



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**Miscellaneous Civil Application 45 of 2009**

**ANTHONY MKALA CHITAVI .....APPLICANT**

**VERSUS**

**THE SECRETARY TO THE BOARD, MALINDI**  
**WATER AND SEWARAGE CO. LIMITED.....RESPONDENT**

**RULING**

The Notice of Motion application is dated 21<sup>st</sup> October 2009 and seeks that the Secretary to the Board of Directors, Malindi Water and Sewerage Company Ltd be ordered to supply the applicant with certified copies of the minutes of the Board meeting held on 13<sup>th</sup> October 2009 at Malindi Water and Sewerage company Ltd board room. Further, that the court do provide a time limit for the respondent's compliance with the order of provision for the certified copies of the minutes of 13<sup>th</sup> October 2009.

The application is premised on grounds that:

- (1) The board of Directors did hold a meeting on the 13<sup>th</sup> October, 2009 with the intention of dismissing applicant from employment as Managing Director of Malindi Sewerage Company Ltd.
- (2) After the said meeting, the said Board capriciously dismissed the applicant from the company's employment meaning that he is currently unemployed.
- (3) The applicant is aggrieved by the decision of the board and he intends to institute judicial review proceedings by way of certiorari, to quash their decision.
- (4) That the minutes of the said meeting are pertinent to the intended proceedings and he had demanded to be issued with the same in vain, hence this application.

In the affidavit supporting this application, applicant depones that he was sworn to board meeting on 13<sup>th</sup> October 2009 to answer charges of mismanagement of the company, and was dismissed from employment – his contention as that the proceedings were tainted with bias and flouted procedure and the rules of natural justice thus leading to miscarriage of justice.

He has annexed a copy of a letter written by his advocate to the defendant/respondent requesting for the copy of

proceedings.

The application is opposed on grounds that it is misconceived and bad in law and has no merit. Further that the applicant has failed to show any grounds in law or in fact, warranting grant of the orders sought and such orders would be prejudicial to the respondent.

In arguing the application, Mrs. Ojode on behalf of the applicant submitted that the document they seek to have is a primary document and the grounds of opposition filed raises no serious point of law and there is no misconception in the application.

Mr. Ojode also raises issue with the notice of appointment filed by the respondent's Counsel saying it is defective and is contrary to Order IX Rule 2 and ought to have been made under Order III Rule 8.

In response, Mr. Ogonya has submitted on behalf of the respondent, that there is no case before this court and the court should not be used to issue orders in vain. He points out that the Civil Procedure Rules provide for the manner in which a party should move the court – which would be by way of Originating Summons, petition or plaint – yet in this instance, there is no such move and so, the application is hanging and so is misconceived.

Reference is also made to section 145 and 146 of the Companies Act, and Mr. Ogonya asks this court to consider the provisions of section 146 which gives the applicant remedies, if indeed he needs the minutes of the meeting. He points out that, the applicant is not a member or a shareholder of the company so as to entitle him to go to the office of registered company and obtain the minutes – which leaves him with only entitlement to minutes of an Annual General Meeting. Mr. Ogonya argues that minutes of a special board meeting touch the core of running a company, containing secret and administrative matters and not open to public scrutiny. Further that the applicant was given a resolution of the company, which is sufficient, because a resolution is actually a decision which he can use to Judicial Review proceedings.

What about the appearance of the respondent's counsel in the matter? Mr. Ogongu submits that since here is no suit, there was no basis for filing a memorandum of appearance and that is why they filed a notice of appointment.

Mr. Ojode's response is that this is a minor issue which does not require filing of a substantive suit, and that is why they have filed a miscellaneous application.

The issues that arise for determination are:

- a) Is the respondent's counsel purportedly on record
- b) Is the application merited or is it misconceived for want of procedure.

How does one come on record on a matter?

Order IX rule 2(1) addresses the mode of appearance, which is to the effect that appearance is effected by a memorandum of appearance signed by the advocate by whom the defendant appears.

Order III rule 8 on the other hand refers to notice of appointment of advocate here a party having sued or defended in person, appoints an advocate to act in a matter. To my mind the respondent's counsel was required to enter appearance,

irrespective of whether the action lodged discloses a cause of action or not. Would that then warrant disregarding the arguments brought forth by Mr. Ogonya? I don't think so, we should not be so bogged down by procedure as to forget what the substantive matter is.

This is a miscellaneous application – there is no suit pegged to the application so that once the orders are satisfied, that brings the matter to an end. There is however an intention to file Judicial Review proceedings – to my mind, the best option for applicant would be to make the application alongside the prayers he would be pursuing in his application for leave to commence judicial review proceedings.

Secondly there is the reference to section 145 and 146 of the Companies Act which provides that:

To my mind, applicant was an employee not a shareholder of the company and so is not entitled to what he seeks. The upshot is that the prayers are not merited and the application is dismissed with costs to respondent.

Delivered and dated this **23<sup>rd</sup> February 2010** at Malindi.

**H. A. Omondi**

**JUDGE**