



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 600 OF 2013

EAST AFRICAN PORTLAND CEMENT LTDPETITIONER

VERSUS

THE CAPITAL MARKETS AUTHORITY1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL2ND RESPONDENT

THE NATIONAL SOCIAL SECURITY FUND3RD RESPONDENT

THE TRUSTEES OF THE BOARD OF THE

NATIONAL SOCIAL SECURITY FUND4TH RESPONDENT

NAIROBI SECURITIES EXCHANGE LTD5TH RESPONDENT

RULING

1. In the application brought by way of Notice of Motion dated 10th February 2014, the applicant seeks orders staying the appointment of Mr William Lay as a Director and Chairman of the Petitioner by Gazette Notice No 821 of 7th February 2014, to stop any attempt(s) by the said Mr. William Lay from assuming office either as a Director or as Chairman of the petitioner, and for orders that Mr. Mark Ole Karbolo, the current Chairman of the petitioner, do remain in office pending the hearing and determination of the petition. The applicant also seeks orders that in the intervening period, the consent orders of status quo as at 30th December 2013 with regard to the composition of the petitioner's board of directors be maintained.

Background

2. The background to this application is that the petitioner, **East African Portland Cement Company Limited**, filed a Petition dated 30th December 2013 in which it sought the following orders:
 1. *An order from this court quashing the said administrative decision stopping or suspending the application of the resolutions passed at the 81st AGM of the Petitioner.*
 2. *An order of permanent injunction staying the administrative decision made by the 1st Respondent on the 18th of December stopping the Applicant from implementing the resolutions duly passed at the Petitioner's 81st AGM held on the 17th of December 2013.*

3. *That the 1st respondent be restrained by an order of permanent injunction restraining the 1st, 2nd 3rd, 4th and 5th from interfering in any way whatsoever with regard to the implementation of the resolutions passed at the petitioner's 81st AGM.*
 4. *Costs*
 5. *Any other or further relief deemed fit and just.*
3. Together with the petition, the petitioner also filed a Chamber Summons application, also dated 23rd December 2013, seeking at prayers 2, 3, and 4 thereof, the following orders:
1. ...
 2. *That this Honourable Court be pleased to grant to the applicant an order temporarily staying the administrative decision made by the 1st respondent on the 18th of December stopping the Applicant from implementing the resolutions duly passed at the petitioner's 81 AGM held on the 17th December 2013 pending the hearing of this application inter partes.*
 3. *That the 1st respondent be restrained by an order of temporary injunction from interfering in any way whatsoever with regard to the implementation of the resolutions passed at the petitioner's 81st AGM pending the hearing of this application inter partes.*
 4. *That the 2nd 3rd 4th and 5th Respondents by themselves agents or servants be restrained by an order of temporary injunction from interfering with the implementation of the resolutions passed at the petitioner's 81st AGM pending the hearing and determination of this application inter partes.*
4. When the matter came up on 30th December 2013 before Odunga J, the Court, with the concurrence of all the parties, ordered that the *status quo* be maintained until the 15th of January 2014. What the *status quo* referred to was not defined, but the orders were extended on the 15th of January 2014, and again on the 4th of February 2014.
5. On 10th of February 2014, the applicant filed the application now before me, the grounds on which the application was based set out in the application, seeking the following orders:
- a. *That this application be certified as very urgent requiring to be heard Ex parte in the first instance.*
 - b. *That this Honourable Court be pleased to invoke its inherent jurisdiction to issue forthwith orders staying the appointment by Gazette Notice No 821 of the 7th February 2014 appointing Mr William Lay as a Director and Chairman of the Petitioner pending the hearing and determination of this application.*
 - c. *That this Honourable Court be pleased to stop forthwith any attempt(s) by the said Mr. William Lay assuming office either as a Director or as Chairman of the Petitioner in furtherance of the gazette notice above stated pending the hearing and determination of this application.*
 - d. *That Mr. Mark Ole Karbolo the current Chairman of the Petitioner do remain in the office pending the hearing and determination of this application.*
 - e. *That upon hearing inter partes the orders sought in prayers (b)(c) and (d) of the Notice Motion be granted pending the hearing and determination of this petition.*
 - f. *That in the intervening period the consent orders of status quo as at the 30th December 2013 with regard to the composition of the petitioner's board of directors be maintained 2013.*
 - g. *Costs of this application be provided for.*
6. The application is supported by an affidavit sworn by **Mr Mark Ole Karbolo** on 10th February

