REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 58 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY WAY OF AN APPLICATION FOR CERTIORARI

AND

IN THE MATTER OF BAHATI WOMEN COMPANY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CAP. 486, LAWS OF KENYA)

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF COMPANIES.....RESPONDENT

AND

ELIZABETH WANJIKU KIMANI & 7 OTHERS.....INTERESTED PARTIES

AND

EX PARTE

JOSEPH MATHENGE MUTURI & 6 OTHERS.....SUBJECTS

RULING

By an application brought by way of Notice of Motion under a Certificate of Urgency dated and filed on 17th May 2010 the Applicant sought the following orders -

(1) that the application be certified urgent and heard on priority basis.

(2) that an order of certiorari do issue to bring to the High Court for purposes of quashing the decision of the Respondent registering the 1st - 7th Interested Parties as the directors of the 8th Interested Party and/or in the alternative the quashing of the registration of the 1st - 7th Defendants as the directors of the 8th interested party.

(3) that the costs of the application be provided for.

The application was supported **firstly** by the Statement of Facts dated and filed on 13th May 2010, and the Affidavit in Verification of Facts of David Mucha Wangang'a together with the attachments and annextures thereto, and **secondly,** the Further Affidavit of the said David Muchai Wang'ang'a attached to the Motion aforesaid and sworn on 17th May 2010, and **thirdly** upon the further Affidavit In Verification of Facts of the said David Muchai Wang'ang'a sworn on 26th July 2010, all with leave of court.

Mr. Ogola also filed skeletal arguments and made oral submissions in support of the Motion for grant of an order of certiorari.

The Motion was opposed, **firstly** by the Replying Affidavit of Elizabeth Wanjiku Kimani sworn and filed on 26th May 2010, and **secondly,** the written submissions by Mr. Githui dated and filed on 14th June 2010.

I have perused and considered the Application and the respective affidavits referred to above as well as the respective skeletal submissions by the respective counsel for the Applicants and the Interested Parties.

I will consider the submissions by counsel for the 1st - 7th Interested Parties, *(hereinafter called "the Interested Parties")* as they raise fundamental questions of law, and which therefore deserve to be disposed of first. Counsel's opposition to the ex parte Applicants *("the Applicants")* was premised upon three grounds that -

(a) the application was incompetent;

(b) the application was an abuse of the process of court;

(c) the orders of certiorari prayed for by the Applicants were not available.

I will take each of these objections in turn.

(1) OF THE COMPETENCE OF THE APPLICATION

It was the submission by Mr. Githui, counsel for the Interested Parties that the application was incompetent on two grounds, **firstly,** that there was no leave to bring the application, and **secondly** that there was no decision to quash made by the Respondent.

On the question of leave, counsel argued that the gist of the Applicant's application was that the 8th Interested Party *(being a limited liability ("the company")* was being managed by persons who were not regularly elected, their claim was in the nature of a derivative action, and disputes affecting the company must be brought in the name of the company, and that a shareholder cannot present an action in respect of irregularities in the conduct of the company's internal affairs.

Counsel argued that where a shareholder claims that an illegality has been committed which may put the company to a loss or damage, a shareholder can bring an action in the nature of a derivative action, presented together with an application on whether the suit should proceed as a derivative suit. Counsel relied on the case of **DADANI VS. MANJI & 3 OTHERS [2004] KLR 95** - where the court cited with approval the procedure for such action as explained in **JUDICIAL REMEDIES IN PUBLIC LAW** by Clive Lewis 2004 Edn. Cap. 2, entitled - The Minority Shareholders-Law and Procedure where the author says -

"… where a shareholder seeks to enforce a right not invested in himself but of the company of which he is a member, for example a claim that the company property was being fraudulently misappropriated by the directors he can only do so (if at all) by means of a derivative claim brought by means of a derivative action."

