



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 216 OF 2011

IN THE MATTER OF ARTICLE 22(1) AND 22(2) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27(1), 27(2), 40(1) AND 40(3) OF THE**

CONSTITUTION OF KENYA

AND

**IN THE MATTER OF SECTION 132(1) OF THE COMPANIES ACT CHAPTER 486 OF THE
LAWS OF KENYA**

BETWEEN

ANDY FORWARDERS SERVICES LIMITED..... PETITIONER

AND

THE CAPITAL MARKETS AUTHORITY..... RESPONDENT

CMC HOLDINGS LIMITED..... INTERESTED PARTY

RULING

Introduction

1. The Petition which has given rise to the application and cross application before this court raises important questions relating to the powers and mandate of the statutory regulator of the capital markets in Kenya and the rights of shareholders of a limited liability company listed on the Stock Exchange. It calls on the court to weigh the competing claims of the regulator to exercise its statutory function of overseeing the market and protecting the interests of investors on the one hand against the claim of a shareholder to exercise its rights under the Companies Act on the other. It is important to note that this dispute has moved beyond the interests of a shareholder or group of shareholders against others and assumed public interest implications far beyond the original dispute.

2. In the Petition dated 25th of October, 2011, the Petitioner seeks various orders against the Respondent. The Petitioner's complaints against the Respondent and on which it seeks this court's intervention arise in connection with the Petitioner's requisition for an Extraordinary General Meeting (EGM) to be held on the 21st of November 2011. The Petitioner asks the court to declare:

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.

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.

3. The Petitioner also seeks a declaration that the Respondent's decision and direction that CMC and each Board member who has a shareholding (directly or indirectly) in CMC to undertake not to requisition for or hold an EGM is without or is in excess of jurisdiction. It asks the Court to issue an order of certiorari to remove and quash the decision and direction of the Respondent dated 11th October, 2011 and issue an injunction to restrain the Respondent from interfering with any meeting of shareholders of CMC called, or to be held pursuant to, in connection with or as a consequence of the Petitioner's requisition dated 12th September, 2011 issued in accordance with section 132(1) of the Companies Act, scheduled to be held on 21st November, 2011.

The Petitioner's Application

4. The Petitioner filed a Chamber Summons application concurrently with the Petition in which it seeks, among others, an injunction *'to restrain the Respondent by itself, its agents or employees, or howsoever from interfering with or in any sense attempting to stop any meeting of Shareholders of CMC called or to be held pursuant to, in connection with or as a consequence of the Petitioner's requisition notice dated 12th September, 2011 issued in accordance with section 132(1) of the Companies Act, which meeting is scheduled to be held on 21st November, 2011'*.

5. The application is supported by the affidavit of **PETER MUTHOKA** the Chairman and Chief Executive Officer of the Petitioner dated the 25th of October 2011. The grounds for the application are set out in the application.

6. When the matter came up before the court on the 31st of October 2011, **CMC Holdings Limited (CMC)** applied to be joined as an Interested Party. There was no objection and the application was allowed with directions for the Petitioner to serve CMC with the Petition and the Respondent and CMC to file their replies to the Petition within 7 days.

The Respondent's Cross-Application

7. On 4th November, 2011, the Respondent filed a Chamber Summons application dated 4th November, 2011 supported by the affidavit of **ROSE LUMUMBA**, the Corporation Secretary of the Respondent. The Respondent seeks orders that pending the hearing and determination of the Petition, the Court do issue *'a conservatory order maintaining the status quo as regards CMC Holdings Company Ltd ("the Company") and the composition of its Board of Directors'*, and pursuant thereto, the court do issue an order, among others, *'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'*.

The grounds on which the cross-application was based are set out in the application and were canvassed at the hearing of the applications inter partes.

8. Pursuant to orders made by this court on 4th November, 2011, the two applications were heard concurrently and as cross applications on the 9th of November, 2011. All the Parties had filed written submissions which they highlighted at the hearing. CMC had also filed a Replying affidavit sworn by **MARY GITHIACA NGIGE**, the Group Finance Director of CMC.

