



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CIVIL APPLICATION NO. 1 OF 2013

IN THE MATTER OF AN APPLICATION BY ALI MUTIMBA, ALEXANDER WAMILI, MARTHA MAKUNGU, VINCENT SAMBULA, DAN MUSUKU AND NELLY AMISI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SECTIONS 13, 22, 24, 74, 132, 133, 134, 140, 141, 142, 143, 182 & 186 OF THE COMPANIES ACT (CAP 486) LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 3, 19, 29 OF THE SUGAR ACT (CAP 342) LAWS OF KENYA

AND

IN THE MATTER OF THE SECOND SCHEDULE TO THE SUGAR ACT (CAP342) LAWS OF KENYA: GUIDELINES FOR AGREEMENT BETWEEN PARTIES IN THE SUGAR INDUSTRY, PARAGRAPHS 2; 9(1) (A), 9 (7)

BETWEEN

REPUBLIC APPLICANT

VERSUS

GREGORY MAKOKHA, RUTH MUKABANE MATENJE, DANIEL MIRIKAU, LEO WEKESA, BENJAMIN WANGA, CHRISTOPHER OTSYENO, MOHAMMED SHIUNDU, JOHNSTONE MALENYA, GAMALIEL ANAMANJA SUED AS THE ELECTIONS COMMITTEE, MUMIAS OUTGROWERS COMPANY (1998) LTD. 1ST RESPONDENTS

MUMIAS OUTGROWERS COMPANY (1998) LTD. 2ND RESPONDENT

REGISTRAR OF COMPANIES 3RD RESPONDENT

RULING

Before me is a Notice of Motion filed under **Order 53 rule 3 (1)** of the **Civil Procedure Rules 2010** dated 10/1/2013. It is an application for Judicial Review orders of certiorari, mandamus and prohibition. The prayers are as follows -

- a. **an order of Certiorari do issue to remove into the High Court for purposes of it being quashed, the proceedings and decision of Gregory Makokha, Ruth Mukabane Mutenje, Daniel Mirikau, Leo Wekesa, Benjamin Wang, Christopher Otsyeno, Mohammed Shiundu, Johnstone Malenya, Gamaliel Anamanja sitting as Elections Committee of Mumias Outgrowers Company [1998] Limited to accept the nomination of Barnabas Walumbe, Faustino Othieno, Gabriel Atoko, Edward Wambani, George Abuche, Stephen Abwara, John Okava and George Okoyiti on 28/12/12 or thereabout to vie as Directors of Mumias Outgrowers Company [1998] Ltd.**
- b. **an order of certiorari do issue to remove into the High Court for purposes of being quashed the proceedings and decision of Gregory Makokha, Ruth Mukabane Matenje, David Mirikau, Leo Wekesa, Benjamin Wang, Chritopher Otsyeno, Mohammed Shiundu, Johnstone Malenya, Gamaliel Anamanja sitting at the Elections Committee of Mumias Outgrowers Company Ltd. to reject the nomination of Ali Mutimba, Alexander Wamili, Martha Makungu, Vincent Sambula, Dan Musuku and Nelly Amisi on 28/12/12 or thereabout to vie as Directors of Mumias Outgrowers Company [1998] Ltd.**
- c. **an order of prohibition do issue to stop and/or restrain Gregory Makokha, Ruth Mukavane Matenje, Daniel Milikau, Benjamin Wang, Christopher Otsyeno, Mohammed Shiundu, Johnstone Malenya, Gamaliel Amanja sitting as the Elections Committee of Mumias Outgrowers Company Limited from proceeding with conducting the election process of the directorship of Mumias Outgrowers Company (1998) Limited.**
- d. **An Order of Prohibition do issue to restrain the Registrar of Companies from registering the list of nominees for directorship of Mumias Outgrowers Company (1998) Ltd. to be submitted to it by the Electorate Committee of Mumias Outgrowers Ltd.**
- e. **An order of mandamus do issue to compel the Registrar of Companies to reject the proposed list of directors of Mumias Outgrowers Company [1998] Ltd.**
- f. **An order of mandamus do issue to compel the Registrar of Companies to conduct the elections of Mumias Outgrowers Company [1998] Ltd. in accordance with the Memorandum of Articles of Association of the company.**
- g. **That the grant herein do operate as stay of any proceedings, decisions or actions of the respondents, their agents, servants, officers or employees in relation to Mumias Outgrowers Co. Ltd. pending the hearing and determination of this application or until such further orders as may be made by this Honourable court.**
- h. **Costs and further incidentals to this application to be provided for, and**
- i. **Such further or other relief as the Honourable court may deem just and expedient to grant.**

The application was filed with an affidavit sworn by Dan Musuku, the 5th ex-parte applicant on 10/1/2013. The affidavit was not filed with leave of the court. I will therefore ignore its contents.

