



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 129 of 2001

IN THE MATTER OF MWARIKI FARMERS COMPANY LIMITED

AND

IN THE MATTER OF COMPANIES ACT SECTION 339

AND

IN THE MATTER OF

JOSECK THUO NGETA1ST INTERESTED PARTY

CALEB KIARIE MUIBU2ND INTERESTED PARTY

SAMUEL MUTHARIA KIBATHI.....3RD INTERESTED PARTY

ALLAN KANYUA MURUTHI4TH INTERESTED PARTY

RULING

In a petition filed under the provisions of Section 339(6) of the Companies Act several members of Mwariki Farmers Company Limited (hereinafter called the Company) sought and obtained *inter alia* an order that the company be restored to the Register of Companies.

Four Interested Parties (hereinafter called the applicants) have now moved the court primarily for an order that the said order restoring the Company to the register of Companies be reviewed and/or set aside. The substantial reasons for the application are that the petition was filed and prosecuted without notice to genuine directors and majority shareholders of the company; that the petitioners save for ten of them are strangers to the company; that the same petitioners have been found to be non-members of the company by the High Court in Nakuru; that the petition is based on false facts and unsupported allegations; that no new directors were ever elected as no extra ordinary meeting took place as the petitioners alleged,; that there was no reason for restoring the company to the Register as all the business of the company had been completed and the shareholders had resolved to dissolve the company, and that the restoration of the company was intended for ulterior motive chief of which is to grab land which was set aside for public use.

The application is supported by an affidavit sworn by one Joseck Thuo Ngeta a former director of the Company. The affidavit is an elaboration of the reasons for the application given on the face of the application. A further affidavit by the same former director reiterates that position. To both affidavits are

several exhibits annexed.

The application is opposed and a replying affidavit was sworn by one Jim Kairu who described himself as one of the directors of the company. He deponed that his advocates had advised him that the requirements as to restoration of a Company to the Register of Companies had been met and the petition had not been filed on behalf of the company but by individual shareholders some with share certificates and others as purchasers of shares of the company. He denied that the petition had been filed in contravention of any order of the court. With regard to the decision to Wind Up the company, he deponed that the decision was made to pre-empt the pending cases and place the applicants in an advantageous position and in any event no petition for winding up had been made and not all members desired the dissolution. He further deponed that there were many matters pending which could only be addressed on the restoration of the company and that no prejudice will be occasioned to the applicants.

The same Jim Kairu swore a further replying affidavit in which he deponed inter alia that the objects of the company went beyond just buying land and striking off the company had the effect of locking out members and prospective members whose grievances can only be addressed by a revived company and not a struck off company.

The application was debated before me on 6.6.2006 by Mr. Gitonga Learned Counsel for the applicants and Mr. Kahiga Learned Counsel for the petitioners. Counsels substantiated their clients' positions as outlined in their respective affidavits.

I have considered the application, the affidavits both for and in opposition to the application and the annexures. I have further carefully considered the submissions of the counsels appearing and the cases relied upon. Having done so I take the following view of the matter.

The Crux of the applicants' case is that the order restoring the company to the register was made in error as material facts had been concealed from the court and the petitioners had lodged the petition in breach of orders of the court. The petition had also not been served upon the former genuine directors of the company or majority shareholders. The petitioners had also not exhibited evidence of their membership of the company and had alleged that all the former directors had died which fact was infact not true. Further the petitioners had filed a Notification of Change of Directors with the Registrar of Companies pursuant to an alleged meeting of the company which meeting was held in disobedience of a court order and which meeting in any event contravened the provisions of the Companies Act and the Articles of Association of the Company.

There was also objection raised to the affidavits relied upon by the petitioners on the ground that the deponent of the said affidavits had not shown that he was a member of the company and for that reason the affidavits should be struck out leaving the application unopposed.

On behalf of the petitioners it was argued that the petition had been filed pursuant to the provisions of Section 339(6) of the Companies Act and those provisions were complied with especially as the applicants admitted that ten of the petitioners were shareholders of the company. According to the petitioners, there were many issues pending resolution when the company was struck off the register and this was evidenced by the pending suits by and against the company and in respect of the company cited by the applicants. Those issues including one for determination of the genuine shareholders which can only be settled if the company remains alive. According to the petitioners, there had never been a resolution to strike off the company from the Register of Companies and even if it is taken that there was such a resolution to dissolve the company, no petition for Winding Up had been filed.