The Submissions

9. Mr. Ojiambo, appearing with Ms. Malik presented the Petitioner's application. He submitted that the Petitioner seeks the intervention of this court in relation to an EGM which it has requisitioned to be held on the 21st of November, 2011. In exercise of rights granted under **Section 132(1)** of the Companies Act, the Petitioner requisitioned for an EGM on the 12th of September, 2011. Upon the failure of the Directors of CMC to convene the EGM, the Petitioner requisitioned for one. The provisions of Section 132(1) of the Companies Act are peremptory, obligatory and mandatory in nature. He referred to **Palmer's Company Law, 25th Edition**. The right of shareholders under Section 132 is a right that cannot be abridged. It is a right of property which may be exercised by the shareholders whatever their motive for exercising the right. He quoted the words of **Jessel, M.R. in Pender -v- Lushington (1877) 6 Ch. D. 70** where the court noted with regard to the right of a shareholder to vote at a meeting that **"... those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise...."**

10. With regard to the jurisdiction of the court to stop a shareholders' meeting, he referred to the decision of the court in **Isle of Wight Railways Company -v- Tahourdin (1883) 25 Ch. D 320** to support the proposition that it would be a rare case in which the court could stop a meeting of shareholders. He cited among others the words of Lindley, L.J in that case when he said that ***'It appears to me that it would be a very strong case indeed which would justify this court in restraining a meeting of shareholders. I do not mean to say of course that there could not be a case in which it would be necessary and proper to exercise such a power.'***

11. Mr. Ojiambo submitted further that the right under Section 132 was not just a statutory right. It had constitutional underpinnings. He referred the court to the definition of property in the **Interpretation and General Provisions Act, Cap.2 Laws of Kenya and Article 262 of the Constitution**. The Petitioner's right under section 132 was protected by Article **40(2)** of the Constitution which prohibited Parliament from enacting any law that permitted the deprivation of property. The right was a fundamental right which cannot be limited except as provided under Article 24 of the Constitution. The Respondent could not therefore, as a statutory body, interfere with the Petitioner's right under Section 132 which was protected under Article 40. Further, any limitation under Article 24 should not limit the right so far as to derogate from its core and essential content. In the Petitioner's view, the core and essential content of the right of a shareholder under Section 132 is to call an EGM. To limit the right to call an EGM is to derogate from the right's core and essential content.

12. According to the Petitioner, there was no provision in the Capital Markets Authority (CMA) Act permitting the Respondent to stop shareholders from holding an EGM. **Section 11(1) (d)** of the CMA Act did not permit the Respondent to stop shareholders from holding meetings. The section, which referred to protection of investor rights, was in vague and ambiguous terms. The constitutional requirement was that limitation of a right must be in specific terms. There was sufficient constitutional basis for protection of fundamental rights, and he relied on the case of **Cholmondley -v- Republic – Nairobi Criminal Appeal No. 116 of 2007**. Decisions such as Kenya **Bus Services & 2 Others -v- Attorney-General (2005) IKLR 787** were passed before the new Constitution came into force.

13. The Petitioner submitted further that while it was argued that the Respondent was carrying out its statutory duty in seeking to stop the Petitioner from holding an EGM, no specific duty had been drawn to the attention of the court. Nowhere in the CMA Act was the CMA authorised to manage investors or shareholders. The rights under Article 40 are sacrosanct and cannot be taken away by statute. Section 37 of the CMA Act does not provide that the CMA Act prevails over the Companies Act. No one should interfere with the rights of shareholders on the basis that they are performing a public duty.

The Respondent's Submissions

14. **Mr. Alibhai** for the Respondent pointed out that the court had before it two applications for conservatory orders. The issue that the court would be called upon to determine was whether the Petitioner was entitled to conservatory orders. The court was not called upon at this stage to determine the issues raised in the Petition.

15. If the Petitioner succeeded in its application, it would hold an EGM on 21st November, 2011. The sole purpose of the EGM was to remove the directors of a listed company who had alleged that the Petitioner has defrauded the Company. Should the Petitioner succeed, it would remove the directors who had made allegations against it and replace them with its nominees, thereby assuming full control of CMC. While the Respondent's application was intended to preserve the *status quo*, the Petitioner was seeking to change the *status quo*. Should the EGM go ahead, then the entire purpose of the Petition would be lost and the Petition spent. There would be no issue left for the court to determine. The Petition would be rendered nugatory.