For the same reasons counsel also relied on the case of **KAMAU & OTHERS vs. MAINA & OTHERS [2008] E.A.L.R. 151** and concluded that the proper applicants ought to have the company, and not the applicants. And on this ground alone, counsel submitted the application should be struck out with costs.

I do not agree with this submission. Here are my reasons. **Firstly** in his book, **JUDICIAL REMEDIES IN PUBLIC LAW** *(op. cit.),* **Cap. 2,** entitled, **Availability of Judicial Review,** p. 9, the said author says: -

"Judicial review describes the process by which courts exercise supervisory jurisdiction over the activities of public authorities in the field of public law. The primary method by which this control is exercised is through the application for judicial review and this procedure is generally regarded as a public law remedy. More accurately, the claim for judicial review is a specialized procedure by which an applicant can seek one or more remedies which can only be claimed by way of an application for judicial review, and in appropriate circumstances, declarations and injunctions and damages."

At p. 11 of his book, Lewis describes the source of the power of Judicial Review. In his own words - the author says -

"Judicial Review has been and remains principally concerned with the activities of bodies deriving their authority from statute. When an individual seeks to challenge the exercise of a power derived from statute, or seeks to compel the performance of any statutory duty, the presumption is that such an issue raises a matter of public law suitable for resolution by judicial review.

The court has on occasion, approached the matter as involving a threefold test, namely, whether the public body was exercising statutory powers, whether the function in question was a public or private function, and whether the body was performing a public duty owed to the individual circumstances in the particular case".

From the above general comments by Lewis, the **first** observation to make is that the judicial review is about process and not merit of the case of either the applicant, or the respondent or the Interested Party. The **second** observation to make is to reiterate what the author says, judicial review has been and remains principally concerned with the activities of bodies deriving their authority from statute.

In Kenya, the power of judicial review is derived from Statute, Section 8 and 9 of the Law Reform Act, *(Cap. 26, Laws of Kenya).* Section 8 gives to this court the power to issue the orders of certiorari, prohibition and mandamus, and states that the High Court shall not issue any of those orders in exercise of its civil and criminal jurisdiction. In other words, Judicial Review is a jurisdiction which is *sin generis*, it is a special jurisdiction, it is neither civil nor criminal. It is exercised irrespective of the existence or availability of another remedy.

Section 9 of the Law Reform Act is the rule making provision, and Order 53 of the Civil Procedure Rules, is made under that Section, and not under Section 81, of the Civil Procedure Act.

The application by the Applicants is therefore not a derivative action but a judicial review application under SS. 8 and 9 of the Law Reform Act, and Order 53 of the Civil Procedure Rules, and is therefore competent.

For the same reasons, although a multiplicity of suits and applications is to be deprecated, the application herein is in law, separate and apart from any action under the civil jurisdiction of the court and is not an abuse of the process of court.

The question here therefore becomes whether the application conforms to those observations earlier made, was/is there a process which the Respondent a person whose decision is challenged was required to follow before making the decision which is being challenged and whether that process or procedure was followed. The third question is whether the body or person whose decision is being challenged is a public body.

There is no question that the Office of the Registrar of Companies is a public body and the officers thereat perform public functions or duties. Their actions and decisions which affect the right of other persons, and are said to be quasi-judicial in nature. Their functions and actions are therefore liable to judicial review by the High Court in its supervisory jurisdiction over subordinate courts, and other tribunals inferior to the High Court.

In the instant case, the application herein concerns the decision of the Respondent to register the 1st to 7th Interested Parties, as directors of the 8th Defendant after complaints by the ex parte Applicants that no legally convened meeting had been held in which the Interested Parties were elected as directors of the

company.

