



**Kiunga & 17 others v Mugambi & 9 others (Civil Case
18 of 2018) [2024] KEHC 3251 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE 18 OF 2018
TW CHERERE, J
MARCH 14, 2024**

BETWEEN

SAMUEL JAMES KIUNGA & 17 OTHERS PLAINTIFF

AND

EDWARD DICKSON MUGAMBI & 9 OTHERS DEFENDANT

RULING

1. The dispute between the parties herein mainly relates to non-existent of a provision for terms and duration of directors in the Memorandum and Articles of Association of Meru Teachers House Limited which is the subject matter of the suit which had resulted in some of the directors holding the positions for a long time which had caused unease to the shareholders among them the plaintiffs herein.
2. When the dispute was placed before the court, it was referred to a court annexed mediator and by a mediation agreement dated 22nd February, 2022, which was adopted as an order of the court on 23rd May, 2023, the parties agreed to constitute a seven member committee to spearhead the amendments of the Memorandum and Articles of Association more so specifying the terms and duration of elected directors and to convene a special general meeting for approval by shareholders of the agreed amendments.
3. Subsequently, the seven-member committee came up with proposed amendments and thereafter the firm of Murango Mwenda & Co. Advocates on 30th September, 2023 drafted the amended Memorandum and Articles of Association of Meru Teachers House Ltd.
4. The amendments were approved by shareholders of Meru Teachers House Ltd in a special general meeting held on 30th September, 2023.



Summons

5. By summons dated 11th December, 2023, supported by an affidavit sworn by Joseph Kibaki Mwangira (4th Plaintiff) on even date and which he avers is sworn with the authority of the co-plaintiffs, the 4th Plaintiff avers that it has come to the attention of the Plaintiffs that the amended Memorandum and Articles of Association of Meru Teachers House Ltd contain various amendments that were not agreed upon by the seven-member committee. The deponent goes ahead to accuse the 1st Defendant of mutilating by way of omitting agreed amendments and introducing amendments that were not agreed upon.
6. Defendants opposed the summons vide a replying affidavit sworn by Edward Dickson Mugambi, the 1st Defendant on 20th December, 2023. He denies altering the agreed amendments and avers that amended Memorandum and Articles of Association were unanimously approved on 30th September, 2023 in a special general meeting attended by Plaintiffs among other shareholders.

Analysis and determination

7. I have considered the summons in the light of the affidavits on record and annexures thereto and submissions filed on behalf of both parties.
8. In order to satisfy myself that Defendants complied with the order of the court, I have had a chance to go through amended Memorandum and Articles of Association of Meru Teachers House Ltd drawn by the firm of Murango Mwenda & Co. Advocates on 30th September, 2023 and approved on the same date in a special general meeting attended by Plaintiffs among other shareholders.
9. For avoidance of doubt, I have lifted article that specifically talk to the issues on the terms and duration of directors as follows:

Article 96.

Unless and until, otherwise determined, by the Company in General meeting, the number of Directors shall be eleven drawn from each of the eleven regions, with each region having one Director. A Director shall hold office for a term of 3 years beginning on the date on which he is elected, and ending on the date when the next fourth Annual General Meeting is held. A retiring Director shall be eligible for re-election in the subsequent term provided that a person shall not hold office as Director for more than three terms.

Article 113

At the first Annual General Meeting of the Company the whole of the Directors shall retire from office, and at the Annual General Meeting in every subsequent year one-third of the Directors for the time being or, if their number is not three or a multiple of three, shall retire from office, Director retiring at a meeting shall retain office until the dissolution of the meeting of which the successor is appointed.

Article 114

The Directors to retire in ever year shall be those who have been longest in office since their last election, but as between persons who become Directors on the same day those to retire shall unless they otherwise agree among themselves, be determined by lot. A retiring Director shall be eligible for re-election.

Article 115



Subject to the provisions of Article 100 hereof, the Company at the General Meeting at which a Director retires in manner aforesaid, may fill up such vacated office by electing a person thereto and in default the retiring Director shall be deemed to have been re-elected unless at such meeting it is resolved not to fill such vacated office or unless such person seeking or proposed to be re-elected has served as a Director for 3 terms.

Article 119

The company may by ordinary resolution remove any Director before the expiration of his period of office notwithstanding anything these Articles or in any agreement between the company and such Director, upon giving a special notice for a resolution to remove a such director or to appoint a person to replace the director so removed at the meeting at which the director removed. A director may be removed from office subject to Article 104 and Part X of the Act. Such removal shall be without prejudice to any claim, such Director may have for damages for any breach of contract of service between him and the Company. The Company may by ordinary Resolution appoint another person in place of a Director so removed from office. The person appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a Director.

10. It is to be remembered that no party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit. This procedural imperative was discussed by the Court of Appeal in Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR, in which the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC 91/2002 was quoted with approval thus:

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

11. It is not disputed that the amendments complained of by the Plaintiffs do not address the issues of the terms and duration of directors of Meru Teachers House Ltd which was the gist of the pleadings between the parties. The issues in the present application introduce a new cause of action and alters the nature of the suit between the parties and falls outside the ambit of the dispute between the parties herein.
12. The rule of the thumb in an adversarial system such as ours, assumes that the best way to get to the truth of a matter is through a competitive process to determine the facts by accurate application of the law.
13. This court therefore declines the invitation to determine new issues that were not pleaded, for to do so, this court would be defying the fundamental principle that ours is an adversarial system where courts decide only those matters that have been properly pleaded and laid out in evidence.
14. Consequently, this court finds the summons dated 11th December, 2023 is devoid of merit and it is dismissed with costs to the Defendants.

DELIVERED AT MERU THIS 14TH DAY OF MARCH 2024



WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Plaintiffs - Mr. Carlpeters for Carlpeters Mbaabu & Co. Advocates

For Defendants- - Mr. Gitonga for J.G. Gitonga & Co Advocates