The Notice of Motion in accordance with the requirements of law in judicial proceedings under Order 53 of the Civil Procedure Rules should be grounded on the documents filed in the Chamber Summons for leave. With the Chamber Summons for leave herein was filed an affidavit sworn by Dan Musuku on 9/1/13. The Chamber Summons was also filed with a Statutory Statement dated the same 9/1/13. It was also filed with a verifying affidavit dated the same day.

In the affidavit sworn by Dan Musuku, it was deponed that a related ruling had been delivered on 4/11/2011 by *Kimaru, J.* in **Kakamega HCCC No. 122/11 - James Kutsushi Atindo & others -vs- Fredrick & 8 others**. It was deponed that the judge found that the Board of Directors of the 2nd respondent (Mumias Outgrowers Company [1998] Ltd.) had been illegally in office since 27/3/11 and could not therefore transact any business of the Board of Directors of the company. It was deponed that the 2nd respondent had now come up with a document dated 4th May 2006, and another document entitled "Amended Articles of Association of Mumias Outgrowers [1998] Ltd.", and purported to amend the Articles of Association of the 2nd respondent. In the purported amendment, Article 87 thereof required members of the 1st respondent Mumias Outgrowers Company [1998] Ltd., to be appointed by the Board of Directors of the company from 8 sugarcane growing zones within Mumias sugar-cane zone. It was deponed also that without any authority or mandate, the members of the Board of Directors who were found by the court to be illegally in office, purported to constitute the respondent herein for the

purpose of conducting nominations vying as directors on 17/12/12 and scheduled for 25/1/13. That on 28/12/12 the 1st respondent during a nomination process, disqualified the ex-parte applicants from contesting for positions of directors of the 2nd respondent for an election scheduled for 25/1/13 on the grounds that they did not hold minimum of Kshs.5,000/= paid shares towards the election.

It was also deponed that the 1st respondent in a skewed manner proceeded to nominate only one candidate in each of the 8 zones for election of directors of the 2nd respondent. That the notice calling for persons to apply to be voted as directors of the company wrongly required that they be members of the 2nd respondent holding a minimum of 500 shares. That the conditions the 1st respondent used to disqualify the ex-parte applicants were arbitrary, and were never envisaged in the original 1998 Memorandum of Association of the company. That some of those nominated for the post of Director were aged above 70 years, which was not allowed in law. That initially, the 2nd respondent and its predecessor were companies Limited by guarantee, but in 2006 a purported amendment to the Articles of Association by the then Directors changed the position and required over 70,000 members to purchase at least 500 shares in order to remain members. That the Directors however never called the members to a meeting to effect the amendments.

The Statutory Statement lists the reliefs sought as required by law, as well as grounds in support of the reliefs. The grounds in brief as follows -