According to the Affidavit in Verification of Facts sworn by David Muchai Wang'ang'a on 13th May 2010, the 8th Interested Party held its Annual General Meeting on 30th April 2002, and again on 16th September 2006 at which the following Directors were elected -

(1) Joseph Mathenge Muturi

(2) David Muchai Wang'ang'a

(3) Lucy Wanjiru Muratha

(4) Emily Nyambura Wainaina

(5) Dorcas Njeri Mwangi

(6) James Chege and

(7) Lucy Wambui Gachau

A Special General Meeting attended by 437 members and at which the above Directors were present, one of the items discussed under Minute 07/07/07 - **Any Other Business**, where it was suggested that the term of Office of Directors be extended to 15.09.2007. In the event it was resolved Resolutions (6) & (7) *inter alia* that -

(1) that the deadline for members to pay up their shares was 4 months from 7/07/2007, i.e. up to 6 November 2007 and that after that date, shares would be sold to willing buyer with a bias to members.

(2) that due to the time wasted in the court cases, and persistent wrangles, the current cited directors should serve up to 31st March 2008 when the Company would be dissolved (Resolution 7).

The said Resolutions were filed with the Registrar of Companies, under rule 2 of the Companies Regulations *(Special/Ordinary Resolution)* who in his letter dated 23rd April 2002 confirmed the directors as aforesaid.

In the seemingly accepted spirit of wrangles among the leadership of the 8th Interested Party, the parties herein filed not less than 4 cases in the High Court, being (1) Nakuru HCCC No. 183 of 2004, (2) Nakuru HCCC No. 223 of 2004, (3) Nakuru HCCC No. 177 of 2007, and (4) Nakuru HCCC No. 226 of 2009.

While these cases were pending, the 8th Interested Party filed a Misc. Application No. 675 of 2006, seeking an order of certiorari against the Registrar of Companies *(the same Respondent)* herein, to quash

his decision to and Notice calling for an Annual General Meeting of Bahati Women Company Ltd to be held on Thursday 30th November 2006 at 9.00 a.m. That application was heard and determined on 13th February 2007.

Once again in the spirit of keeping the affairs of the company unresolved a further suit was filed, being Nakuru HCCC No. 355 of 2009 (**Bahati Women Co. Ltd. vs. Alice Wairimu Kingara & 10 others** *(including the Registrar of Companies)*. An interim injunction was granted restraining the Defendants *(including the Registrar of Companies)* from calling any General Meeting. That matter is, to the best of my knowledge still pending.

Despite, and inspite of these multiplicity of suits and orders the Registrar of Companies was able to write to the District Officer (DO) Mau Narok Division Njoro on 14th April 2010 conveying to the District Officer the names of the Interested Parties as being the Directors of the Company as at 4th December 2009.

There is no reference to any election of the Interested Parties, in the Replying Affidavit of 1st Interested Party, Elizabeth Wanjiku Kimani. Instead the Replying Affidavit refers to the suits I have already cited and concludes that the applicants are duplicating causes of action and that this application should be **struck out, for want of merit, incompetence and abuse of process.** Perhaps as expected the Registrar of Companies the Respondent, did not file any Affidavit to justify his list of directors of 4th December 2009.

According to the Further Affidavit in Verification Facts sworn on 26th July 2010, the Applicants protested to the Respondent on 21st December 2009 after learning of a purported meeting held two (2) days earlier, and before a record of purported new directors was filed, and that said meeting was irregular as no notice was sent out by Interested Parties or to the existing Directors, and despite the existing court orders *(in particular HCCC No. 117 of 2007)* and no Annual General Meeting was held on 19th December 2009.

The Applicants also cited other irregular acts by the Respondent, the issue a Certificate of Incorporation No. C.48145 on 22/12/2009 and purportedly signed an officer who had retired over five (5) years previously whereas the certificate bore the same number to the 8th Interested Party's Certificate issued to it as private company before it became a public company in the year 2000.

These are matters which of course none of the Interested Parties could effectively depone to, even if any of them were part of what I can only call the effort to confuse the official records of the company. In the absence of any such explanation of his actions, the court can only draw one conclusion, that is, the acts of the Registrar of Companies were not only irregular but quite irrational and against the applicant's legitimate expectation.

