IN THE MATTER OF: THE LAND LAW REFORM ACT 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE COMPANIES ACT CAP 486 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO BRING JUDICIAL REVIEW PROCEEDINGS BY WAY OF ORDERS OF CERTRIORARI AND PROHIBITION

BETWEEN

STEPHEN MWANIKI KABUE…..…….....……..1ST APPLICANT

ONESMUS KIEME KAROKI……..…….2NDAPPLICANT

DAVID MAINA NGURU……..…….3RD APPLICANT

JOHN MAINA KAMURU…….4TH APPLICANT

-VERSUS-

THE REGISTRAR OF COMPANIES…….....……. RESPONDENT

EX-PARTE
STEPHEN MWANIKI KABUE
ONESMUS KIEME KAROKI
DAVID MAINA NGU
JOHN MAINA KAMURU

INTERESTED PARTIES
PETER GATAWA MUTHOGA
JOHN MWANGI MUKIRI
JULIUS MUHIA MACHARIA
STEPHEN MWANGI GITHINJI

CYRUS MAINA KIHUGA
GEOFFREY MWANGI
STEPHEN KAMAU MUCHERU

J U D G M E N T

The four applicants herein approached the court on 4th August, 2006 vide a chamber summons application dated 2nd August, 2006 seeking leave to institute judicial review proceedings against the Respondent, the Registrar of Companies.

Leave was granted by J. Emukule on 6th October, 2006 and subsequently on 26th October, 2006 the applicants filed the substantive motion seeking the following orders:

i) OF CERTIORARI: **To bring this Honourable Court and to quash the action or directives of the Respondent of endorsing the illegal elections of and registering the purported new directors to wit;** PETER GATAWA MUTHOGA, JOHN MWNAGI MUKIRI, JULIUS MUHIA MACHARIA, STEPHEN MWANGI GITHINJI **or such other purported director for want of compliance with the company's Rules and the procedure provided for under Section 182 and Table A First Schedule Rule 50 and 93 of the Companies Act Chapter 486 of the Laws of Kenya.**

ii) OF MANDAMUS: To **compel the Respondent to allow the Applicants to hold the Company's Annual General Meeting scheduled for 28th August, 2006 or such other date that the Honourable Court will direct where the proper agenda of the Annual General**

iii) Meeting will be followed including election of Directors (Applicants herein) by Rotation as provided by law.

iv) OF PROHIBITION: **To prohibit the Respondent from making any changes in the records of** KIRU INVESTMENT HOUSING COMPANY LIMITED **and in particular registering the purported new directors to replace the Applicants herein without holding a proper Annual General Meeting in a closed venue and with full participation of the Applicants herein.**

b) Costs of this application be granted to the Applicants.

The application was supported by the statutory statement and verifying affidavit sworn by the 1st applicant Stephen Mwaniki Kabue on his own behalf and on behalf of the other three applicants namely Onesmus Kieme Karoki, David Maina Nguru and John Maina Kamuru. The application was opposed by both the Respondent and the interested parties. The respondent filed a replying affidavit on 16th June, 2009 sworn by Johnson Otieno Adera a Senior Assistant Registrar in the Department of Registrar General, Attorney General's Chambers Nairobi.

The interested parties opposed the motion through the replying affidavit dated 6th December, 2006 sworn by Peter Gatawa who described himself as the Chairman of the board of directors of Kiru Investment Housing Company Ltd. He deponed in paragraph I that he had been granted authority to swear the affidavit on behalf of the board of directors of Kiru Investment Housing Company Ltd in opposition to the motion filed by the applicants.

On 6th November, 2006 the case was mentioned before Nyamu, J (as he then was) who directed the parties to exchange and file their written submissions which apparently were to have been highlighted on the hearing date. Several hearing dates were taken in Year 2007, 2008, 2009, 2010 but for various reasons which are on record, hearing could not proceed on either of those dates but eventually on the last hearing date which was on 15th November, 2011 Mr. Onindo who was holding brief for Mrs. Waiganjo for the exparte applicants and Mr. Macharia counsel for the interested parties attended the court and informed the court that they were relying on their written submissions as filed and they had no wish to highlight the

same and on their invitation court proceeded to fix judgment date.

Though the Respondent had been properly served with a hearing notice, there was no representation for the respondent on the said hearing date.

