



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO 181 OF 2013**

**JAKOYO PATRICK ONYANGO AIRO.....PLAINTIFF**

**VERSUS**

**KENANI HOUSING COMPANY LIMITED.....DEFENDANT**

**RULING**

1. The Plaintiff's Notice of Motion application dated and filed on 8<sup>th</sup> May 2013 was brought under the provisions of Section 3A of the Civil Procedure Act Cap 21 (Laws of Kenya), Order 40 Rule 2 (1) and (2), 4(1) and 8 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law. Prayer Nos (i), (ii) and (iii) are spent and I will therefore not deal with the same. The remaining prayers were as follows:-
  - i. **Spent**
  - ii. **Spent**
  - iii. **Spent**
  - iv. **THAT the Defendant, its servants, agents and/or employees be hereby restrained from passing an ordinary resolution for removal of the Plaintiff as a director of the Defendant pending the hearing and determination of the suit.**
  - v. **THAT the cost (sic) of this application be borne by the Defendant.**
2. In the grounds in support of his application and Supporting Affidavit sworn on 8<sup>th</sup> May 2013, the Plaintiff averred that the passing of a resolution to remove him from the company would cause him irreparable loss for the reason that he had not done anything to warrant his removal as director and he had also not attained the retirement age of seventy (70) years. It was his case that being a founder director of the Defendant, he had made enormous contributions towards the growth of the Defendant and he ought not to be removed as a director of the said company.
3. In the Replying Affidavit sworn on its behalf on 16<sup>th</sup> May 2013 by Wagane Diouf, the Defendant stated that any contribution by the Plaintiff was in accordance with his obligations as a director and that he was fully remunerated in terms of an agreement dated 18<sup>th</sup> November 2012 that had been entered into between the Plaintiff and the Defendant. In addition, the deponent averred that the Plaintiff's removal did not divest him of his rights as a shareholder of the Defendant.
4. The deponent also contended that the Plaintiff was not a director for life and could be removed from the directorship of the Defendant in accordance with Section 185 (1) of the Companies Act Cap 486 (laws of Kenya) and that the court could not interfere with the mechanism for removal of the Plaintiff as the Defendant had not breached any procedure or law by calling for the Extra Ordinary Meeting. It was the Defendant's further contention stated that it was not correct as the

- Plaintiff had stated that he could only retire after the age of seventy (70) years because Section 186 (8) of the Companies Act did not relate to retirement of directors in private companies like the Defendant.
5. In his written submissions dated and filed on 23<sup>rd</sup> May 2013, the Plaintiff submitted that Section 189 of the Companies Act clearly laid out the circumstances under which a director can be removed from directorship of a company and that since he had not committed any offences, his removal as a director of the Defendant was unjustified and that he would suffer irreparable loss.
  6. He also argued that he could only vacate his office as a director at the conclusion of the Annual General Meeting commencing next after he attains the age of seventy (70) years which was in line with Section 186 (2) of the Companies Act.
  7. In its written submissions dated 29<sup>th</sup> May 2013 and filed on 30<sup>th</sup> May 2013, the Defendant argued that the member who requisitioned for the meeting under Section 132 of the Companies Act had a shareholding of more than half of the shares in the Defendant and that the Defendant could remove a director by passing an ordinary resolution before the expiry of the period of his office in accordance with Section 185 (1) of the Companies Act.
  8. It was its submission that Sections 189 and 323 of the Companies Act were of no assistance to the Plaintiff as the same dealt with disqualification of a directors and not their removal. It further contended that it was not necessary for a company to have a reason to convene an Extra Ordinary Meeting and that in any event the Plaintiff would have been given an opportunity to be heard on the resolution of the said meeting.
  9. The Defendant therefore submitted that the Plaintiff had not demonstrated that he would suffer loss if the resolution was deliberated upon for the reason that by virtue of Section 185(6) of the Companies Act, a director removed from office was not deprived of any compensation or damages (if any) payable to him in respect of the termination of his appointment as a director.
  10. Under Regulation 96 of the Regulations for Management of a Company Limited, not being a private company, which was included in the Company's Articles of Association, it is stipulated as follows:-

***“The company may by ordinary resolution, of which special notice has been given in accordance with Section 142 of the Act, remove any director before the expiration of his period of office notwithstanding anything in these regulations or in any agreement between the company and such director. Such removal shall be without prejudice to any claim such director may have for damages for breach of any contract of service between him and the company.”***

11. According to the said Company's Articles of Association, a director could also be removed from office by an ordinary resolution of the company in which special notice has been given in accordance with Section 142 of the Act.
12. The court notes that the company issued a notice dated 17<sup>th</sup> April 2013 for the Extra ordinary meeting that was to be held on 14<sup>th</sup> May 2013. The twenty eight (28) days notice was not in accordance with Section 142 of the Act as it was exactly twenty eight (28) days from the date of the notice to the date of the meeting. It is irrespective fact that the meeting had been requisitioned under Section 132 of the Act.
13. In the absence of proof of when the Plaintiff received the said notice and the fact that the notice was not less than twenty eight (28) days before the Extra Ordinary Meeting, take courts the view that the said notice was not effective in accordance with Section 142 of the Act and was not the notice envisaged under Section 133(1) (a) & (b) of the Act as had been submitted by the Defendant as the requisitioning of the removal of the Plaintiff was under Section 185 of the Act.
14. Having analysed the pleadings and the submissions herein, the court finds the procedure for termination of the consultancy was stipulated in the said agreement. The Plaintiff and the consultancy were different entities and it cannot therefore be correct as the Defendant has submitted that the Plaintiff was adequately compensated as a director of the Defendant.
15. I am, However, persuaded by the Defendants submissions that even if the plaintiff was removed from the company, as he was not a director for life, this did not stop him from pursuing his compensation as was expressly provided for in Regulation 96 referred to hereinabove.
16. I am in agreement with the Defendant that provisions of Section 186 (8) of the Act relating to

vacation of office of a director on attainment of seventy (70) years relate to a company which is not a private company. This is not a provision that can assist the Plaintiff as the subject company is a private company.

17. I am therefore not inclined to grant the orders sought by the Plaintiff because doing so would be intermeddling with the affairs of the company when the Plaintiff and the Defendant already had in place Articles of Association that were to govern the affairs between them.
18. However, bearing in mind that the Defendant's notice was not effective as was envisaged by Section 142 of the Act, I hereby direct that the Defendant issues a fresh requisition notice in accordance with the law.
19. For the reasons that I have not been satisfied that the Plaintiff will suffer irreparable loss that cannot be compensated by way of damages, I hereby dismiss his Notice of Motion application dated and filed on 8<sup>th</sup> May 2013. In view of the fact that the Defendant had issued a notice that was not effective, I hereby order that each party will bear its own costs.
20. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of September 2013**

**J. KAMAU**

**JUDGE**