In **O'REILLY VS MACKMAN [1982]3ALL E.R. 114,** Lord Diplock re-stated the fundamental principle of Judicial Review as follows -

"Judicial review, now regulated by RSC Order 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons ..) or else a refusal by him to make a decision."

"We can", said Lord Diplock, **"classify under three heads the grounds on which** administrative action

is subject to control by Judicial Review, **"illegality", "irrationality",** and **"procedural impropriety".**

The authors of **All ER Annual Review 1984**, say and I endorse what they say, "essentially these grounds are one ground, *"ultra vires"*. The **first** is **substantive** *ultra vires*, the **second** is **objective unreasonableness** under the **Wednesbury principle (ASSOCIATED PROVINCIAL PICTURE HOUSES VS. WEDNESBURY CORPORATION [1947]2 ALL ER. 680),** the **third** is procedural *ultra vires* which for instance constituted the ground of challenge in **COUNCIL OF CIVIL SERVICE UNIONS VS. MINISTER FOR THE CIVIL SERVICE [1984] ALL E.R. 935,** *(the GCHQ case)* - that a ministerial decision is amenable to judicial review, **in principle** because the appellants *(the counsel of Civil Service Unions)* had a legitimate expectation *(to be consulted)* which was infringed, but the element of national security in the particular dispute meant that it was not **"justiciable".**

These grounds or questions relate to the wrong being complained of. What must be considered is the standpoint of the persons complaining as wrong doing cannot exist in a vacuum. Lord Diplock in the GCHQ case said -

"To qualify as a subject for judicial review the decision must have consequences which affect same person *(or body of persons)* other than the decision maker, either -

(a) by altering rights or obligations of that person which are enforceable by or against him in private law, or

(b) depriving him of some benefit or advantage which either -

(i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to [enjoy] until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or,

(ii) he has received assurance from the decision maker [that the benefits and advantages] will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

In the matter at hand, the Applicants were the duly elected directors of the company. Interested parties were members of the company and were desirous of the positions held by the applicants. The Respondent *(the Registrar of Companies)* being the custodian of records of all companies, was aware of this. In any event he was made aware by the protest both physical, visitation upon his office by representatives of the applicants, and in writing by handwritten and typed letters of 21st December 2009, respectively.

It was the applicant's legitimate expectation that the respondent would inquire into their complaint and give them a hearing or a rational explanation as to the reasons why he decided to recognize the Interested Parties as the duly elected directors of the company while there had been no lawfully convened meeting of the company. As the Government agency or body responsible for the implementation of the Companies Act in all its facets, it behoves the Respondent at all times to take cognizance of all complaints, and respond to them, and not hide behind such contentions as ***"there is no decision of the respondent registering the Interested Parties as directors"*** when the same Respondent in a letter dated 4th December 2009, lists the Interested Parties as directors of the company.

That letter must have arisen out of a Resolution of the company and passed at duly convened Annual/Special/Extra-ordinary General Meeting of the company. In the absence of any evidence to this effect, the list of directors set out in the Respondent's letter of 4th December 2009, lacks legitimacy either

in law or fact.

Mr. Githui learned counsel for the Interested Parties contended that there was no decision to quash. He relied on Black Laws Dictionary, 8th Edition for the definition of a decision-

"judicial or agency determination after consideration of the facts and law .."

Section 145(3) of the Companies Act states -

(1)

(2)

(3) where in accordance with the provisions of this section minutes have been made of proceedings at any general meeting of the company or meeting of directors then, until the contrary is proved, the meeting shall be deemed to have been duly held and convened, and all proceedings thereat to have been duly transacted and all appointment of directors, managers or liquidators shall be deemed valid."

And of the appointment of directors, Section 185(2) says -

S. 185(1) ..

(2) Special notice shall be required of any resolution to remove a director under this section or appoint somebody instead of a director so removed at a meeting at which he is removed and a receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the director concerned and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting."

