



**IN THE MATTER OF AN APPLICATION FOR ORDER OF CERTIORARI
AND
IN THE MATTER OF THE COMPANIES ACT
(CAP 486 OF THE LAWS OF KENYA)**

REPUBLIC APPLICANT

VERSUS

REGISTRAR OF COMPANIES. RESPONDENT

EX PARTE: KYANZAVI FARMERS COMPANY LTD.

R U L I N G

The application before me is a Notice of Motion dated 4th September, 2009 brought by the Registrar of Companies who is represented by the Attorney-General. It seeks, inter alia, that the ex parte leave granted to the ex parte applicant herein on 4th September, 2009 to apply for an Order of Certiorari in this case, be set aside and the order for stay issued on the same day be discharged. It also seeks that thereafter, the Chamber Summons dated 31st August, 2009 under which the said orders were granted and issued, be dismissed with costs in this and the said application, in favour of the applicant herein.

Among the grounds upon which this application is based are

- (a) That in obtaining the impugned orders, the ex parte applicant withheld and suppressed from this court, facts and information relevant and material to the issue before the court.
- (b) That in obtaining the said orders the ex parte applicant failed to disclose that Lenaola, J, of Machakos High Court had directed in Machakos High Court Misc. Application No., 245 of 2009, that the Respondent do issue a notice called for the ex parte Applicant's Annual General Meeting which it had failed to call since December, 2006.
- (c) That the said order of Machakos High Court by Lenaola, J to call for the

Annual General Meeting, still validly stood and had not been challenged or vacated by the ex parte Applicant when the ex parte Applicant freshly filed this Ex Parte application in this court and obtained fresh orders dated 4th September, 2009 as aforesaid.

The facts as I understand them are that Lenaola, J in Machakos High Court Misc.

Application No. 245 of 2009 on 26th August, 2009, made the following orders inter alia: -

- (a) That the stay of proceedings of the Annual General Meeting of the Ex Parte applicant Kyanzavi Farmers Company Limited for the years 2007 and 2008, scheduled for 29th July 2009 be and was thereby set aside.
- (b) That the Registrar of Companies do issue a fresh Notice of Annual General Meeting and elections be not the only agenda or subject of the meeting.

Thereafter the Registrar of Companies in obedience to the above orders, proceeded to issue a notice calling for a special Annual General Meeting to be held on 11th September, 2009. As that pended the Ex Parte applicant-the Respondent in this application, left Machakos and came to Nairobi High Court where he filed, under a certificate of urgency dated 31st August, 2009, a Chamber Summons seeking the following orders: - That leave be granted to it, to file a Notice of Motion seeking an Order of Certiorari to quash the decision of the Registrar of Companies notice calling for the Annual General Meeting in compliance with the Machakos High Court order aforesaid. The application was heard by this court which on 4th September, 2009 allowed it, granting the leave sought and making the leave a stay until the intended Notice of Motion would be heard.

It is the applicant's case herein that this court was not given the relevant, correct and proper facts in the process of persuading it to grant the orders. That the court was told that the Registrar of Companies notice would bring confusion to the running of the company. That the Registrar of Companies' acted contrary to Section 131 of the Companies Act in issuing the notice, which amounted to an illegality.

It is further argued that this court's attention was not specifically drawn to Lenaola, J's aforementioned orders which are the ones that effectively authorized and/or directed the Registrar of Companies to issue the relevant Annual General Meeting notice. That although the said ruling was indeed annexed to the application its presence, relevance and importance was avoided or was not drawn to the courts attention. Nor was an extracted order thereof annexed. That even the Registrar of Companies' said notice which quoted, its authority and source to the Machakos Court order was not annexed.

Furthermore, the applicant urged this court to note that the Ex Parte applicant had not appealed to the Court of Appeal or attempted to set aside or modify or review the Machakos Court order if at all it was dissatisfied with it.

In conclusion the applicant herein argued that had the Ex Parte applicant been candid and honest and had it disclosed the relevant and material information to this court, particularly to the existence of the Machakos High Court orders and their effect, this court would unlikely have granted the leave and stay which it granted. That since the same were granted on the basis of dishonest grounds and non disclosure of the relevant information, they are amenable to setting aside to abide the hearing and disposal of the Notice of Motion still- pending in Machakos High Court, being the Machakos High Court Civil Misc. Application No. 245 of 2009.

Finally, the applicant also raised the prospect of Res Judicata or Res Subjudice the Machakos Suit. He also drew the attention of this court of the several similar orders the Ex Parte applicant has obtained in the last several years which have contrary, to the provisions of the Company Law, almost paralysed the functioning of the company to the detriment of the majority of the shareholders who are the common members of the public.

In response to the above facts deposed by the applicant/Registrar of Companies, the

Ex Parte applicant, stated that, indeed its leave and stay order earlier granted on 16th July, 2009 were set aside by Machakos High Court on 19th August, 2009. That it was then the Registrar of Companies published a notice for an Annual General meeting that it rushed here to file this application for leave to file Notice of Motion for an order of certiorari and obtained it with a stay.

The Ex Parte applicant conceded that the Registrar's notice for the Annual General Meeting included the tabling of 2007-8 accounts as well as the Chairman's Report, thus complying with the courts order that the Annual General Meeting should not be for elections alone. The Ex Parte's applicant's problem was that the accounts were not ready yet.

Mr. Oyugi for the Ex Parte applicant also seemed to suggest that the court ought to have closely studied every annexure annexed to the said application, inclusive of the extracted order and the Ruling from Machakos High Court, in exhaustive details. He thus absolved the Ex Parte applicant from its failure at the relevant time to specifically draw the same to court's attention.

