



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MISC APPLICATION NO. 1002 OF 1996

GITHUNGURI CONSTITUENCY

RANCHING CO. LTD.....PLAINTIFF

VERSUS

THE REGISTRAR OF COMPANIES

AND NOTHER.....DEFENDANT

RULING

This is the application dated 1.3.2000 and filed on 2.3.2000. The application is brought by the company and seeks the following orders:

1. An order of prohibition directed to the Registrar of Companies to cancel all subsequent registration of directors based on the annual General meeting of the applicant Company.... which was held on 21.11.96.
2. A declaration be issued that the Annual General Meetings of the applicant company held on 2.11.96 be declared null and void.

The application was filed pursuant to leave sought in a Chamber Summons dated 1.11.96 and amended on 14.5.97. The leave was granted by Amin J. on 14.2.2000. The amended application was supported by an amended affidavit of Waira Kamau (now deceased) and an amended statement filed on 14.5.97.

The original application was filed on 1.11.96. It sought leave to apply for an order of prohibition to prohibit Registrar of companies from conducting and/or proceeding with Annual General Meeting of the company scheduled on 2.11.96. That application was supported by a statement and an affidavit. The application was placed before Duty Judge on 1.11.96 but Duty Judge ordered that the application be served and heard inter partes on 7.11.96. On 4.11.96 another application dated 4.11.96 was filed. It sought two main orders:

1. Registrar General of companies be restrained from registering the list of new directors and resolution passed on 2.11.96 and in the alternative.
2. Order against the Registrar General of companies revoking the registration of the new list of Directors and resolutions passed at the Annual General Meeting held on 2.11.96.

That application was placed before Duty Judge on 5.11.96 Record shows that the application dated 1.11.96 and the applications dated 4.11.96 have never been heard. I correct that to say that the application

dated 1.11.96 was amended on 14.5.2000 and leave to apply for order of prohibition granted on 14.2.2000.

Is the application dated 1.3.2000 competent ?

The Original application in this file was an application dated 1.11.96 for leave to apply for an order of prohibition to prohibit the holding of elections scheduled for 2.11.96. An amended application was filed one 14.5.97 supported by amended statement and affidavit It now sought leave to apply for an order to cancel the elections held on 2.11.96 and the resolutions. The record does not show that applicant applied for leave to amend the application or that leave to amend was ever granted. The statement can only be amended with leave of the court - order LIII Rule 4(2) CP Rules. So the amended statement and the amended affidavit are in admissible in evidence. Secondly the application now filed is of a different nature from the application which for applicants sought leave to file. In my view, after the application dated 1.11.96 was rendered futile by the holding of election on 2.11.96, the applicant should have withdrawn it and filed a fresh application for leave to apply for order of certiorari to quash the result of elections and to apply for an order of mandamus to compel Registrar to amend his records. Since the application is of a different nature from the one sought to be made initially and since the application is supported by the amended affidavit and amended statement which are in admissible in evidence as the amendments were made without leave of the court, the application is incompetent.

The application is also incompetent because it seeks relief which is not infact an order of prohibition The leave given was for applying for an order of prohibition. The order of prohibition sought in prayer 1 of the application is to cancel the subsequent registration of directors. An order of prohibition prohibits the doing of an act which has not been done. In this case, the elections were held on 2.11.96 and new directors registered. So an order of prohibition cannot issue to prohibit what has long taken effect. The registration of directors cannot be cancelled by an order of prohibition. What applicants should perhaps have asked for is an order of certiorari to quash the result of the elections and the registration of the new directors and an order of mandamus to compel the Registrar to remove names of new directors from the Register. The order of prohibition sought in the application is clearly misconceived. By 2.3.2000 when the application was filed more than six months had expired since the proceedings of 2.11.96 and the registration of new directors. So, even time for applying for leave to cancel the registration of directors, which can only be done through an order of certiorari and mandamus, had expired.

Secondly, is the application competently brought by the company? Mr. Wanjau for the elected directors submitted that there is no resolution of a company to file this suit. No such resolution either of directors or of the shareholders of company was shown to court. It appears that application was brought by Mr. Waira Kamau (deceased) personally in the name of the company. The directors could not have passed a resolution because former directors including Mr. Waira Kamau had been removed as directors. It is only the new directors who could have competently passed a resolution.

Thirdly, the order sought is discretionary. Courts do not issue orders in vain. All Counsels informed the court that elections of directors of the company is supposed to be done annually and that elections are long overdue since the election of the present directors on 2.11.96 The application therefore seeks to cancel elections held over four years ago. Yet the office of the new directors has expired. The Elections arelong overdue since the last election of the present directors on 2.11.96.

It would be futile in the circumstances to grant any orders sought in the application. Dr. Khaminwa for applicant prays that court do order new elections under the supervision of the Registrar of companies or Administrative officers. It would be wrong for the court to interfere with the company. The company has its own Articles of Association. It is better to leave it to shareholders and directors to decide when the elections should be held.

As regards costs, the application is brought in the name of the company. But it is clear from these proceedings that the company did not authorize the institution of the suit. It is Mr. Waira Kamau who instituted the suit. If costs are ordered against the company, it is the shareholders who will meet the costs for a case they did not authorize. It is not just to order the company to pay either the costs of applicants

counsel or the costs of the interested parties. In the circumstances I should make no orders as to costs.

For the above reasons I dismiss the application with no orders as to costs.

E. M. Githinji

Judge

23.6.2000

Mr. Mbogua holding brief for Dr. Khaminwa present

Mr. Mwilu holding brief for Mr. Wanjau present

Miss Joram for Registrar of companies present