Several conclusions may be drawn from these provisions. **Firstly** under Section 145(3), the presence of minutes is prima facie evidence that an annual/extraordinary/special/general meeting took place. Conversely, as Mr. Ogola learned counsel for the Applicants submitted, the absence or lack of minutes is prima facie evidence that no Annual General/Special or Extraordinary meeting took place. **Secondly** section 185(2) codifies the rules of **natural justice** that a special notice is required to remove a director and that such notice be sent to the director concerned and that such director be heard or be given an opportunity to be heard.

Again in the absence of any affidavit by either the respondent or indeed the Interested Parties stating compliance with the requirement of the Companies Act, the only reasonable inference to be drawn is that no such notice was sent to the company, and none of the Applicants consequently got an opportunity to be heard. In the absence of such evidence as to what informed the Respondent to determine that the Interested Parties were duly elected to the office of directors of the company, and that the applicants were duly removed, there is no basis either in fact or law upon which the Respondent concluded and made a decision that the Interested Parties were the duly elected directors of the company. The conclusion and decision of the Respondent to that effect must have been based upon facts and circumstances which were extraneous to the law, and therefore entirely arbitrary. Arbitrariness is also a ground for granting an order

of certiorari.

Again, I must disagree with the contention by Mr. Githui, learned counsel for the Interested Parties that the Respondent's duties are merely clerical, to receive and file away returns made by companies or that the conduct of meeting and/or elections is a private affair of a company qua shareholders or qua shareholders. On the contrary, the Registrar of Companies, the Respondent herein, is both the ultimate prefect and referee of all companies registered under the companies Act. He is not a by-stander. He sees both the registration and exit of companies under the Act, issues notices for striking off under Section 339 of the Act, liquidations and receiverships. He also has a duty over the management and control of the companies. He may inquire into the regularity of holding annual meetings and where in particular disputes are brought to his attention, then he has a specific duty to inquire into the complaint, and determine it in relation to the specific and applicable provisions. In this case for instance, did the Interested Parties call or requisition for a meeting under Section 131(2) of the Act, were minutes drawn in terms of Section 145(2) of Act, was there a special notice to remove the directors, as required under S.185(2) of the Act?

Once a complaint was made to the Registrar, his antennae should have been automatically tuned into inquiry into these provisions before assuming without more, that the Interested Parties were duly elected. In this regard it makes no difference that the company is either private or public. It is more urgent in the case of a public company which concerns a large number of people and probably large assets over which there may be serious disputes, and perhaps involving stripping of the company's assets without knowledge of the majority shareholders.

A decision, one or the other way is not a one line affair. It may like a contract, be composed of a series decisions, an offer, and acceptance, a variation and confirmation all amounting to one contract.

By confirming in his letters of 4th December 2009, and 14th April 2010, that the Interested Parties, were directors, it is clear that the Respondent had made a decision, that the Interested Parties were the duly elected directors of the company. This was not only in breach of the rules of natural justice as envisaged by Section 145 of the Companies, but also in the absence of any evidence necessary notices under Sections 131(2), 185(2), not only illegal but quite unreasonable, and entirely arbitrary. This is not the way to nudge or nurture the culture of the rule of law among our budging entrepreneurs and *"private developers"*.

In summary, the applicants have *locus standi*, the application is competent and the Respondent is a public officer, and administers a public law the remedy of certiorari is available.

There shall therefore be called to this court and be quashed, the decision of the Respondent to register the Interested Parties on or before and by his letters of 4th December 2009, and 14th April 2010.

I direct the Respondent to convene a consultative meeting in his office among the Applicants and the Interested Parties, within the next 30 days, so as to arrange for a date in which to call and hold an Annual or Special General Meeting to elect new directors of the company, and in the meantime the Applicants shall remain the directors of the company till such meeting is held, 30 days following the consultative meeting.

As this is public law litigation, I direct that each party should bear its own costs.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of May 2011

M. J. ANYARA EMUKULE
JUDGE