1. That the so called amended Articles of Association of the respondent 2006 requires the members of the 1st respondent to be appointed by the Board of Directors of the 2nd respondent from 8 sugar-cane growing zones within Mumias Zone, and that the 2nd respondent had never had a Board of Directors since 27th March 2011.
2. That the High Court sitting in Kakamega HCCC No. 122 of 2011 – James Kutsushi Atindo & 8 others -vs- Patrick Okuku & 8 Others in a ruling delivered on 4th November 2011 confirmed that there were no Board of Directors for the 2nd respondent and issued restraining orders *inter alia*, against the Kenya Sugar Board and annulled the special resolutions made on 27th December 2010 purporting to appoint, Patrick Okuku, Kenedy Echesa, Gabriel Atoko, George Abuche, Basil Khalumi Misango, Francis Washika and Alfonse Bwire as directors of the 2nd respondent.
3. That without authority, the said persons above had purported to conduct nomination for candidates vying for Directorship of the company on 28/12/2012 and scheduled elections of Directors for the 2nd respondent on 25th January, 2013.
4. That the company was funded by the Sugar Development Fund, which was a public fund and that the decisions of the 2nd respondent were amenable to the judicial review.
5. That at the time of purporting to conduct nominations for directors, the 1st respondent included the Chief Executive Officer of the 2nd respondent as a member which was *ultra vires* the provisions of Article 7 of the amended Articles of Association.
6. That on 28/12/12, the 1st respondent illegally rejected the applicants' application to contest as Directors of 2nd respondent for elections scheduled for 25/1/13.
7. The said notice of the elections meeting erroneously limited the number of persons to vie for directorship to those holding a minimum of 5,000/- shares which minimized the number of nominations.
8. That the 1st respondent in his decision of 28th December 2012, purported to nominate candidates who were above 70 years to contest for directorship which was in breach of Section 6 of the Companies Act.
9. The conditions that the 1st respondent set for persons qualifying to be voted as directors was *ultra vires* Article 3 of the 1998 Articles of Association.
10. The 2nd respondent was incorporated as a company limited by guarantee and not shares, therefore the condition to hold a minimum of shares was *ultra vires* and also in breach of Section 13 (1) of the Companies Act.
11. That the purported amendment of the Articles of Association of the 2nd respondent in 2006 was *ultra vires* the provisions of Section 24 of the Companies Act.
12. That by the purported amendment to the Articles of Association in 2006 by the then directors was meant to divest the over 70,000 cane farmers within Mumias sugar-cane area of their right to participate in the membership of the 2nd respondent in breach of Section 24 of the Companies

Act.

13. That the 1st respondent's decision of 27/12/12 to refuse to nominate the applicants to contest for the position of director of the 2nd respondent on grounds of share holding were *ultra vires* of the provisions of Section 13 (1), 24 and 74 of the Companies Act (Cap. 406).

The application is opposed. A replying affidavit sworn by Justice Rapando, Company Secretary and Chief Legal Officer of the 2nd respondent was filed. It was deponed, *inter alia*, that the 2nd respondent could not be subjected to Judicial review as it was a private entity and not a public body. That had the court been aware of this fact at the leave stage, leave would not have been granted. That the 5th ex-parte applicant was improperly brought into these proceedings. That the ruling delivered by Justice Kimaru on 4th November 2011 in **Kakamega HCCC. No. 122 of 2011 James Kutsushi Kutindo -vs- Patrick Akuku** was meant to address an issue of the vacuum in the management of the 2nd respondent with regard to its Board of Directors. That consequent upon that ruling, elections for Directors were scheduled to take place on 3rd January 2012. That a further ruling was delivered in the same case by Chitembwe, J. on 5th March 2012 directing that the management of the 2nd respondent should publish a fresh election Notice. That another ruling by the same Judge of made orders that the management of the 2nd respondent do organize, supervise and carry out elections of Directors within 45 days and the management complied.

That the said elections were conducted under the amended Articles of Association and that the applicants participated in the nomination process conducted on 8/12/2012 but did not meet the requirements and qualifications to contest directorship. That the election committee had valid reasons to disqualify the ex-parte applicants at the nomination stage. That the 6th ex-parte applicant had contested for nomination as a director from the Eastern zone and was disqualified because she did not have a seconder, and had also ongoing court cases in which she had sued the 2nd respondent, that is HCCC NO. 53 of 2012 and HCCC No. 8 of 2012.

Parties counsel filed written submissions by consent. The written submissions of the ex-arte applicant were filed by Prof. Tom Ojenda & Associates on 17/1/13. They also filed further submissions on 2nd May 2013. The 1st and 2nd respondents did not file submissions but relied on the affidavit sworn by Justine Rapando. The Registrar General 3rd respondent did not participate in the proceedings.

The learned counsel who appeared in court for the parties, Prof. Ojenda for the applicants and Mr. Lutta for the 1st and 2nd respondents made extensive highlighting of the submissions in court. Several case authorities were cited on both sides. I have perused and considered all the submissions both written and oral. I have also considered all the documents filed, and authorities cited.

This is a Judicial Review matter brought under Order 53 of the Civil Procedure Rules. The prayers range from certiorari sought against named people Election Committee members of the 1st respondent (prayer (a) and (b)), prohibition against the same named persons in the same capacity, prohibition against the 3rd respondent from registering the list of directorships, to mandamus against the 3rd respondent to reject the list of directors, to mandamus against the 3rd respondent to compel him or her to conduct elections of the 1st respondent.

