



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 49 OF 2013

SAMUEL MONYO 1ST APPLICANT
CHARLES NGANGA KIRURI 2ND APPLICANT
NYOIKE MAINA 3RD APPLICANT
JOHN KARIUKI NGUYAYI 4TH APPLICANT
GABRIEL KABURU KAMUNYA 5TH APPLICANT

VERSUS

REGISTRAR OF COMPANIES 1ST RESPONDENT
NGANGA KIHOTO NAIVASHA LIMITED 2ND RESPONDENT

RULING

1. Before this Court is the Notice of Motion brought under Certificate of Urgency by the second Respondent dated 5th December 2013. It principally seeks that this Court be pleased to set-aside its Orders made on 17th September 2013 that the Registrar of Companies do call for and conduct the Annual General Meeting of the second Respondent Company. The Application is brought under the provisions of **sections 3, 3A, 1A and 1B** of the *Civil Procedure Act*. The same is supported by the Affidavit of **Pharis Mburu Ngugi** sworn on 5th December 2013. When the Application came before this Court under Certificate of Urgency on 6th December 2013 it was certified as urgent and the inter-parties hearing was set for today. Indeed the Application has been served and both the 5 Applicants in this matter are represented before Court as well as the first Respondent. Indeed, the first Applicant **Samuel Monyo** has sworn and filed a Replying Affidavit dated today.
2. First of all, the Court notes that the sections of the Civil Procedure Act cited by the second Respondent in the heading to its said Application are all sections of general application in relation to the inherent jurisdiction of this Court. There is no specific reference made to **Order 45** of the *Civil Procedure Rules, 2010* which applies to applications for review of Court Orders and under which the second Respondent's Application would or should have been brought. Indeed, the second Respondent has not even made mention of the general Order for Applications being **Order 51** of the *Civil Procedure Rules*. To my way of thinking, the said Application is not properly brought before this Court.
3. Be that as it may and bearing in mind the provisions of *Article 159 (2) (d)* of the *Constitution*, this

Court should now consider the merits of the Application before it. As I understand the Affidavit in support of the second Respondent's said Application, the deponent, who states that he is the chairman of the Board of Directors of the second Respondent Company, objects to the way that the proposed Annual General Meeting scheduled to be held tomorrow 11th December 2013 has been called. He deponed to the fact that he and his fellow directors had only become aware of the holding of the said meeting through a shareholder who had called him and brought to his attention the newspaper advertisement in relation to the said meeting contained in the edition of the Daily Nation dated 12th November 2013. The deponent also took issue with the methodology of service of the Applicants' Chamber Summons dated 5th February 2013. He drew the attention of the Court that the second Respondent Company does not have offices in Naivasha but in Thika and, as a consequence, the contents of the Affidavit of Service sworn by **Francis Matu** on 17th September 2013 were highly suspicious. Mr. Ngugi also criticised the Applicants as "fugitives" under warrants of arrest issued by the High Court in Nakuru for defying Court Orders. More importantly, the deponent detailed that he and his colleagues were the *bona fide* Board members "suited" to run the affairs of the second Respondent Company as per the last Annual General Meeting of the same held in November 2012. To this end, Mr. Ngugi attached to his said Affidavit, a copy of the minutes of a meeting held on 23rd November 2012.

4. The Replying Affidavit of the said Samuel Monyo dated today had attached to it, a copy of the second Respondent Company's Articles of Association. The deponent noted the empowerment for the Company to conduct as many meetings of members as practically possible but that the Annual General Meeting was mandatory. He noted that the notice calling the meeting had been sent out and queried as to why the Board of Directors of the second Respondent were afraid of facing an Annual General Meeting of shareholders. He saw no prejudice that would be suffered in that regard. He did however maintain that the current Board of Directors had misused and/or abused the Court process to oppress members of the second Respondent Company. He also commented that the meeting to which Mr. Ngugi had referred in his Supporting Affidavit to the Application was a Special General Meeting, not an Annual General Meeting, as the minutes thereof clearly stated. There was no provision for a Special General Meeting to be held under the second Respondent Company's Articles of Association. Further, the agenda that had been stipulated for that meeting was not pertinent for an Annual General Meeting under the provisions of the Companies Act. There had been no notice convening the said meeting and the minutes did not show the number of members, if any at all, who had attended the same. The deponent maintained that the second Respondent Company had not conducted any Annual General Meetings since the year 2007 which was when the current Board of Directors was appointed.
5. I have considered the Affidavits filed herein as regards the second Respondent's Application. In fact, it is not the Application of the second Respondent more that of the Board of Directors of the second Respondent Company. I have also taken into account submissions made by counsel for the Applicants as well as counsel for the said Board of Directors. More importantly, I have taken into account the submissions of Mr. Ndirangu of the Registrar of Companies' Office to the effect that, according to the second Respondent Company's records at the Companies Registry, no Annual General Meeting of the Company has been held for a period of 7 years. I hold no regard for the submissions of learned counsel for the said Board of Directors that the Registrar of Companies has been in cahoots with the five Applicants herein by seeking to have the Annual General Meeting held to the disadvantage of Counsel's clients. *Article 22* of the second Respondent Company's *Articles of Association* reads as follows:

"The company shall in each year hold a general meeting as its Annual General Meeting in addition to any other meetings in that year, and shall specify the meeting as such in the notices calling it, and not more than 15 months shall elapse between the date of the one Annual General Meeting of the company and that of the next. The Annual General Meeting shall be held at such time and place as the directors shall appoint. All General Meetings other than Annual General Meetings shall be called Extraordinary General Meetings."

6. I have perused the minutes of what was called the Special General Meeting of the second Respondent Company held on 23rd November 2012 at Naivasha. Such was certainly not an Annual General Meeting as alleged by Mr. Ngugi in the Supporting Affidavit to the Application. It

is also quite apparent to this Court that no Annual General Meeting has been held of the second Respondent Company for a number of years and the Board of Directors has continued in office oblivious to the requirements of not only the second Respondent Company's Articles of Association but also the provisions of **section 131** of the *Companies Act*. I have no doubt that the Annual General Meeting scheduled for tomorrow should proceed as planned. I am satisfied that the Registrar of Companies has complied with the Orders of this Court issued on 17th September 2013 and that proper notice of the Annual General Meeting has been given. **Section 133 (2)** of the *Companies Act* provides that such a meeting may be called by the giving of 21 days' notice of the same in writing. I am satisfied that the said advertisement in the Daily Nation edition of 12th November 2013 suffices for that purpose.

7. As a result, I direct that the Annual General Meeting of the second Respondent Company shall proceed as planned at Gatanga at 11 a.m. tomorrow morning, 11th December 2013. I dismiss the second Respondent's Application dated 5th December 2013 with costs to the Applicants.

DATED and delivered at Nairobi this 10th day of December, 2013.

J. B. HAVELOCK

JUDGE