



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 512 of 2012

DAVE MACHARIA.....1ST PLAINTIFF

JIMMY KAHUMBURA.....2ND PLAINTIFF

VS

KENYA MOTOR SPORTS FEDERATION LIMITED.....DEFENDANT

RULING

1. Before the court is a Notice of Motion dated **9th August 2012** and expressed to be brought under order 40 Rule 1, 2, 3 and 9 of the Civil Procedure Rules and Section 63 (c) and (e) of the Civil Procedure Act. The application is seeking for one main order that the defendant, its servants and or agents be restrained from holding and conducting a general meeting of the plaintiffs' company on 15th August 2012 or on any date thereafter pending the hearing and determination of the suit.
2. The application is based on the grounds set out on the face of the application and is supported by the affidavit of **Dave Macharia** sworn on **9th August 2012** and a further affidavit sworn by the same person on **19th September 2012**.
3. The plaintiffs aver that on or about the 3rd day of August 2012, they received notice by email together with accounts convening a general meeting of the company on the 15th day of August 2012 at 11.00 am at Kenya Motor Sports Federation Limited offices, Riverside Drive, Nairobi. It is the plaintiff's case that the defendant's acts in convening a meeting of the company on the 15th day of August were illegal, wrongful and unlawful for the following reasons:-
 - a) **The said annual general meeting did not have the sanction of the duly constituted board of directors and/or the board's chairman authority to convene was never sought. The 1st plaintiff as the chairman of the defendant company did not participate in any board meeting sanctioning or authorizing the company to hold the annual general meeting on the 15th day of August 2012.**
 - b) **No proper notification was given to the company's shareholders, that is, the notice was not sent or served to all members of the company as is required under the Companies Act. The provision of twenty one (21) days notification vide post was not complied with.**
 - c) **The agenda sent out to members such as the accounts are for an entity known as the Kenya Motor Sports Limited and not the defendant.**
 - d) **Proper business that the company is to hold an annual general meeting has not been provided or complied with.**

4. It is further the plaintiffs' case that if the said meeting proceeds, it will be a sham on shareholders/members and will greatly compromise the principle of sound corporate governance. The plaintiffs contend that it will be impracticable to conduct any proper meeting as envisaged under sections 131 to 135 of the companies Act, as no proper accounts have been tendered or furnished to members as envisaged.

5. In opposing the application, the defendant filed a replying affidavit sworn by **Kevin McCourt**, described as the current chairman of the Board of Directors of the defendant, on **21st August 2012**. It is deponed that, upon instructions from the board of directors, the defendant's company secretary, Livingstone Associates, sent to all the chairmen of the defendant's shareholders a Notice of the Annual General Meeting that was scheduled to be held on 15th August 2012. The Notice was sent on 24th July, 2012 via e-mail, a copy of which is attached to the defendant's Replying affidavit as "KM2".

6. It is further deponed that the mandate of the 1st plaintiff as the chairman of the defendant was removed on 29th March, 2012 by a resolution passed by the Board a copy of the same is annexed to the replying affidavit as "KM3". Therefore, the 1st plaintiff is not the chairman of the defendant as claimed. The defendant avers that, on 25th July, 2012 the board of directors of the defendant met and sanctioned the defendant holding an Annual general Meeting on 15th August 2012.

7. The defendant confirms that the agenda included in the Notice was for the defendant only that the accounts were for Kenya Motor Sports Limited which is a company directly related to and carrying on the same business as the defendant. It is noted that since its inception, the defendant has during its Annual General Meeting reviewed and ratified accounts drawn up in the name of Kenya Motor Sports Limited and neither the plaintiffs nor any other member has at any time raised an objection in that regard. It is therefore, the defendant's contention that the plaintiffs are estopped from relying on that ground. The defendant attached minutes of the Annual General Meetings held since 2005 to 2010 together with the accounts presented.

