



ANDY FORWARDERS SERVICE LIMITED.....PETITIONER/APPLICANT

VERSUS

THE CAPITAL MARKETS AUTHORITY..... RESPONDENT

CMC HOLDINGS LIMITED.....1ST APPLICANT/ INTERESTED PARTY

DANIEL KIMOTHO MUCHIRI.....2ND APPLICANT/ INTERESTED PARTY

JONES KAVINYA NZAU.....3RD APPLICANT/INTERESTED PARTY

GEOFFREY BETHUEL MAOGA.....3RD APPLICANT/INTERESTED PARTY

EMMANUEL MASABA.....4TH APPLICANT/INTERESTED PARTY

ALOIS WAFULA CHAMI.....5TH APPLICANT/INTERESTED PARTY

KIRTESH P. SHAH.....6TH APPLICANT/INTERESTED PARTY

R U L I N G

1. Before me is a Notice of Motion dated 14th March 2012 premised on the provisions of **Section 5** of the **Judicature Act** and it is the prayer by the Petitioner/Applicant that the Respondent, Capital Markets Authority (*hereinafter referred to as "CMA"*), the Interested Party, CMC Holdings Ltd (*hereinafter referred to as "CMC"*) and Kung'u Gatabaki, Joel Kibe, Paul Wanderi Ndung'u, Ashok K. Shah, Charles Njonjo, Andrew Hamilton, William Lay and Bill Ngige, be committed to civil jail for breach of the Orders issued by this court on 16th November 2011. As a consequence, it is further prayed that the decision of the Respondent vide its letter of 27th February 2012 and the Interested Party's and/or the alleged contemnors' decision and/or action at the CMC Director's meeting of 12th March 2012 in so far as it relates to breach of the orders made on 16th November 2012 be declared unlawful and a nullity.

2. Although advocates for the parties spent considerable time arguing the Application, certain facts are uncontested and are best out at this stage. They are the following;

(i) *The Petition dated 25th October 2011 was filed by the present Applicant seeking certain Orders relating to its requisition of an Extraordinary General Meeting of the Interested Party's Shareholders on 21st November 2011 which was stopped by the Respondent.*

(ii) *Concurrently with the Petition, a Chamber Summons Application was filed and the prayer sought was that of a temporary injunction restraining the Respondent from purporting to stop the Applicant from requisitioning for the EGM aforesaid.*

(iii) *The Respondent filed a response to the Chamber Summons but also filed a Cross-Application seeking*

the following Orders;

(a) “a Conservatory Order maintaining the status quo as regards CMC Holdings Company Ltd (“the Company” and the composition of its board of Directors).”

(b) “an Order” restraining “the Petitioner from proceeding with its requisition for or otherwise convening or holding an Extraordinary General Meeting (EGM) on 21st November 2011 or on any other date prior to the hearing and determination of the Petition herein.”

I have deliberately reproduced the Orders sought for reasons to be seen shortly.

(iv) On 16th November 2011, Mumbi Ngugi, J. issued the following Orders in determining the Chamber Summons and Cross-Application aforesaid;

“(1) The Petitioner’s Application dated 25th October 2011 is hereby dismissed.

(2) The Respondent’s Cross-Application dated 4th November 2011 is allowed and therefore;

(i) The Status quo as regards CMC Holdings Company Ltd, the Interested Party herein, shall be maintained pending the hearing and determination of the Petition dated 25th October 2011.

(ii) The Petitioner is hereby restrained from proceeding with its requisition for or otherwise convening or holding an Extraordinary General Meeting on 21st November 2011 or on any other date pending the hearing and determination of this Petition.

(3) The Petition shall proceed to hearing on a priority basis and the parties are invited to take a date for the hearing of the Petition.

(4) Costs shall await the hearing and determination of the Petition.”

(v) On 27th February 2012, Kung’u Gatabaki chairman of CMA, wrote to Joel Kibe, Chairman of the CMC and made reference to two meetings on 21st February 2012 and 22nd February 2012 between the two entities in which certain agreements were allegedly reached regarding the affairs of the company. One of those agreements was that an interim Board of the CMC would be established comprising nominees of the Authority and seven Directors of the Company. He proceeded to nominate three persons to represent the Authority viz; - Ms. Zehrabanu Janmohamed, Dr. Joshua Okumbe and Mrs. Susan Wakhungu – Githuku.

(vi) On 12th March 2012, Joel Kibe replied to the letter of 27th February 2012 and stated that on the same day the Board of Directors of the Company had met and upon a resolution, seven Directors were nominated to join the Interim Board and two were removed i.e. Peter Muthoka and one J. Kivai.

3. It is the decisions in (v) and (vi) above that are the subject of the contempt proceedings and during Submissions by the advocate for the parties, one question arose which I am required to determine in limine. It is the following;

What is the exact meaning of the Orders of Mumbi Ngugi, J. and was there breach and if so by whom?

4. On the issue above, it was argued by the advocates for the Applicant, Mr. Ojiambo and some Interested Parties represented by Mr. Norwojee that the “Status quo” Order made by the learned judge (Mumbi Ngugi, J.) could only mean and include the composition of the Board of Directors of the Company and no more.