There seemed to me an inadequate appreciation by the applicants of the scope of Section 339(6) of the Companies Act. The Section reads:

“If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register the court on an application made by the company or member or creditor before the expiration of ten years from the publication in the Gazette of the Notice aforesaid may, if

satisfied that the company was at the time of the striking off carrying on business or in operation or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon a certified copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.”

What was before Ombija J was an application by way of a Petition to restore the Company to the Register of Companies. The application was properly made under the Section quoted above by the petitioners who described themselves as shareholders of the Company. Some of the reasons given for the application were that the business of the Company had not been finished as shareholders had not obtained their Title Deeds and that the company owned public utility land which had not been distributed and shareholders had a case relating to loans borrowed by the company but which were never released to the members.

Under the above Section any member of the Company had a right to apply to restore the Company to the Register and the court had the jurisdiction to make such an order if satisfied that the company was at the time of the striking off carrying on business or in operation or otherwise that it was just that the Company be restored to the register.

The applicants admit that ten of the petitioners are members of the company. Those ten at least had the *locus standi* to file the petition under Section 339(6) of the Companies Act. Indeed any one of them could have done so and they did not have to institute proceedings on behalf of the company. The affidavit in reply was not sworn on behalf of the company.

Both sides refer to court proceedings involving shareholders or about the shareholding in the company. I have perused the affidavit evidence relied upon by the parties. It would appear that Nakuru HCCC No.6 of 1999 between the company and some of the petitioners is still pending determination. The Company seeks inter alia a declaration that some of the petitioners are not shareholders. The defendants have a counter-claim and seek inter alia a declaration that the meeting of 29/1/99 was not a meeting of the company and consequently the decision to dissolve the company was unlawful. There is also Nakuru HCCC No.175 of 2000 between some of the petitioners, National Housing Corporation and the Municipal Council of Nakuru. The dispute appears to be in respect of a loan allegedly advanced by M/S National Housing Corporation to some of the petitioners. It appears that that suit is also pending and so is Nakuru HCCC No.555 of 1998.

Both sides also refer to property surrendered for public utility purposes by the company. It is not clear how this property is held and whether or not the surrender has been completed. This issue is therefore still alive.

In the premises, it appears to me that the reasons for the petition to restore the company to the Register still subsist. The petitioners said that the former directors had died. This was in the affidavit in support of the petition. In the same affidavit the petitioners deponed that the meeting of 29.1.1999 that legitimized the striking out of the company was called by former directors who had no mandate to do so. In my view therefore, the statement that all the directors of the company had died was not a deliberate non-disclosure. Even if the averment is taken as a non-disclosure, I am of the view that that non-disclosure was not material.

The applicants have also challenged the legitimacy of the Notification of Change of Directors, which change is said to have been fraudulent and effected by strangers who were not members or shareholders of the company. The issue of who were the legitimate shareholders of the company appears to have dogged the company even before the company was struck off the Register. The various cases referred to by the parties attest to this. The legitimacy of the extra ordinary General Meeting held on 2.1.1999 in which new directors were allegedly elected is also challenged. The applicants contend that that meeting was held in convention of a court order in HCCC No.555 of 1998. The petitioners on their part content

that the suit was filed by them and no order was issued in that suit restraining them from holding the meeting. I have perused the ruling of Rimita, J. in the said case. It is clear that the Learned Judge was dealing with an interlocutory application for injunction. He was not persuaded that the same was deserved. He did not and could not conclusively determine the issue of shareholders or directorships. He certainly did not issue any order capable of being disobeyed by the petitioners. I am therefore not persuaded that the petition was based on false facts and unsupported allegations. I am also not persuaded that there was no reason for restoring the company to the Register or that the said restoration of the company to the Register was intended for ulterior motive.

With regard to the complaint that the petition was not served upon genuine majority shareholders or genuine directors of the company, I have found that such non-service cannot invalidate the application/petition.

In the premises, I am not satisfied that the applicants have satisfied the requirements for setting aside or reviewing the order of Ombija, J. The applicants have not shown that there has been discovery of new and important matter or evidence. I am further not satisfied that there is some mistake or error apparent on the face of the record. I have also not been shown any other sufficient reason to warrant review.

My broad view of the matter is that the order of Ombija, J. remains undisturbed as several matters remain unconcluded by the company. I also do not detect any prejudice that will be occasioned to the applicants if the company remains on the Register of Companies.

In the end the Amended Notice of Motion dated 24.4.2003 and filed on 5.5.2003 is dismissed.

With regard to costs, I order that each party pays his/its own costs – as the company probably ultimately belongs to all of them.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 21st day of June, 2006.

F. AZANGALALA

JUDGE

21/6/06

Read in the presence of:-