REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Judicial Review 110 of 2011

JOSEPH MATHENGE MUTURI AND 6 OTHERS.....APPLICANTS

VERSUS

REGISTRAR OF COMPANIES.....RESPONDENT

AND

JOSEPH MATHENGE MUTURI.....1ST SUBJECT

DAVID MUCHAI WANGANGA.....2ND SUBJECT

LUCY WANJIRU MURATHA.....3RD SUBJECT

EMILY NYAMBURA WACHANIA.....4TH SUBJECT

DORCAS NJERI MWANGI.....5TH SUBJECT

JAMES CHEGE WAMARIA.....6TH SUBJECT

LUCY WAMBUI GACHAU.....7TH SUBJECT

EXPARTE

ELIZABETH WANJIKU KIMANI.....1ST INTERESTED PARTY

MARGARET WAMBUI GITAKA.....2ND INTERESTED PARTY

CONSOLATA WANGECI KURIA.....3RD INTERESTED PARTY

MONICA WAIRIMU ITHAKA.....4TH INTERESTED PARTY

GRACE WAITHIRA MWANGI.....5TH INTERESTED PARTY

JULIA WANGARI.....6TH INTERESTED PARTY

DAMARIS MUTHONI KIGUTA.....7TH INTERESTED PARTY

BAHATI WOMEN CO. LTD. …….....….. 8TH INTERESTED PARTY

RULING

The applicant's counsel Mr. Githui expressed concern regarding the management of the Company, pointing out that, as a result of the findings made by the court on 2nd April 2010, there was a crisis created because there is no one providing management at the moment. Mr. Githui pointed out to this court, that although Bahati Women's Group is not a party to this suit, it is affected by the court's ruling which nullified parallel elections which had been held by two separate groups. He urges the court to consider that the company conducts its Annual General Meeting every 2nd July of the year – the last elections having been held in July 2011 and we are two months away from the Annual General Meeting, so in the meantime pending the elections, the court ought to give directions regarding interim management.

The initial objective of the company's formation, was to settle women within GACHEMBE FARM, and save for 3, 4, 5 and 7 applicants, the prime movers of the application are men.

He further points out that, the ruling by EMUKULE J which led to the elections, had installed the subjects for an interim period of 30 days pending elections, and the fact of that ruling cannot be held as a ground to have the subjects installed as directors because their role was interim.

He further argues that, there is nothing to suggest that the interested parties cannot take care of the interests/affairs of the company until elections are held. He contends that, the court explicitly indicated that the confusion was caused by the Registrar of Companies, so it cannot be a reason to strike out the interested parties. Counsel points out that, at stake is a parcel of land measuring thousands of acres and many parties are affected, so it is in the interest of everyone that the status quo be maintained, and the party to run the affairs of the company should do so along with the Registrar of Companies. His suggestion is that the party to be involved in the management of the company is the interested party, and at most the Registrar of Companies pending the Annual General Meeting.

Mr. Ogola on behalf of the Respondents opposes this, saying that what Mr. Githui seeks are substantive orders which cannot be granted at a mention. His contention is that, the status obtaining as at the time of the elections was that the subjects were the directors of the company. He explains that Hon. Justice Emukule was very clear as to who were the directors of the company, and before the interested parties were elected, there was no lacuna as to the management of the company. He draws this court's attention to the ruling by Judge Emukule, saying that he had directed the applicants to remain as directors until a consultative meeting was held. Mr. Ogola argues that, it did not mean that if the meeting did not take place, the applicants would cease to be directors. Further, that the scenario and confusion created by the interested party herein, is not real, and the problem arose on how to conduct elections because of the partisan manner in which the Registrar of Companies dealt with the issue, i.e., changing the venue for the meeting.

Mr. Ogola submits that, the easiest way to solve the matter is to revert to the status that was subsisting prior to the ruling made on 20/05/2011 for direction that parties do have a consultative meeting within 30 days on when, where and how to conduct elections.

Mr. Ogola's contention is that, having found that the interested party came to office illegally, there can be no basis for making them the interim officials.

Having been found that Respondents were the directors, then they can only be removed through properly

conducted elections or through an order of the court, none of which has happened. Mr. Ogola explains that, prior to them being summoned to court, the Respondents had approached the Registrar of Companies by letter and through a physical visit, seeking for directions on when to have a consultative meeting – the letters have been shown to court. However the representative of the Registrar of Companies refused to give a date for the consultative meeting on the basis that there was a date for mention before court on 25/04/2012. Mr. Ogola's contention is that the confusion created here is due to the partisan manner in which the Registrar of Companies and the Interested party, are dealing with this matter. He argues that, prior to the Interested party being directors, they did not invoke Section 131 of Companies Act for the court to order elections. Counsel urges the court not to make any substantive orders in absence of a formal application.

As regards the question of Status Quo Mr. Ogola points out that, there are several decisions HCCC No.133 of 2009, HCCC NO.177 of 2007, all dealing with issues of land and pending before Hon. Justice Wendoh since December 2011. Mr. Ogola's position is that in so far as pleadings and prayers sought, the court became *functus officio* upon issuing orders of certiorari which quashed the election of all parties concerned.

