REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 412 of 2007

IN THE MATTER OF JUDICIAL REVIEW OF THE REGISTRAR OF COMPANIES

NOTICE OF CHANGE OF DIRECTORS DATED 11TH APRIL 2007

AND

IN THE MATTER OF THE COMPANIES ACT (CAP 486)

AND

IN THE MATTER OF SECTION 178 A OF THE CERTIFIED PUBLIC SECRETARIES OF KENYA ACT (CAP 534) AND FORM 203 A DATED 5TH APRIL 2007

-BETWEEN-

REPUBLIC .....APPLICANT

AND

THE REGISTRAR OF COMPANIES.....1ST RESPONDENT

JOHN MWANGI MWAURA..... 2ND RESPONDENT

JOHN IRUNGU MWANGI.....3RD RESPONDENT

SIMON NJUNGA MACHARIA..... 4TH RESPONDENT

HERBERT NJUGUNA MWANGI..... 5TH RESPONDENT

MARY WANJIRU NDUNGU.....6TH RESPONDENT

LUCY MUTHONI MAINA..... 7TH RESPONDENT

EPHANTUS KARUNGE NJUGUNA..... 8TH RESPONDENT

AGNES NJERI MUKUNDA.....9TH RESPONDENT

JOSEPH MUITHE CHEGE..... 10TH RESPONDENT

-EX PARTE-

1 KIANDAS LIMITED

2 MACHANGA MBUTHIA

3 THIONGO KAGICHA

4 BENJAMIN KOYRA

RULING

By a Notice of Motion dated 30th September 2011, the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents seek the following orders:

1. **That the suit herein be dismissed for want of prosecution.**

2. **That the Ex parte Applicants be ordered to pay the costs of this application**

The application is based on the following grounds:

a. That an ex parte order for leave to file the application herein was granted by this Honourable Court on the 24th April 2007 and the application filed on the 2nd May 2007.

b. That the 1st respondent filed their replying affidavit on the 21st June 2007 and the other Respondents filed their replying affidavit on the 19th May 2009.

c. That since then the Applicants have not taken any steps to prosecute the matter as filed.

d. The Applicants have been collecting rent from the company's properties and enriching themselves with the proceeds without giving any divided to the shareholders and have refused to hold a general meeting on the basis of the ex parte orders they have been enjoying since 24th April 2007.

The application is supported by an affidavit sworn by **Mary Wanjiru Ndungu**, the 6th respondent and a shareholder of Kianda Limited, one of the *ex parte* applicants herein on 30th September 2011. According to her, the affairs of the said Company were being properly conducted from the time of its incorporation in 1978 until the year 2000 when the ex parte applicants were elected as directors of the company. Since then the affairs of the company were being run by the three ex parte applicants herein who have failed to call Annual General Meeting but have been unjustifiably enriching themselves with the rent collected from the company's properties to the exclusion of the rest of the shareholders. Following a complaint lodged by the shareholders to the Registrar of Companies court proceedings were commenced in which a consent was recorded directing the said Registrar to call for an Annual General Meeting of the company for 18th March 2006 but the same was not held until 30th March 2007 when new directors were elected which election is the subject of the instant judicial review. On 24th April 2007 an interim order was granted and the Registrar and the Respondents filed replying affidavit on 19th May 2009. Since then no step has been taken by the applicants to fix the matter for hearing. In the meantime the ex applicants continue denying the shareholders their share of the profits based on the said order which order did not reinstate the said directors after their removal. The said applicants have in the meantime frustrated attempts to call for an Annual General Meeting on the ground that the matter is *sub judice* while the land rent and rates remain unpaid thus exposing the company's properties to the risk of being attached and auctioned.

In opposition to the application the respondents filed a replying affidavit sworn by **Machanga Mbuthia**, one of the ex parte applicants on 9th January 2012. According to him, the Notice of Motion is misconceived, defective and an abuse of the court process as it is the respondents who have not prosecuted their pending application filed on 30th September 2009 thus barring the applicants from prosecuting the main suit. According to the deponent, the ex parte applicants have not in any way misused the company's income but have been running the company affairs smoothly and filing genuine returns since 2007 hence the application ought to be dismissed so as to pave way for the full hearing of the pending suit and the main suit. In a further affidavit sworn by the same deponent on 27th February2012, it is deposed that the application dated 30th September 2009 was withdrawn vide a notice dated 4th October 2011 filed on 12th October 2012 after the deponent had filed and served the replying affidavit, a demonstration that the present application has no merit.