8. It is the defendant's case that they have complied with both the provisions of the Companies Act and the Memorandum and Articles of Association of the company in calling the meeting. The defendant states that the plaintiffs have not demonstrated any prima facie case under the provisions of the Companies Act and neither have they met any of the conditions to warrant the grant of an injunction. It is further stated that, the order restraining the defendant from holding an Annual General meeting has ground the defendant's operations and that the damage likely to be suffered by the defendant shall be greater if the injunction is granted than that to be suffered by the plaintiff's if the injunction is denied.

9. I have carefully considered the application, the replying affidavit in opposition and the oral submissions by learned counsel for the parties as well as the authorities filed by the defendant.

10. I have also taken the liberty to peruse the plaint filed on 10th August 2012 by the plaintiffs contemporaneously with the application before the court and the prayers sought in the plaint are as follows:

- a) A declaration that the meeting convened by the defendant herein on the 15th day of August 2012 is unlawful and or illegal.**
- b) An injunction restraining the defendant by itself, agents, servants or proxies from holding and or conducting a general meeting of the company on the 15th day of august 2012 or on any other date thereafter.**
- c) An order that the defendant be compelled to furnish all member/shareholders with its proper audited accounts for consideration at any annual general meeting convened by itself or as the court may direct.**

d) Costs of the suit.

11. It is my considered view, that the prayers sought in the plaint have been substantially subsumed in the application presently before the court. The plaintiffs' contention is that the Notice convening the meeting did not comply with the Company's Articles of Association and that the Notice period was not adequate as per the company's articles which requires a Notice of 21 days to be issued to each member in writing. They also complain that the defendant failed to render its accounts but instead produced the accounts of a company known as Kenya Motor Sports Limited. All these issues relate to legal obligations of a company to its members as expressly provided for in the Companies Act and in the Memorandum and Articles of the Company. Therefore the court can deal with the matters in the present application and there will be no need for the suit to be subjected to full trial as all the evidence that is needed has been produced.

12. I now turn to the substance of the application, which is whether the plaintiffs should be granted an injunction restraining the defendant from holding and conducting a general meeting. It is obvious that the Annual General Meeting set for 15th August 2012 has since been overtaken by events. If another Annual General Meeting is to be convened, it will be incumbent upon the defendant to send proper and fresh Notices to its members.

13. On the issue of accounts, the plaintiffs have contended that the accounts as produced by the defendant are for an entity known as the Kenya Motor Sports Limited and not the defendant. This has not been rebutted by the defendant. However, it is their claim that since inception they have been producing the accounts of the said entity, which is directly related to the defendant, during their annual general meetings and the same has never been disputed. From the foregoing, it is apparent that the plaintiffs have all along been aware of the production of the said accounts and it is not clear why they are now disputing the same. That notwithstanding, the issues arising herein relate to the internal affairs of the company which can best be resolved in a general meeting and not before this court. In that regard, I find it unnecessary to grant injunction orders in the present application as granting such an order would essentially only serve to paralyse the operations of the defendant and this would be of no gain to the plaintiffs. It would be prudent that a proper Annual General Meeting of the company be arranged and conducted, through which all the grievances of the plaintiffs would be addressed.

14. For these reasons, I am inclined to make the following orders:

- a) That an Annual General Meeting of the defendant company be convened within 60 days from today.**
- b) That all members, including the Plaintiffs, be allowed to present their agenda items and these be duly incorporated in the agenda for the Annual General Meeting.**
- c) That Notice of the Meeting be issued in writing and served upon each member in accordance with Article 8 of the Company's Articles of Association to be received by each member at least 21 days from the date of the meeting. Such notice to specify the matters stipulated in the said article.**
- d) The Registrar of Companies or a representative to supervise the Annual General Meeting to ensure that the meeting and its agenda accord with the law and the Articles of the company.**
- e) The costs of this application be in the cause.**

IT IS SO ORDERED.

DATED, DELIVERED AND SIGNED THIS 15th DAY OF NOVEMBER 2012

J.M MUTAVA
JUDGE