting of the company had been held for the last three years."

It is apparent that the Registrar was trying to correct some mistakes. The 1st Applicant is a public company limited by guarantee and is under the close watch of the Registrar. The shareholders empower the directors. What the Registrar did was only to revoke a list of directors which in her view was issued erroneously. She then proceeded to organize for an Annual General Meeting in which the members were expected to take charge of their company. The Registrar did not therefore overstep the mandate of that office.

From the material placed before the Court, I find that the applicants have not established a case for the issuance of orders of certiorari and prohibition. The application therefore fails and the same is dismissed with no orders as to costs. The Registrar can proceed to organize for an Annual General Meeting for UKAI and give directions, as necessary.

Dated, signed and delivered at Nairobi this 13th day of February ,2015

W. KORIR,

JUDGE OF THE HIGH COURT