Having perused the pleadings filed by the applicants and the written submissions filed on their behalf by Counsel Nyokabi Waiganjo, I find that the applicants are challenging the decision made by the respondent of convening and holding an Annual General Meeting (AGM) for Kiru Investment Housing Company Ltd (the company) on 24th June 2006, the election of the interested parties as the new directors of the company and their registration as the new directors of the company on 27th June, 2006.

It is the applicant's case that the calling of the said AGM was ultra vires the provisions of Section 130 and 131 of the Companies Act and was contrary to Section 182 of the Companies Act (hereinafter referred to as the Act) and Table A first schedule Rules 50 and 53 of the Companies Rules. The applicants further contended that the election of the interested parties as directors of the company breached Article 23 of the Company's Articles of Association which provided for Rotation of directors.

The applicants also claimed that the respondent's decision to hold the company's AGM on 24th June, 2006 was reached in breach of the rules of natural justice as they were not notified of the decision by the respondent and only learnt about it through the police. In addition, the applicants complained that Mr. J.O. Odera State Counsel who was handling the matter on behalf of the respondent had colluded with the interested parties to frustrate and illegally throw them out of office and this explains the haste with which the purported new directors were registered on 27th June, 2006 about two days after the AGM held on 24th June, 2006.

The respondent in the replying affidavit sworn on its behalf by Johnson Otieno Adera averred that the application by the applicants was baseless, mischievous, filed in bad faith and was an abuse of the court process. In paragraph 4,5,6,12,13,14,16 and 18, Mr. Johnson Adera deponed that the AGM of 24th June, 2006 was held and elections conducted within the strict requirements of the law as the company had not held an AGM close to eight years. He also deponed that he personally attended the meeting and confirmed that there was quorum and that the respondent did not breach the rules of natural justice as the applicants were notified of the meeting and given opportunity to participate in it but they chose to stay away from the meeting. He also denied that the purported new directors were registered in haste asserting that the respondent was duty bound to accept and act on any notices of change of directors unless barred by a court order.

On their part the interested parties in the replying affidavit sworn on their behalf by Peter Gatawa supported respondent's case and maintained that the AGM of 24th June, 2006 was held and conducted by the respondent within the law as no AGM had been held since Year 2005. They claimed that all shareholders of the company had been notified of the intended meeting and that the applicant's claim that they were unable to attend the AGM for fear of their safety had no basis as no threats had been made on their lives.

I have carefully considered the respective cases for the parties herein as summarized hereabove as well as the written submissions filed by their counsel.

I find that it is not disputed that the applicants were the directors of Kiru Investments Housing Company Ltd (hereinafter referred to as the company) prior to the holding of the AGM called by the respondent on 24th June, 2006 when new directors were elected into office and registered as such by the respondent on 27th June, 2006.

It is also not disputed as this has been admitted by the applicants in paragraph 12 of the verifying affidavit that the company had held its last AGM on 18th May, 2005 and that no AGM had been conducted in Year 2006.

Though at the leaves stage the applicants had challenged the respondent's decision to convene the AGM on 24th June, 2006 on grounds that it was ultra vires Section 130 and Section 131 of the Companies Act, this position appears to have been abandoned in the substantive motion when focus of the challenge changed from the claim that the respondent had exceeded her powers under Section 131(2) of the Companies Act to a claim that the election and registration of the new directors was illegal for having been done in contravention of Section 182 and Rules 50 and 93 of Table A first schedule of the Companies Act.

Given the undisputed facts in this case as summarized herein before and the complaints made by the applicants against the respondent, I find that only two issues emerge for determination by this court namely;

(1) Whether the election and registration of new directors of the company by the respondent who happen to be the interested parties in this case was illegal for having been done in contravention of the Companies Act and the Company's Articles of Association.

(2) Whether the Annual General Meeting in which the said elections were done was convened and conducted by the respondent in breach of the rules of natural justice.

On the first issue I think it is important to reproduce Section 182 of the Companies Act which the applicant's claim was breached in the election and registration of the new directors.