2014 and a supplementary affidavit also sworn by Mr. Ole Karbolo on 12th February 2014. Interim orders were given in terms of orders (b)(c) and (d) of the application dated 10th February 2014 and the matter set for mention on 11th February 2014, when it was then fixed for *inter partes* hearing on 12th February 2014.

7. The application is opposed. The 2nd respondent has filed grounds of opposition dated 11th February 2014 together with a replying affidavit sworn on the same date by **Mr. Wilson Songa**, the Principal Secretary, Ministry of Industrialization. The 3rd and 4th respondents have also filed a replying affidavit sworn by Mr Gideon Kyengo on 12th February 2014.
8. The application was canvassed before this Court on 12th February 2014. Conservatory orders were granted at the conclusion of the hearing restraining both **Mr. William Lay** and **Mr. Mark Ole Mark Karbolo** from exercising the functions of the Chairman of the petitioner pending the ruling on the application.

The Submissions

Submissions by the Applicant

9. In his submissions on behalf of the applicant, Mr. Aduda, Learned Counsel, submitted that the applicant had come to court on 23rd December 2013. He referred to paragraph 4 of the petition in which the petitioner had stated that one of the shareholders had sought an amendment to the petitioner's Memorandum and Articles of Association to increase the number of directors to 11 from 7 by amending Article 82; that it had been pointed out by the Company Secretary that there were irregularities in the proposal and the proposed nomination of Mr. Lay as a Director had been rejected as it was late by one day.
10. Mr. Aduda also referred to paragraph 11 of the petition to the effect that the 2nd and 3rd respondent in this matter had insisted on the changes to the petitioner's articles; that Mr. Syonga had, in his affidavit dated 30th December 2013, given a breakdown of the composition of the petitioner's board and alleged collusion between Mr. Mark Ole Karbolo, as well as the petitioner's Managing Director, with directors from Lafarge Limited, which is also a shareholder in the petitioner. Mr. Aduda submitted therefore that from the petition and the affidavit by Dr Syonga, there was and there is a big issue with regard to the composition of the petitioner's Board; and with regard to whether the nomination of Mr William Lay as a Director had been rejected or not. He submitted therefore that the composition of the Board and the quest to control it, either by the government or by the Lafarge Group, is central to this petition.
11. The applicant contends that on 30th December 2013, a consent order was entered into before Odunga J; that the order was made with the concurrence of all the parties to the effect that the status quo be maintained; and that the status quo related to the composition of the Board as this was at the heart of the petition. Mr. Aduda submitted that the consent order had been extended with the consent of all the parties on the 4th of February 2014, and had on that date been extended by consent to the date of the hearing of the application.
12. The applicant thus challenges the appointment of Mr. William Lay as a director and chairman of the Board of the petitioner by the President on 7th February 2014 vide Gazette Notice No. 821 in which the President invoked powers under section 7(3) of the State Corporations Act. Counsel contended that this Gazette Notice, which was sanctioned by the 2nd respondent, had the effect of changing the composition of the Board of the petitioner.
13. Mr. Aduda conceded that the provisions of the State Corporations Act allowed the President, in the national interest, to override the provision of any written law and the provisions of any Articles of Association of any state corporation. He submitted, however, that the President did not have

power to override a court order such as the consent order which he contended had been entered into in this matter with the concurrence of all the parties and had not been set aside nor any application made to set it aside.