The jurisdiction of this court in Judicial Review matters is conferred by Section 8 and 9 of the Law Reform Act (Cap. 26). Such jurisdiction was put into effect through Order 53 of the Civil Procedure Rules.

The jurisdiction is special and relates only to the conduct by public officials or public institutions exercising their powers. It is an intervention either when they act illegally outside their public powers or irregularly or through bad faith. In the case of **Commissioner of Lands -vs- Kunste Hotel Ltd. – CA 234 of 1995** (unreported), the Court of Appeal stated that the judicial review jurisdiction is exercised by the High Court to correct decisions of public officials or public institutions, where there is either the lack of jurisdiction or where the principles of fairness and due process are not complied with. In the case of **Kenya National Examinations Council -vs- Republic – Nrb. CA No. 266 of 1996** (unreported) the Court of Appeal elaborated the circumstances in which the judicial review orders of certiorari, mandamus

and prohibition can be granted. Judicial review is not interested in the merits of a matter. It is interested in the procedure adopted. It is not available to settle private interests.

This court does not exercise its judicial review jurisdiction in matters relating to private institutions, or private activities. This position was clearly stated in the case of Kadamas -vs- Municipality of Kisumu [1985] KLR 954 where the court held *inter alia* as follows -

1. **The fact that an employer is a body corporate, sustained by public funds does not ipso facto render the rights, and the duties it owes to its employees an issue of public nature.**
2.
3. **The remedy of judicial review is only available where an issue of a public law nature is involved. The Judicial Review remedy is not available where the issue is ordinary relationship of master and servant with no element of public law involved in it.**
4.
5.

It has been urged on behalf of the applicants that Judicial Review remedies are available in the present situation. Firstly because the company or 2nd respondent is funded by public funds. Secondly, because the decisions complained of were made contrary to the Articles of Association of the 2nd respondent and the Companies Act.

The 2nd respondent is registered under the Companies Act. There is no indication or evidence tendered to show that any of its directors or officers are public appointees or officers. There is no indication that their conduct of the affairs of the company is supervised or influenced by a Ministry or Department of Government. There is no indication that whatever they do has to be approved by a department in a Ministry of Government.

In my view, even assuming that they get some funding from public sources, the 1st and 2nd respondents are private entities operating under the Companies Act. Their actions affect their members. Those members come from the public, but they are individual members who once they join the 2nd respondent, have to comply with the requirements of the rules and regulations of that company that is the Memorandum and Articles of Association. The members can have disputes between themselves or between themselves and the company. The avenue for addressing those disputes is through the ordinary civil suit and not through Judicial Review proceedings.

Though a number of issues have been raised on the internal workings of the 1st and 2nd respondents, as well as the nomination and appointment of directors and the amendment of Articles of Association of the 2nd respondent, those are not matters that can be adjudicated through judicial review proceedings. Those are private matters to be addressed through ordinary civil suits. In my view, the ex-parte applicants have come to the wrong court, for redress. This judicial review court is not clothed with jurisdiction to adjudicate their complaints through prayers for certiorari, mandamus and prohibition.

The ex-parte applicants have also sought orders against the 3rd respondent, a public official. The 3rd respondent is sought to be prohibited and compelled through mandamus. Again, I have not been told what obligations the 3rd respondent owes the public in general and the ex-parte applicants in particular, for the prayers sought. No statutory or legal provision was cited to me creating such public duty. The 3rd respondent exercises certain administrative powers under the Companies Act. Such exercise and how to solve issues arising therefrom, is adequately provided for under the Companies Act. It was not envisaged that it be a subject of judicial review, unless the 3rd respondent has acted irregularly or illegally under the statute or has refused to act according to the law, where he is required to do so by the law. The party who comes to court must demonstrate the alleged failures of the 3rd respondents. In the present case there is no evidence that the 3rd respondent has done any illegal thing under the statute, or failed to act according to the statute. The case against the 3rd respondent will also fail.

In my view, this application is misconceived. It lacks merits. I dismiss the application, with costs to

the 1st and 2nd respondents.

Dated and delivered at Kakamega this 19th day of June, 2014

George Dulu

J U D G E