Section 182 reads as follows:

(1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in a prospectus issued by or on behalf of the company, or as proposed director of an intended company in a prospectus issued in relation to that intended company, or in a statement in lieu of prospectus delivered to the registrar by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus or the delivery of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorized in writing-

(a) signed and delivered to the registrar for registration a consent in writing to act as such director, and

(b) either-

(i) signed the memorandum for a number of shares not less than his qualification, if any, or

(ii) taken from the company and paid or agreed to pay for his qualification shares, if any, or

(iii) signed and delivered to the registrar for registration an undertaking in writing to take from the company and pay for his qualification shares, if any, or

(iv) made and delivered to the registrar for

registration a statutory declaration to the effect that a number of shares, not less than his qualification, if any, are registered in his name.

(2) Where a person has signed and delivered as aforesaid an undertaking to take and pay for his qualification shares, he shall, as regards those shares, be in the same position as if he had signed the memorandum for the number of shares.

(3) References in this section to the share qualification of a director or proposed director shall be construed as including only a share qualification required on appointment or within a period determined by reference to the time of appointment and references therein to qualification

shares shall be construed accordingly.

(4) On the application for registration of the memorandum and articles of a company, the applicant shall deliver to the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding one thousand shillings.

(5) This section shall not apply to-

(a) a company not having a share capital; or

(b) a private company; or

(c) a company which was a private company before becoming a public company; or

(d) a prospectus issued by or on behalf of a company after the expiration of one year from the date on which the company was entitled to commence business.

A reading of Section 182 shows clearly that it has no application to the applicant's case and it is totally irrelevant. It is evident that this provision of the law has nothing to do with election of directors of an existing company but it provides for requirements to be met by persons willing to be appointed as directors of a company by its Articles of Association or proposed to be director in its prospectus or in a statement in lieu of prospectus delivered to the Registrar by or on behalf of a company and this requirement should be satisfied before registration of the Articles of Association or publication of the prospectus or delivery of the statement in lieu of the prospectus to the Registrar of Companies. It is obvious that the provision applies to companies that are in the process of incorporation.

In the instant case Kiru Investment Housing Company Ltd according to annexture ***marked SM1(b)*** was an existing company which had been incorporated as a private company on 24th March, 1998 but was later converted into a public company on 17th December, 2004 as stated by the applicants in their pleadings.

It is important to note that by the clear provisions of Section 182(5)(c) public companies which had started as private companies are exempted from the provisions of Section 182 of the Act. As the company in which election of directors is challenged by the applicants is one such company as stated above, Section 182 was not applicable to it for that reason and for the reason that it had no application in the election into office of new directors in an AGM.

The applicants have also complained that Rule 50 and 93 of Table A first schedule of the Act were not followed by the respondent and that therefore the election and registration of the interested parties as directors of the company should be quashed by this court.

Rule 50 relates to the period of notice to be given to shareholders of a company before holding of an AGM. It provides for the giving of 21 days notice. It is noted that none of the parties addressed the court on the issue of how much notice was given to members of the company by the respondent notifying them of the intended AGM slated for 24th June, 2006. The applicants have claimed that they were not given any notice by the respondent but they became aware of the notice through the police on 16th June, 2006. They did not however inform the court whether any such notice was issued to the other members of the company except themselves and if so the period of such notice. The respondent on the other hand claimed in the replying affidavit that the applicants were aware of the intended meeting but Mr. Odera did not go further to state how such awareness had been achieved and whether the shareholders of the company had been served with a formal notice for the AGM.

However, whether such notice was issued or not the law is that lack of the requisite notice does not render proceedings in an AGM invalid – ***see Rule 51.*** It therefore follows that even if the applicants had not been served with a 21 day's notice of the intended AGM by the respondent, that very act would not of itself

render the elections that were conducted in that AGM illegal or unlawful.

The applicant has also not availed any evidence to prove that Rule 93 was not complied with.

On the claim that the said elections were invalid as there was no quorum in the AGM, it is noted that in the applicants own admission there had been about 70 people present in the said AGM and according to Article 11 of the Company's Articles of Association which is the company's governance instrument, only 2 people present at the meeting were sufficient to constitute a quorum. Article 23 which has also been cited by the applicants in support of their case in my view does not set any specific criteria for election of directors.

It is in the following terms:

"The Company may from time to time in general meeting by Ordinary Resolution increase or reduce the number of Directors and may also determine in what rotation the increased or reduced member is to go out of office".

In my opinion Article 23 only allows members present in an AGM to pass an ordinary resolution to either increase or decrease the number of directors and determine when the increased or reduced number of directors would leave office. It does not give any directions on how new directors should be voted into office.