14. Counsel challenged the filing of form 203A with regard to the appointment of Mr. Lay with the Companies Registry, arguing that the form could only be filed by the petitioner's secretaries, which the firm of Kamau, Iseme & Maema & Co. Advocates, which had filed the form, was not. Counsel contended that what had happened in the present case was a hostile takeover of the company, and he submitted that the appointment of Mr. Lay was a nullity.
15. Mr. Aduda made reference to the decision of Warsame J in **High Court Misc. Application No. 337 of 2011 – Mark Ole Karbolo & Others –vs- Ag. Minister, Ministry of Industrialisation & Others** in which the current petitioner and others were interested parties. He contended that on 9th February 2012, in the middle of the said proceedings concerning the petitioner, the President revoked the appointment of the Chairman, Mr Mark Ole Karbolo, notwithstanding the existence of court orders, and appointed another person; and that the Court (Warsame J.) reversed the appointment for having been done in disobedience of a Court order. Mr. Aduda asked the Court to stay the illegal Gazette notice, and hold that Mr. Mark Ole Karbolo is validly in office and should remain in office until the expiry of his terms in October 2014.

Submissions by the 2nd Respondent

16. Counsel for the 2nd respondent, Mr. Kamau Karori, contended that the filing of this application was not sanctioned by the company as there is no authorization either for the filing of the application or for Mr. Mark ole Karbolo to swear any document on behalf of the petitioner.
17. Counsel contended further that the Certificate of Urgency placed before the Court on 10th February 2014 was deliberately misleading. He pointed out that, contrary to the applicant's Counsel's allegation in the Certificate of Urgency filed with the application, neither the revocation of Mr. Ole Karbolo's appointment nor the issue of whether Mr Lay should or should not be a director of the petitioner was before the Court in the petition or discussed at the meeting out of which the resolution the subject of this petition was made.
18. Mr. Kamau further drew the Court's attention to the prayers in the petition and to the resolutions in question. He submitted that there was no mention of either Mr Mark Ole Karbolo or of Mr William Lay; and that even if the petitioner were to succeed in all the prayers sought in the petition, there would be no order made for or against Mr Ole Karbolo or Mr. William Lay as there were no issues raised with regard to them at the petitioner's Annual General Meeting (AGM).
19. Counsel contended further that what the Court was being asked to do was to make an order for Mr. Ole Karbolo to remain in office till October 2014; that this was not sought in the petition or in the application that came before Odunga J on 30th December 2013. He argued, further, that the question of the composition of the directors of the petitioner was not before the Court, and even were the Court to agree with the petitioner in all its prayers in this petition, the Court would not make any orders with regard to the composition of the petitioner's directors.
20. Mr. Kamau submitted further on behalf of the 2nd respondent that the President had power under the State Corporations Act to appoint or revoke the appointment of a director of a state corporation; that the President having exercised that power, the petitioner is now asking the court to keep Mr Ole Karbolo in office till October 2014 contrary to the wishes of the President; that section 7(3) of the Act gives the power of appointment of directors and Chairmen of state corporations to the President, and the Court has no right or authority to issue an order with regard to the said appointment.
21. Counsel submitted therefore that if Mr Ole Karbolo was dissatisfied with the decision of the

President, he had the option of filing his own suit in the Industrial Court which would then deal with the issue. The 1st respondent placed reliance in this regard on the decision of the Court in **Peter Muthoka –vs- CMC Holdings and 12 Others High Court Case No 154 of 2012**, in which the court held that the remedy for removal from office lay in damages.

22. On the contentions regarding the status quo order, it was Counsel's submission that the purpose of an interim conservatory order is to preserve the status of the subject matter of the dispute; that the subject of the present dispute was the resolutions of 17th December 2013, namely whether they should be adopted, or whether the 1st respondent could stay their implementations pending investigations. It was the 2nd respondent's case that what the Court was preserving were those resolutions so that they are not revoked, investigated or implemented pending the hearing of the petition.
23. In his view therefore, the status quo was that the petitioner could not implement the resolutions, the 1st respondent could not revoke or investigate the resolutions, and the 2nd – 4th respondents could not pursue their implementation. Counsel relied on the case of **Andy Forwarders & Others –vs- Capital Markets Authority & 4 Others (2012)eKLR**, in which the Court had granted orders of status quo and the issue of breach arose before Lenaola J. Counsel submitted that the approach taken by Lenaola J in his ruling dated 2nd August 2012 in that matter was the most appropriate; that the question of the removal of Mr Ole Karbolo or the appointment of Mr Lay is not an issue before the Court in the petition, and cannot be said to be the subject of the status quo order.
24. The 2nd respondent distinguished the decision of Justice Warsame in **Mark Ole Karbolo & Others –vs- Ag. Minister, Ministry of Industrialisation & Others (supra)** on the basis that in that case, the issue in dispute was whether the Minister was entitled to remove the entire Board of the petitioner; the President then revoked the appointment of a director while the matter was pending, which affected the issue before the court. He submitted that this was not the case in the present petition, that the applicant was misleading the court; and that a prayer not in the substantive suit cannot be granted.