Mr. Oyugi further argued in answer to their application being Res Judicata or Res Subjudice, that their application only related to the Registrar of Companies Notice and not the Machakos High Court orders. He stated that part of the reason to come to Nairobi was because Machakos High Court judge was on vacation.

He also interestingly argued that he could not go back to Machakos and was entitled to come to Nairobi because the law bars revisiting orders granted under Order 53 of the Civil Procedure Rules.

I have carefully perused the material and deponements submitted in this case and I have also carefully considered the arguments from both sides. I will first deal with the

issue of jurisdictions raised by the applicant as his last issue.

There is no doubt and the Respondent/Ex Parte applicant did not specifically deny the fact, that in Machakos High Court Civil Misc. Application No. 245 of 2009, it had sought for a grant of leave to apply for an Order of Certiorari to remove into the High Court for quashing, the decision of the Registrar of Companies dated 1st July, 2009 calling for the convening of the Annual General Meeting of Kyanzavi Farmers Company Limited for the years 2007 and 2008. It had also sought that the leave granted operate as stay of the proposed Annual General Meeting or the decision of the said Registrar for the convening of the Annual General Meeting.

There is no doubt also that the Machakos High Court granted the leave and made it operate as stay to the said Registrar's decision to have the Annual General Meeting called. Although the Machakos High Court later lifted and set aside its said orders, it nevertheless, also dealt with the issue of calling for or convening of the Annual General Meeting in question by authorizing the Registrar of Companies and the Company itself to convene the Annual General Meeting in a particular manner to include certain relevant items like the tabling of annual accounts etc beside election of the Board of Directors.

It seems to me and I so hold, that the issue of convening the Annual General Meeting of the Ex Parte Applicant for the years 2007 and 2008 was exhaustively dealt with by the Court. In case the party was dissatisfied by that said court order, it could only apply for review of or the setting aside thereof or indeed file an appeal against the orders to the Court of Appeal.

The Ex Parte applicant, however instead rushed to Nairobi Central High Court and filed on 4th September, 2009 this application again seeking leave to file an application for the order of Certiorari against the Applicant herein to call into this court for quashing, the

decision of the applicant to issue notice to convene the relevant Annual General Meeting, this time intended to come on 11th September, 2009. The parties in the similar application earlier were the same. The issues were exactly the same although the Nairobi Chamber Summons for leave concerned with the same Annual General Meeting which had earlier been stayed from taking place by the Machakos court order.

On the basis of Section 7 of the Civil Procedure Act, it is my finding that the Chamber Summons application filed before this court by the Ex Parte applicant on 4th September, 2009 seeking for leave to file a Notice of Motion and making the leave operate as a stay against the Notice of the Registrar of Companies to convene an Annual General Meeting of Kyanzavi Farmers Co. Ltd on 11th September, 2009, was Res Judicata the earlier similar Chambers Summons filed and dealt with by the Machakos High Court on 16th July 2009. This means that the said earlier application was a bar to instituting the application filed by the ex parte applicant in this court, being the application in respect of which the present application was brought to annul. That is to say that the ex parte applicant was not entitled to file the application which makes it amenable for this court to strike it out, with the relevant consequences. That, is to say that all orders made by this court under it would also be set aside and be discharged. This conclusion should alone dispose of this application. However, other grounds were argued by the parties and I will now turn to consider them.

The application before me was grounded mainly on the issue that the Respondent/Ex Parte applicant's application, was prosecuted by it without disclosing all the relevant and essential facts of the case, thus denying this court an opportunity to make a proper and just decision. Having considered that ground I am persuaded that it so. That is to say that the Respondent/Ex Parte applicant, failed to disclose to this court about the Machakos High

Court decision convening the issuance and the later setting aside of the leave to file a Notice of Motion seeking an order of Certiorari. That court's reasons for doing so should have been disclosed since they were bound to persuade this court one way or the other.

I further agree that had circumstances surrounding the issuing of the orders by Machakos High Court been placed before this court by the Respondent herein, this court would first have found that this application here was *res judicata* and would have struck it out. In addition, this court would not have granted the leave sought and would also have not have made the leave to operate as a stay.

Incidentally, this court notices that in filing the Machakos High Court Miscellaneous Civil Application No. 245 of 2009, the Respondent was actually evading a similar application earlier filed in Nairobi High Court as High Court Miscellaneous Civil Application No. 416 of 2009 (JR) on 14th July, 2009 in which Dulu, J refused to grant similar relief's on the above date. It is possible to state that that application must have been validly pending in this court when the Respondent filed the other two, in Machakos High Court and in Nairobi High Court.

What is most worrying about this circus by the Respondent/Ex Parte applicant, is the fact that all was being conducted by advocates and officers of this court who knew of the position of the matter under the law and who were misguiding and assisting a party by using the law to delay the end result and thus committing open injustice. A conduct like that, with great respect to those concerned, is below their dignity as advocates of the High Court and one which needs to be brought to the attention of the Law Society of Kenya.

Be that as it may, for the reasons stated hereinabove, this application has merit. It is hereby allowed as the application by the Respondent/Ex Parte Applicant dated 7th September, 2009 is hereby struck out as *Res Judicata* and order granted there under are

hereby lifted and set aside. Costs are to the applicant. Orders accordingly.

Dated and delivered at Nairobi this 5th day of February, 2010.

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D A ONYANCHA

JUDGE