In their submissions the respondents in the main application, while reiterating the contents of the supporting affidavit, contended that the application alleged by the ex parte applicants to have not been prosecuted was withdrawn on the 12th October 2011 before the instant application was filed. It is further submitted that the said application did not bar the ex parte applicants from fixing the matter for hearing. Relying on **National Indiustrial Credit Bank Limited vs. Freshco International Limited & 4 Others HCCC No. 593 of 2001**, it is submitted that there has been an inordinate delay for close to five years since the main application was filed; that the delay is inexcusable; and that the respondents have suffered financial and other prejudice out of the delay and have been denied the opportunity to run the company since they were last elected hence the suit ought to be dismissed.

On behalf of the ex parte applicants, it is submitted that the respondents took 2 years without prosecuting their application date 30th September 2009 hence were the authors of their own misfortune. According to them they have filed their list of witnesses and witness statements under the new Civil Procedure Rules and even invited the respondents for fixing of a hearing date but the Registry declined that the pending applications be disposed of first. According to them the present application was filed before the application dated 30th September was withdrawn hence amounts to an abuse of the process of the court. Since the primary duty of the Court is to proceed with hearing and full determination of the Suit and the cardinal duty of the court is to sustain a suit and not to dismiss it on flimsy grounds, the application seeking dismissal of the suit ought to be dismissed with costs.

I have considered the foregoing. It would seem that the ex parte applicants are labouring under the misconception that judicial review proceedings are to be conducted in the same manner as the conduct of an ordinary civil suit. In **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 of 1983** the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the Civil Procedure Act and Rules do not apply unless expressly provided by such an Act hence the provisions of the Civil Procedure Act and rules cannot be applied merely because the special procedure does not exclude them. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and Order 1 rule 8 of the Civil Procedure Rules render the application wholly incompetent and fatally defective since a representative suit can only be brought in an ordinary action under the Civil Procedure Act and rules.

It follows that the provisions of the Civil Procedure Act and the Rules made thereunder do not apply to judicial review proceedings.

Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The

financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.**

That these proceedings have been pending for an inordinately long period is not in question. As was held in **Republic vs. The Minister For Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.

The *ex parte* applicants contend that they were unable to fix their matter for hearing because of the pendency of an application filed by the respondents. In my view, the mere fact that there is an application filed by the opposite side which remains unprosecuted cannot be a bar to the applicants in proceeding with their application. The worst the applicants are expected to do is to fix the other side's application or apply for its dismissal but if they similarly sit on their laurels and twiddle their thumbs or decide to take a Rip Van Winkle like slumber then they ought to blame themselves when the opposite side opts to apply for the termination of the proceedings. As was held in **Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140:**

"The purpose of rule 6 of Order 16 is to provide the court with administrative machinery whereby to disencumber itself of case records in which parties appear to have lost interest…....It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition".

The application dated 30th September 2009 was seeking orders for preservation of the proceeds of the company's properties. That application, in my view, was not in any way an impediment to the prosecution of this matter. Although the ex parte applicants allege in the submissions that they were barred by the registry from taking dates during the pendency of the said application, there is no such averment in the replying affidavits. Accordingly, the said contention carries little if any weight and in my view is an afterthought.

In the premises I am not satisfied that the ex parte applicants have explained the reasons for not prosecuting their motion. The applicants have been enjoying stay which was granted on 24th April 2007 to the detriment of the respondents without bothering to call for Annual General Meeting of the Company. In my view even if the action the *ex parte* applicants complain of had not been taken the applicants' tenure in the office would have expired by now so that there is no justification for keeping these proceedings alive.

In the premises I accede to the prayers by the respondents in the Motion dated 30th September 2011 and hereby dismiss this suit with costs to the respondents in the main motion.

Dated at Nairobi this 13th day of March 2013
G V ODUNGA
JUDGE

Delivered in the presence of:

Mr Gitau for the ex parte applicants

Mrs Kamweru for the 2nd to 9th Respondents