5. The advocate for the Respondent was of the contrary view; that the Status quo order “*related to the general affairs of CMC and not the composition of the Board of Directors.*” The advocate for the Respondent further submitted that the “*orders were meant to stop the shareholders from changing Directors through an Extraordinary Special General Meeting*” and never meant that the Regulator could not move to protect the company in any way.

6. The advocate for the 4th alleged contemnor also added his voice to the above argument and submitted that since the Applicant was denied Orders to conduct the EGM and was also restrained from doing so, the “*Status quo*” Order should be read in that context.

7. On my part, I have elsewhere above reproduced the Prayers sought in the Cross Application by the Respondent and I have also reproduced the final Orders issued by Mumbi Ngugi, J. It can be seen that the original Prayer on maintenance of “*Status quo*” had two facets to it; viz;

- “*as regards CMC Holdings Company Ltd (“the Company”) and*
- “*the composition of its Board of Directors*”.

8. The learned judge, in her wisdom, granted only one facet of the Prayer and completely said nothing of the second facet i.e. composition of the Board of Directors of CMC which is the subject of the proceedings for contempt. In her Ruling, she made reference to the substance of the Petition and in addressing the issue of “*Status quo*” she stated as follows;

“The second issue of concern is whether the grant of a Conservatory Order to the Petitioner will result, in terms of the test proposed above, in enabling the Court to ‘maintain the Status quo or existing situation or set of facts and circumstances’ so that the issues for determination in the Petition before this Court would remain live and the hearing of the Petition would remain live and the hearing of the petition would not be rendered a mere academic exercise. To my mind, the answer is no. If the regulator is restrained and the Petitioner permitted to convene the EGM on 21st November 2011, the critical questions that this Petition seeks to answer relating to the mandate of the Respondent as regulator with regard to the rights of shareholders under the Companies Act would be rendered moot.

Conversely, should the Cross-Application succeed, the status quo in the Interested Party would be maintained and the issues raised by the Petition would remain live for determination at the hearing of the Petition.”

9. The “*issues raised by the Petition*” relate to the holding of an EGM and the agenda for the EGM is not an issue at all, so that whether it related to election of new Directors, removal of old Directors or change in the composition of the Board generally, was and is not an issue to be determined within the Petition and consequently could not and cannot be an issue in any interlocutory Application, including the one before Ngugi, J. and the one now before me. For avoidance of doubt, the Prayers in the Petition are *inter-alia* recorded as follows;

“(i) That the Respondent’s decision dated 11th October 2011 purporting to require the CMC Board of Directors not to hold an extra-ordinary general meeting (EGM) in direct breach of statutory duty imposed upon CMC Directors by virtue of Shareholders’ interest under Section 132 of the Companies Act was in violation of Article 40 of the Constitution and therefore invalid. (Emphasis added)

(ii) That the Respondent’s decision and direction for CMC or its Shareholders not to hold an EGM, thereby compelling the Petitioner as a Shareholder in CMC to undertake not to exercise its right which is attached to and exercisable only by virtue of its shareholding in CMC, was in violation of Article 40 of the Constitution and therefore invalid.” (Emphasis added)

10. In spite of my finding above, it may be argued that the “*holding*” of an EGM or any other meeting cannot be divorced from its agenda. With respect, whatever the answer to that question may be, Mumbi Ngugi, J. in addressing the competing interests at play in this dispute found that the Applicant “*had not*

demonstrated that it has an arguable case with a probability of success” and therefore the right to call for a meeting and the substance of discussion at the meeting were found wanting and I cannot now revisit the issue.

11. It is obvious to me therefore that Mumbi Ngugi J., from a clear reading of her Ruling and the Orders that she issued, never intended that her Orders should extend and include any act by CMA to protect CMC, including from itself.

A change of Directors and the composition of the Board was not one of the matters covered by the “*Status quo*” Order and I have said why.

12. **Having so held, can the actions elsewhere set out above be said to be in contempt of court?** Clearly not and since I am aware that there are other proceedings challenging the legality of the removal of Peter Muthoka and J. Kivai as Directors of the Company, I have deliberately limited myself to what is crucially in issue before me.

13. Once I have held that there cannot have been any contempt of the Orders of 16th November 2011, it follows that all other issues raised by advocates for the parties are merely academic and I see no reason to delve into them. I mean no disrespect in doing so.

14. The Application dated 14th March 2012 is without merit and is dismissed with costs.

15. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2nd DAY OF AUGUST, 2012

**ISAAC LENAOLA
JUDGE**

In the presence of:

Irene – court clerk

Mr. Alibhai and Miss Lubano for Respondent

Miss Ndhicho hold brief for Mr. Ojiambo for petitioner

Mr. Munyu for Interested Parties

Mr. Norwojee for Interested Parties

Mr. Moskta for 4th alleged contemnor

Order

Ruling duly read.

**ISAAC LENAOLA
JUDGE**

Miss Ndiho

I seek leave to appeal and also for a date for the Application dated 9/12/2011 and the Petition.

Mr. Alibhai

No objection

Mr. Munyu

No objection

Mr. Norwojee

No objection, I seek leave to appeal

Mr. Mosoka

No objection

Order

Leave is granted to the Applicant and any Interested Party to appeal against the Ruling of 2/8/2012.

In the meantime, Application dated 9/12/2011 and the Petition to be heard on 7/11/2012

Parties to file Submissions before then

Copy of the Ruling to be supplied.

ISAAC LENAOLA

JUDGE

2/8/2012