16. The Respondent submitted further that what it was trying to do in a situation where there were accusations and counter-accusations was to maintain the situation as it was. It did not want to see a change in the composition of the Board of CMC while the pending issues were unresolved. There were currently representatives of both camps on the Board, and the Respondent did not want a change in this composition as this would hamper its investigations. The Respondent as the regulator has not interfered with the exercise of the rights under Section 132. It wanted the *status quo* maintained.

17. Counsel for the Respondent argued further that in a matter such as this, the applicant for a conservatory order must show a *prima facie* case. The Petitioner, he argued, has submitted that Section 132 rights are sacrosanct and no one can interfere with them. This, however, was not the case, even for non-listed companies. He referred to the cases of **Ebrahimi -v- Westhouse Galleries Ltd (1970) 3 ALL ER. 374** where the court held that:-

“a shareholder was not entitled to exercise her majority votes as a shareholder in any way she pleased. Her right was subject to equitable considerations which might make it unjust to exercise it in a particular way....”

18. There was nothing sacrosanct about the right conferred by Section 132 of the Companies Act and the court was entitled to interfere where there is an abuse of this right in the case of an unlisted company. He submitted further that **Section 11(1) (d) and (c)** of the CMA Act mandates the Respondent as the regulator to intervene to protect Investor Interests. Further, Section 37 of the CMA Act provides that where the provisions of the CMA Act are in conflict with those of any other Act, the CMA Act provisions prevail. He referred the court to the decision of the Court in the case of **Shah Munge & Partners Ltd. & 4 Others -v- The Capital Markets Authority (2009)KLR 154**

19. According to Mr. Alibhai, constitutional rights are not absolute – they cannot be upheld to the detriment of others. He referred to the case of **Kenya Bus Services Ltd. & 2 Others -v- The Attorney-General (2005) IKLR 787** in support of this proposition. What the court should be concerned with is the question of balancing of rights. The Respondent as regulator must balance the interests of one shareholder against those of 15,000 investors and the Interests of the market. The regulator was acting in good faith in taking the action it has taken. Further, when CMC chose to be listed on the Stock Exchange, it agreed to be subject to CMA regulations.

20. Finally, the Respondent submitted that Article 40(2) of the Constitution talks about arbitrary deprivation of property. The Respondent was not acting arbitrarily by requiring that the status quo in CMC be maintained. He asked the court to allow the cross application.

CMC's Submissions

21. CMC, through its Counsel Mr. Munyu, associated itself with the submissions of the Respondent and

reiterated that the purpose of conservatory orders was to conserve the *status quo*. He submitted that it would not be possible to consider the applications before the court without considering the import and effect of the EGM requisitioned for 21st November, 2011. He relied on the affidavit sworn by **MARY GITHIACA NGIGE**. The requisition, he submitted, was in response to a resolution by the Directors of CMC to have a forensic audit of the company carried out and the revocation of the Petitioner's Chairman's appointment as CMC's Chairman. Should the court issue a conservatory order, such order should be to maintain the status quo and ensure non-interference with the ongoing investigations.

22. He submitted, further, that Article 40(3) provides for situations where there can be a valid deprivation of rights. According to CMC, the letter written by the Respondent on October 11, 2011 was in performance of a statutory function and in pursuit of the objectives of the Respondent under the CMA Act. The Court cannot stop the performance of that function but can only supervise if it is not being carried out properly. He referred the court to the case of **Bogonko -v- National Environment Management Authority KLR (E&L) I** and **Kenya National Examination Council -v- Republic Ex-parte Kemunto Regina Ouru (Civil Appeal No. 127 of 2009)** in support of this proposition.

23. Mr. Munyu also referred to the case of **Isle of Wight Railway Company -v- Tahoudin (supra)** cited by the Petitioner in which the court ruled that it may be necessary to restrain the exercise of shareholder rights and submitted that the case before this court was one such case. He urged the court to consider all the investors in CMC, including the applicant, whose best interests would be served by maintaining the *status quo* pending the investigations ordered by the Respondent.

FINDINGS

24. It must be borne in mind that I am not at this stage dealing with the issues raised in the Petition and I am therefore not called upon to delve into the merits of the respective parties' cases. The court is here concerned with whether or not to grant conservatory orders either to the Petitioner or the Respondent as prayed in the application and cross-application respectively.

