



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPL. JR. NO. 173 OF 2013

BETWEEN

REPUBLIC APPLICANT

AND

REGISTRAR OF COMPANIES RESPONDENT

AND

EMBAKASI RANCHING CO. LTD INTERESTED PARTY

EXPARTE

JAMES BANGA YANCAN

JOHN MWANIKI KIARIE

DANIEL WANJIE LAMECK

JANE WANGUI GIKUYA

RAHAB WANJIRU KIARIE

DR GEORGE WAINAINA

SAMMY KARANJA MUNGAI

JUDGMENT

Introduction and background

1. The *ex-parte* applicants (“the applicants”) are shareholders of Embakasi Ranching Company Limited (“the Company”). The Company is a public land buying company and has over the years been involved in internecine disputes in and outside courts.
2. This matter concerns the Annual General Meeting (“AGM”) of the Company and its genesis can be traced to certain court proceedings concerning the Company being ***Milimani HC JR No. 174 of 2010, Emma Njoki Kamau and Others v The Registrar of Company***. The issue in that case concerned the Company AGM which had not been convened in two years. The matter was resolved by the parties agreeing that the Registrar of Companies conduct the AGM. The consent recorded was on the following terms;
 - i. *The respondent (Registrar of Companies) do convene an annual general meeting of Embakasi Ranching Company Ltd ... at a date and venue of his choice.*
 - ii. *The respondent do make provisions for the vetting of the members of provisions of security at the venue of the meeting.*
 - iii. *That parties to pay then our costs.*
 - iv. *That the meeting to be convened on or before 15th May 2013.*
3. Following the consent order, the Registrar of Companies proceeded to convene the AGM which was held on 14th May 2013 at the Embakasi Ranching Company Limited Arena in Ruai. The result of the election was that the slate of the existing directors was re-elected.

Applicants’ Case

4. The applicants by the Notice of Motion dated 28th May 2013 moved the court for the following orders;
 1. *That the Honourable Court be pleased to grant an order of certiorari to quash the proceedings of the AGM and the results of the directors elections conducted by the respondent on 14th May 2013.*
 2. *That an order of mandamus do issue to compel the respondent to convene another Annual General Meeting of the Interested party and conduct fresh elections of Directors strictly in accordance with the law.*
5. The thrust of the applicants’ complaint elucidated in the verifying affidavit of James Banga Yancan sworn on 22nd May 2013 and buttressed by the submissions of Mr Kago, his counsel, is that the meeting held on 14th May 2013 was a sham, conducted in total disregard of the laws and procedures applicable to such meetings.
6. The applicants complained that the AGM was irregularly held at Ruai Arena and not Moi International Sports Centre as agreed by the parties during the consultative meetings held prior to the AGM. They complained that there was no vetting of shareholders on the material date and that strangers, who included entertainers hired to provide entertainment for the day, were allowed to vote. The applicants contend that contrary to prior agreement, only two of the respondent’s officers were involved in vetting and the exercise was taken over by the officers designated by Company directors to the exclusion of the applicants’ agents. Further that some directors who vied for the election did not execute the bond and code of conduct. The applicants aver that any shareholder who complained about the vetting irregularities was arrested and thrown out of the meeting. They complain that the resolutions at the meeting were passed by fiat and without opportunity being given to opponents to air grievances.
7. Mr Kago submitted that an order of certiorari and mandamus was merited in the circumstances as the AGM was illegal, manifestly unjust, unfair, irregular, and unreasonable and one that frustrated the legitimate expectations of bona fide shareholders. Counsel submitted that an order of certiorari was available in the circumstances to stop abuse of power and to ensure that the individual is given fair treatment by the authority to which he is subjected.

8. As regards the order of mandamus, the applicants' case was that respondent should be compelled to comply with the court orders and convene an AGM which should be conducted strictly in accordance with the law.