Submissions by the 1st Respondent

25. Counsel for the 1st respondent, Mr. Murugara, while associating himself with the submissions of Counsel for the 2nd respondent, submitted that the petitioner is East African Portland Cement Company Limited, a separate entity from the applicant, Mr Mark Ole Karbolo; that the petition cannot relate to the applicant who seeks injunctive orders, and the applicant cannot merge his cause of action with that of the petitioner.
26. Counsel pointed out, further, that while the petitioner, East African Portland Cement Company Limited, alleges breaches of certain provisions of the law, including the Constitution and the Companies Act, Mr. Ole Karbolo was alleging breaches of the State Corporations Act and the Employment Act, matters which were not before the Court.
27. Counsel argued, further, that the applicant cannot seek orders in a suit where he is not a party as the Court cannot make orders for or against a party not before it. He submitted therefore that orders cannot be made against Mr. Lay who is not a party before the Court.

Submissions for the 3rd and 4th Respondents

28. In his submissions on behalf of the 3rd and 4th respondents, Mr. Ogembo argued that granting the orders sought will have the Court descend into the merits of the appointment and revocation of the

appointment of the Chairman of the petitioner, which will change the character of the petition; that the main ground for this application is the issue of the alleged violation of the status quo, but the supplementary affidavit of Mr. Karbolo sworn on 12th February 2014 introduced new issues which are completely different from the grounds cited in support of the petition, issues which are irrelevant. He prayed that the application be dismissed with costs.

Findings

29. I am grateful for the submissions of the parties in this matter, and the respective authorities cited. While they have made submissions on a wide range of issues, among them the powers of the President under section 7 of the State Corporations Act and whether the returns to the Companies Registry with regard to the appointment of Mr. Lay were properly filed or properly filed by the party with the capacity to do so, I believe the issues before me are fairly simple: whether the prayers sought by the applicant have a basis in the petition before the Court; whether they were covered by the status quo orders entered into on 30th December 2013; and if the issue of the composition of the board of the petitioner was the subject of the petitioner and of the orders issued on 30th December 2013 to warrant the injunctive orders sought in the application.
30. This petition relates to action taken by the 1st respondent with regard to the resolutions reached by the petitioner at its 81st AGM held on 17th December 2013. Following that resolution, a decision was made by the 1st respondent to suspend the resolutions and to investigate the petitioner. It was that administrative decision that was the subject of the petition as can be discerned from the orders sought by the petitioner in the petition and the application filed with the petition dated 23rd December 2013 which have been set out in their entirety earlier in this ruling.
31. The petition seeks an order quashing the administrative decision made by the 1st respondent on 18th December 2013 stopping or suspending the implementation of the resolutions passed at the 81st AGM of the petitioner; a permanent injunction staying the administrative decision made by the 1st Respondent on the 18th of December stopping the petitioner from implementing the resolutions passed at the said AGM; and a permanent injunction restraining the 1st, 2nd, 3rd, 4th and 5th respondents from interfering in any way with regard to the implementation of the resolutions passed at the petitioner's AGM. Similar orders were sought on an interim basis in the application dated 23rd December 2013 which came up before Odunga J, on 30th December 2013, and in respect of which the status quo order was made.
32. What were the resolutions whose implementation is under contention? I have read the resolutions made at the AGM of the petitioner held on 17th December 2013. Resolutions 1, 2, 3, 5, and 6 thereof relate to the confirmation of minutes, financial statement, dividends, directors' remunerations and appointment of auditors respectively. Resolution 4, which I believe is relevant to the present application, relates to re-election of directors and is in the following terms:

4. Re-election of Directors

i) It was unanimously resolved that the National Social Security Fund (NSSF), a Director retiring at this meeting by rotation in accordance with Article 98 of the Company's Articles of Association be and is hereby re-elected a Director of the Company.

ii) It was noted that Mr Hamish Keith, a Director retiring at this meeting by rotation in accordance with Article 98 of the Company's Articles of Association had withdrawn his offer for re-election as a director of the company.