25. In considering the respective submissions of the Parties therefore, I will confine myself to those matters touching on the conditions under which this court can give conservatory orders pending the determination of the substantive issues raised by the Petitioner and whether or not those conditions have been met.

26. The exercise of the Court's discretion to grant conservatory orders under **Section 19 of the Sixth Schedule of the Constitution** and **Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006** has been recently considered in two petitions before this court.

27. In **Centre For Rights Education And Awareness (CREAW) & 7 Others -v- The Attorney-General and Others Petition No. 16 of 2011**, Hon. Justice Musinga stated that:-

".....It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

28. In **Muslims For Human Rights & Others -v- The Attorney General & Others Petition No 7 of 2011** Ibrahim, J noted that:-

"What is clear to me from the authorities is that strictly a Conservatory Order is not an injunction as known in civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way

that the Constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to “give such directions as it may consider appropriate for the purpose of securing of ... the provisions of the Constitution.”

He further stated that:-

‘A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.’

29. From the decisions above, it is apparent that two conditions need to be satisfied for a conservatory order to issue, and in this I would agree with the Respondent’s written submissions. The first is that the situation requires ‘*conservation*’ so as to maintain the status quo pending the hearing of the Petition. If the order is not issued, the Petition will be rendered nugatory. The second is whether the Petitioner or other party seeking a conservatory order has established a prima facie case with a probability of success.

30. In its application before this Court, the Petitioner seeks an order to restrain the Respondent, the statutory regulator of the capital market in Kenya, from interfering with the EGM which the Petitioner has requisitioned and which is scheduled for the 21st of November 2011. The express purpose of the EGM is to remove certain directors of CMC and replace them with others. The Petitioner argues that to allow the Respondent to stop it from holding the EGM would result in violation of its constitutional right to property. On its part, the Respondent argues that it has a duty to protect other investors and the capital market in Kenya. It wishes to have the status quo maintained to allow for investigations into the affairs of CMC in light of various allegations made against the Petitioner.

31. It is common ground that allegations of fraud have been made against the Petitioner. It is alleged by CMC that the requisition for the EGM followed the decision of CMC’s Directors to commission investigations into the dealings between the Petitioner and the Interested Party.

32. The Petitioner has submitted at length about the nature of its rights under Section 132 of the Companies Act and its constitutional underpinnings under Article 40 of the Constitution. It has argued that the Respondent’s actions in seeking to stop it from holding the EGM amount to a violation of this right, and that it will suffer prejudice if the restraining orders are not issued.

33. The Respondent and the Interested Party argue that the only way to maintain the status quo and protect the interests of the investing public and the market is to issue an order restraining the Petitioner from proceeding with the EGM.

34. The submissions on behalf of the Petitioner have been directed primarily at the substantive issues raised in the Petition. The Petitioner has argued that the right under Section 132 are sacrosanct and are protected under Article 40. It cites various cases to support the proposition that this right cannot be interfered with. The cases, however, and with respect to the Petitioner, are in relation to unlisted companies and were determined close to two centuries ago. Would a court rule the same today, in a situation where the company which is the subject matter of the Petition has invited the public to purchase its shares and has therefore come under the regulatory regime of the Capital Markets Authority? The answer to that must await the outcome of the Petition. At this point, the court must weigh the respective interests of the Petitioner against the interests of other investors and the market. A change in the status quo in CMC would radically alter the situation and render the questions for determination in this Petition moot.

35. In my view, the Petitioner has not demonstrated that it has an arguable case with a probability of success and that it will suffer prejudice if conservatory orders in its favour are not granted. If anything, the authorities cited in support of its case suggest that there are circumstances in which a shareholder’s rights may be limited by the court. Further, given the fact that the authorities relied on date back a century or more ago and relate to unlisted companies, it may well be that the court, upon hearing the Petition, may

find that shareholder's rights can be subject to limitation by the regulator. An analogy could be drawn with regard to the right to land, where the rights of a land owner are limited in terms of user by, for instance, the need to comply with requirements by the environmental management regulator, NEMA.

36. 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 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.

37. 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.

I therefore make the following orders:-

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.

Dated and Delivered at Nairobi this 16th day of November, 2011.

Mumbi Ngugi
Judge