Respondent's Case

9. The respondent opposed the application through the Replying Affidavit of Wilson Rading, an assistant registrar of Companies, sworn on 12th July 2013. The thrust of the affidavit was that the office of the Registrar of Companies arranged and organised the AGM in accordance with the consent order. As the officer designated to organise the AGM, Mr Rading stated that his office arranged for security for the venue and provided an adequate number of officers who carried out their responsibilities without favouring any faction.
10. Mr Rading confirmed that the meeting proceeded in accordance with established procedures. He further noted that the Company Articles of Association do not provide for the manner in which voting would be conducted hence the members agreed to pass resolutions by acclamation as opposed to using a straw poll or secret ballot. He.
11. Mr Wamotsa, counsel for the respondent, submitted that the application was not properly before the court as it is one that requires *viva voce* evidence and that the application was lacking evidence of the AGM proceedings and the results complained of have not been exhibited. Counsel also submitted that the date and venue of the AGM was at the respondent's discretion but was reached in a consultative manner and that there was no irrationality or unfairness of any decision of the respondent. Counsel submitted that judicial review is a discretionary remedy and the Court should not grant the orders sought in light of the facts of the case.

Company's Case

12. The Company, as interested party, also opposed these proceedings through the replying affidavit of Samwel Mwangi Thuita sworn on 29th July 2013. Mr Kamau, counsel for the Company, submitted that these proceedings are based on disputed matters of facts and this is not the proper forum for proceedings.
13. Counsel submitted that the AGM was made pursuant to a Court order recorded in ***JR No. 174 of 2010*** and that nothing has been raised to show that respondent acted in breach of that consent order.

Determination

14. The scope of orders of Judicial Review is now well settled, the court is not concerned with reviewing the merits of the decision but the process by which the decision is made.
15. In this case the issue is whether the AGM was conducted procedurally. The respondent and the Company have both submitted the court should not consider the matter because of the nature of the disputed evidence. The court is called upon to consider the material before it. I do not think that merely because the evidence is contested or disputed is sufficient cause for the court to divest itself of jurisdiction to hear an application and grant orders of judicial review. The court at all times is called upon to consider the facts before it and resolve the issue at hand. Affidavits before the court constitute evidence and the court is required to weigh the depositions on both sides and come to a conclusion one way or other.
16. In my view, following the consent orders in ***JR No. 174 of 2010***, the Registrar of Companies carried out its mandate to ensure that an AGM was held and the directors of the Company were elected. Although issues have been raised about the manner in which the AGM was conducted, I am not convinced that the allegations are substantial enough to vitiate the entire process.

17. Judicial review is a discretionary remedy and even where there are circumstances that the court will grant an order, it may decline to do so (see **Republic v Judicial Service Commission ex-parte Pareno [2004] 1 KLR 203 – 209**). The court has to consider the circumstances of the case and decide whether the remedy sought is efficacious. In **Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was observed that: “[I]t is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances.” (See also Odunga J., in **Republic v Minister of Agriculture & 2 Others Ex Parte Equatorial Nuts Processors Limited & 3 Others, Nairobi HC Misc. Appl. JR No. 368 of 2010 [2013] eKLR**)
18. In this case, I decline to quash the AGM as it is clear that the Company had not held an AGM for two years preceding the order. The re-opening of the AGM would propagate further disputes to the detriment of the Company and its shareholders. According to the deposition of Wilson Rading, the company has over 1,000 shareholders and in the circumstances to accede to the applicants request would be to prejudice the rights of the substantial majority of shareholders who are not party to this suit.
19. I have also taken into consideration the fact that the Company is expected to hold another AGM after the year hence the shareholders will have the opportunity to elect new directors in the not so distant future. A Company is a democracy and the **Companies Act (Chapter 486 of the Laws of Kenya)** and the Articles of Association have provisions for shareholders, like the applicants, to requisition meetings, if necessary, to elect directors or to remove them. It would be improper to continue to saddle the Office of the Registrar of Companies and the taxpayer with the costs of supervising another election of a public company.

Disposition

20. I therefore decline to issue the orders sought and consequently the Notice of Motion dated 28th May 2013 is dismissed with costs to the respondent and interested party.

DATED and DELIVERED at NAIROBI this 27th day of September 2013.

D.S. MAJANJA

JUDGE

Mr Kago instructed by Gikera and Company Advocates for the *ex-parte* applicants.

Mr Wamotsa, Litigation Counsel, instructed by the State Law Officer for the respondent.

Mr Kamau instructed by Ngata Kamau and Company Advocates for the interested party.