Miss Chirchir from the office of the Registrar informed this court that they are ready and willing to have consultative meetings with the parties within the next four (4 days). She confirms that the Respondents went to the office of the Registrar of Companies seeking directions for a consultative date, but the Registrar's office could not give them a date as she had just been given the file and she had also been informed about the mention. She informed this court, that the bone of contention has always been the venue and urged court to give directions on a specific venue for the next Annual General Meeting. Mr. Ogola clarified that the Annual General Meeting was only held in July 2011 due to consultations by the parties and there was no hard fast rule that it has to be July.

In reply Mr. Githui submitted that:

1. Although the matter was for mention, the court has powers under Section 135 of the Companies Act to act on its own motion and make sustainable orders.

2. The interim orders which placed the subjects as directors was only to be effective pending the consultative meeting and if the mandate was to proceed, or continue it would be on the strength of the court order.

His argument is that the subjects have not always been directors and the trend in the company is that after every election, there has to be a court case.

He argues that between 5th July 2011 and 2nd April 2012, 1-7th Interested Parties were the directors so they need not request for a meeting to elect directors under Section 131 of the Companies Act, the only thing they would do is to call a Special General Meeting, if so needed.

Mr. Githui submits that, Mr. Ogola is off target about requisition of a meeting because Judicial review No.58 was challenging the legality of the applicant's status – which means that, for the last ten years, it is the Interested Parties who have run the company.

Mr. Githui's contention is that the 8th Interested Party, has to run, before elections are concluded. He has no problem with the Registrar of Companies looking at the Company's Memorandum and Articles and deciding on when to call a meeting to agree on date for elections.

As regards venue, Mr. Githui's submissions is that the issue doesn't arise as the Company has registered offices and meetings can be held there. There is no dispute that:

(1) This matter was for mention to enable the court give directions following its ruling which left the company without any directors.

(2) Parties are not in agreement as to who should run the offices of the company pending fresh elections.

The issues to be addressed, as raised by counsel appearing in this matter are:

(a) Can the court give formal orders under section 135, does there have to be a formal application?

(b) Has the court been rendered *functus officio* following its decision of 2nd April 2012?

(c) What was the status quo obtaining before the July 2011 elections?

(d) Between July 2011 to April 2012, who has run the companies offices?

(e) Venue for the next Annual General Meeting.

The purpose of the mention was so that this court could exercise its powers under provisions of **section 135(1)** of the Companies Act which provides that:

"If for any reason, it is impracticable to call a meeting of a company in any manner in which meeting of that company may be called, or to conduct the meeting of the company in manner prescribed by the Articles of this Act, the court may, either of its own motion, or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the court thinks fit, and where any such order is made, may give such ancillary or consequential directions as it thinks expedient; and it is hereby declared that the directions that may be given under this subsection include a direction that one member of the company present in person or any proxy shall be deemed to constitute a meeting."

I therefore hold that this court is properly placed to give directions and is in no way functus officio since there seems to be a stalemate.

What was the status quo before July 2011 elections? It was that the subjects were the directors in the interim 30 days pending elections for new directors. This was courtesy of an order issued by Hon. Justice Emukule on 24th May 2011, which quashed the election of 1-7th Interested Parties as the directors. Then came the contested elections where the Interested Parties begun running the show, despite there having been a parallel election by the subjects. The only reason why the Interested Parties say they were the de facto directors is because of the steps they took to have the Registrar of Companies recognise them as such. Now that their status has been nullified by the court, I concur with Mr. Ogola, that it would be illogical to them have the interested parties continue running the show. Yet again it would be defeating to direct that the subjects do run the company as interim directors because the orders were made for a limited period and I recognise that this court has no powers whatsoever to impose or install directors on the 8th Interested Party. So that we end up with a very bad game of musical chairs, more like, the cat chasing after its own tail (just going in circles.

I recognise that if I was to direct that one set of directors take over the management of the company at this point even on a temporary basis, I will only be advancing the ping pong game adopted here, and certainly prejudicing the interest of one group. Section 135(1) as necessity require this court to help break the stale mate affecting the companies welfare and that does not in my view lie in making orders for interim directorship. The representative from the Companies Registry has indicated the Registrar's willingness to convene a consultative meeting within four (4) days of the court's orders – we need not wait for July. So I will direct that the Registrar of Companies do convene a consultative meeting in the Company's (8th Interested Party) office with the subjects and the interested parties within the next 7 (seven) days so as to set a date to call and hold an Annual or Special General Meeting to elect new Directors of the company.

Since there appears to be a contest even on the question of venue, the consultative meeting shall also

determine the venue where the Annual General Meeting will be held and in the event of the parties failing to agree, then to avoid any further delay which will impact on the running of the company's affairs, the court orders that the Annual General Meeting be held at Afraha Stadium. The Annual General Meeting shall be supervised by the Registrar of Companies or her representative, and the District Commissioner, Njoro.

Matter be mentioned on 22nd June 2012 to confirm the outcome of the consultative meeting.

Delivered and dated this 18th day of May, 2012.

H.A. OMONDI
JUDGE