Lastly, the applicants claim that the 1st interested party was not qualified to be elected as a director allegedly because he was not a fully paid up member or that some of the members who voted in the new directors into office were not fully paid up members of the company cannot be sustained as no evidence was availed to the court to substantiate the claims. In the absence of evidence in that regard, this court cannot put any weight to such claims.

Finally, I now wish to turn to the complaint that the AGM of 24th June, 2006 was convened and conducted by the respondent in breach of the rules of natural justice. I find no basis for this complaint because from the applicant's pleadings, though it is not clear whether or not the respondent had served a notice on the applicants and other members of the company of the intended AGM, it is clear that the applicants were aware about the intention of the respondent to hold the AGM on 24th June, 2006 as early as 16th June, 2006. However by their own admission they chose not to attend or participate in the AGM allegedly for fear of their safety.

It is worth noting that the applicants have not claimed that they were totally unaware of the date of the AGM or that the respondent prevented them or prohibited them from attending the AGM. They have also not attributed the alleged threats on their lives to the respondent.

Having been aware of the date of the AGM and having chosen of their own volition not to attend, participate and offer themselves for re-election I do not see how they can now turn around and claim that the respondent breached the rules of natural justice by convening and conducting the AGM. I find that the respondent would only have been guilty of contravening the rules of natural justice if the office of the Registrar General had made any attempts to prohibit or prevent the applicants from attending the AGM because in that case the office would have interfered with their right to be heard in the AGM or right to offer themselves for re-election as directors of the company which would obviously be detrimental to their interests.

In view of the foregoing, I find that the applicants have failed to establish a case that would warrant the intervention of this court in granting the judicial review remedies sought in this case. No illegality has been shown to have occurred in the election and registration of the interested parties as the directors of the company as alleged by the applicants. In the circumstances, I decline to issue the order of certiorari as prayed in Prayer I.

As for the order of Mandamus and Prohibition sought in Prayer (II) & (III) of the application, I find that the two remedies are not available to the applicants since the prayers have already been overtaken by events. Issuance of the orders now will not serve any purpose.

For the order of mandamus, the date the respondent was supposed to be compelled by order of mandamus to hold the AGM namely 28th August, 2006 has already passed. It is also reasonably expected that other AGMs have been held and possibly other directors elected into office after the institution of this suit. This was alluded to by counsel for the interested parties Mr. Macharia in his address to the court on 29th November, 2010.

In any event, the order of mandamus is used by the court to compel the performance of a public duty which is imposed on a person or a public body by a statute where such person or body of persons has failed to perform that duty to the detriment of a party who has a legal right to expect the duty to be performed.

The scope and efficacy of the order of mandamus was well captured by the Court of Appeal in Kenya National Examination Council Vs Republic Exparte Geoffrey Gathenji, Njoroge & 9 Others Civil Appeal No.266 of 1996 where quoting with approval Halsbury's law of England 4th Edition Vol.I page 111 the learned judges stated as follows:

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual…… The order must command no more than the party against whom the application is made is legally bound to perform….."

From the foregoing, it is clear that an order of mandamus can only be issued against a public body or public officers who have failed to perform a public duty. In this case, there is no allegation that the respondent has failed to perform a public duty to the detriment of the applicants. In fact the complaint by the applicants is that the respondent performed its public duty of registering new directors but in haste.

As the respondent had already performed its statutory duty of registering the newly elected directors of the company even before this suit was instituted there is nothing left for this court to compel the respondent to do by issuing orders of mandamus.

The same argument goes for the prayer for order of prohibition in Prayer III. The registration of the new directors had been done and completed by 27th June, 2006 and an order of prohibition cannot issue to prohibit past events. The order of prohibition looks into the future and can only be used to prevent the making of contemplated illegal actions or decisions based on the wrong exercise of jurisdiction or lack of it or where there is contemplated breach of the rules of natural justice.

For all the foregoing reasons, I find no merit in the applicants Notice of Motion dated 26th October, 2006 and it is hereby dismissed with costs to the respondent and the interested parties.

Dated, **Signed**and**Delivered** by me at Nairobi this 19th day of January, 2012.

C. W. GITHUA
JUDGE
In the presence of:

Florence – Court Clerk

Mr. Onindo holding brief for Waiganjo for Applicants
N/A for Respondent
Mr. Weru holding brief for Macharia for Interested Parties