(iii) It was resolved by majority vote on a show of hands that Mr Didler Tresarrieu be and is hereby elected as a director of the Company.

33. Whichever way one reads or interprets this resolution, one cannot find any reference or linkage with the composition of directors of the petitioner that touches even remotely on the position of Mr. Ole Karbolo.
34. Effectively, the application before the Court seeks to ensure that Mr. Mark Ole Karbolo remains the Chairman of the petitioner until October 2014. As argued by counsel for the 1st respondent, the applicant before the Court in the present application is Mr. Mark Ole Karbolo, seeking to protect his position as a director and Chairman of the petitioner. He has filed his application in the petition in which the petitioner seeks to stop the 1st respondent from implementing the administrative decision that it took regarding the petitioner's resolutions at its 81st AGM.
35. Counsel for the applicant presented an ingenuous but ultimately specious argument. As I understand it, his argument is that because the resolutions in question, whose implementation the 1st respondent sought to revoke, related to the company and to the decision reached at the AGM with regard to the directors, then the issue of the Board's composition is at issue in this petition; and that therefore the issue of Mr. Ole Karbolo's position as director was at issue and was the subject of the status quo order.
36. At face value, the argument is convincing. On closer scrutiny against the substance of and the prayers sought in the petition, it must fail. As submitted by Counsel for the 2nd respondent, even were the court to accept every argument made by the petitioner and grant all the prayers that it seeks, the orders of the Court would have absolutely no impact on either Mr. Ole Karbolo or Mr. Lay. I believe that there can be no dispute that a party cannot seek orders in an interlocutory application that have no basis in the substantive suit.
37. With the greatest respect, it is apparent that Mr. Ole Karbolo has conflated his personal interests with those of the petitioner, which he cannot lawfully do.
38. The President has power to appoint directors and Chairmen of state corporations under the provisions of Section 7(3) of the State Corporations Act which states as follows:
- “Notwithstanding the provisions of any other written law or the articles of association establishing and governing a Board, the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine.”***
39. The application before the Court is a reaction to the exercise of the President's power under the above section in appointing Mr. William Lay as Chairman and revoking the appointment of Mr. Ole Karbolo. It has nothing to do with the substance of the petition before the Court; as the position of Mr. Ole Karbolo as director or Chairman of the petitioner was not the subject of any of the resolution at the petitioner's 81st AGM nor was it the subject of the status quo order of 30th December 2013. Should Mr. Ole Karbolo be dissatisfied with his removal as a director and Chairman of the petitioner, then he is at liberty to file a suit in the appropriate forum challenging the decision of the President to remove him.
40. The upshot of my findings above is that the application dated 10th February 2014 is completely without merit, and it is hereby dismissed.
41. With regard to costs, it is my view that in the circumstances of this case, the petitioner should not bear the costs of an unmerited application that was clearly intended to protect the personal interests and position of a director. In the circumstances, the costs of this application shall be borne personally by Mr. Mark Ole Karbolo.

42.It is so ordered.

Dated, Delivered and Signed at Nairobi this 20th day of February 2014

MUMBI NGUGI

JUDGE

Mr. Aduda instructed by the firm of Aduda & Co. Advocates for the Applicant

Mr. Gotonga Murugara instructed by the firm of Hamilton, Harrison & Mathews & Co. Advocates for the 1st Respondent

Mr. Kamau Karori instructed by the firm of Ideme, Kamau & Maema & Co. Advocates for the 2nd Respondent

Mr Ogembo instructed by the firm of Okoth & Kiplagat & Co. Advocates for the 3rd and 4th Respondent

No Appearance for the 5th Respondent