



**Kenya Hospital Association v Genga-Eyama & 399 others;
Bichange & 13 others (Interested Parties) (Civil Case E544 of 2024)
[2024] KEHC 13591 (KLR) (Commercial and Tax) (4 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E544 OF 2024
PM MULWA, J
NOVEMBER 4, 2024**

BETWEEN

KENYA HOSPITAL ASSOCIATION PLAINTIFF

AND

**BECKY VALERIE AELA GENGA-EYAMA & 399 OTHERS & 399 OTHERS &
399 OTHERS & 399 OTHERS & 399 OTHERS DEFENDANT**

AND

**CHRIS MUNGA NYAMARA TANDI BICHANGE & 13 OTHERS & 13 OTHERS
& 13 OTHERS & 13 OTHERS & 13 OTHERS INTERESTED PARTY**

*(On the Applications dated 12th September 2024,
16th September 2024 and 19th September 2024)*

RULING

Introduction and Background

1. It is common ground that the Plaintiff is a company that owns and operates the Nairobi Hospital, that was established in 1950 and operates 6 outpatient centers within Nairobi and Kiambu Counties (hereinafter ‘the Hospital’). The Hospital serves over 182,500 patients annually with a bed capacity of over 450 and over 400 doctors with admitting rights and it is, according to the Defendants, a leading healthcare facility in Kenya, providing general and specialized healthcare services to citizens of Kenya and East Africa. The Defendants state that the Hospital occupies a uniquely critical and important role, though not a parastatal of the Government, it is a national institution, whose operations resonate with public interest and that its optimal functioning is accordingly a matter of great public interest.



2. The Defendants are persons that signed a requisition to convene an Extraordinary General Meeting (EGM) of the Hospital sent to its company secretary on 2nd August 2024 whereas the Interested Parties are members of the Hospital's Board of Management ("the Board") duly appointed pursuant to its Memorandum and Articles of Association. The Board is made up of nine members who are elected by its fully paid up members, three co-opted members who are appointed by the Board and two representatives of the doctors who for the time being are the Chairman and Vice-Chairman of the Admitting Staff Association (ASA). The Chairperson and Vice-Chairman of the ASA assume membership in the Board by virtue of their election by members of the ASA. The ASA consists of Medical and Dental Practitioners with the privilege of admitting rights within the Hospital. The Hospital's Articles of Association provide for rotation of the Board with one third of the elected members of the Board retiring at the Annual General Meeting (AGM). Each elected member of the Board holds office for a maximum of three years and is eligible for re-election at the AGM at which he retires for another term of three years.
3. By a Complaint dated 12th September 2024, the Hospital filed this suit claiming that the 11th -14th Interested Parties (Jaldesa Guyo Waqo, Peter Larry Waweru Ndaguatha, Samson Mbuthia Kinyanjui and Valerie Gaya) were appointed to the Board to fill vacancies that arose following the resignation of Sammy Onyango on 13th March 2024, David Githaiga on 22nd July 2024 and Wilfred Irungu Ndirangu and Ludmilla Shitakha on 29th July 2024. The Hospital's case is that vide a letter dated 2nd August 2024, the firm of Ahmednasir Abdullahi Advocates LLP forwarded to the Hospital signed requisitions which required the Board to call for an EGM of the Hospital in order to vote on their removal and election of new members to the Board and the requisitioners stated that they were fully paid up members of the Hospital. The Hospital avers that the requisitions that were annexed to the letter contained various allegations against some of the members of the Board including allegations of conflict of interest, tribalism, nepotism, cronyism and dereliction of duty, among others.
4. On 8th August 2024, the Hospital informed the firm of Ahmednasir Abdullahi Advocates LLP on behalf of the requisitioners that the requisitions would be processed in strict adherence to the Hospital's Articles of Association, the *Companies Act* and other relevant laws. The Hospital claims that on 16th August 2024 or thereabouts it received a court order originating from Milimani MCCC E4166 of 2024 between Dr. Chris Bichage v A.M.R. Laving & 363 others which prohibited the defendants therein from inter alia relying on and/or publishing the requisition notice served on 2nd August 2024 and that the Hospital promptly informed its members of the said court order vide a communication made on 16th August 2024 by the Hospital's company secretary.
5. It is the Hospital's position that vide a letter dated 21st August 2024, its company secretary responded to the letter of 2nd August 2024 and informed the requisitioners through their advocates, that the Hospital was unable to convene a lawful EGM for reasons inter alia that; the foregoing court order issued on 16th August 2024 prohibited any person acting on behalf of the defendants in those proceedings from any further publication of the requisitions and that the Board would therefore be unable to take any further step in respect of the requisitions contained in the letter of 2nd August 2024. That the members of the Board had complained about defamation and had stated that the requisitions made false statements of fact which were injurious to their reputation and the convening of an EGM where the said statements would be debated and any resolution resulting therefrom would therefore in contravention of section 277 (6) (b) of the *Companies Act*.
6. The Hospital also stated that it had received complaints from some of its members that they had not signed the said requisition notices yet their names and signatures were on it. In the circumstances, the Hospital was unable to authenticate the persons making the requisition in accordance with



section 277(7) of the *Companies Act*. Further, that the requisitions sought to remove the 4th and 8th Interested Parties who are Chairman and Vice-Chairman of the ASA respectively in contravention of the Hospital's Articles of Association and the Regulations for the ASA made pursuant to Article 38 of the Articles of Association. The Hospital contends that the 4th and 8th Interested Parties are not elected by its members or appointed and/or co-opted by the Board and as such, the requisitions were frivolous or vexatious within the meaning of section 277 (6)(c) of the *Companies Act*. Furthermore, that there was an order in Nairobi Milimani High Court Commercial and Admiralty Division Civil Suit No E233 of 2024 restoring status quo ante, that is, restoring the 4th Interested Party as Chairman of MAC and therefore a member of the Board under Article 38 of the Articles of Association.

7. It is the Hospital's further case that vide a letter dated 29th August, 2024 from the firm of Ahmednasir Abdullahi Advocates LLP, the requisitioners communicated their intention to proceed with the said meeting requisitioned on 2nd August 2024 without further reliance on the requisition as it had served its notice. On this basis, the firm of Ahmednasir Abdullahi Advocates LLP proceeded to serve upon the Hospital a notice of the meeting vide their letter dated 3rd September 2024 (the Notice of Meeting). That the Notice of Meeting was purportedly signed by more than fifty percent (50%) of the Hospital's members who purportedly signed the requisition notice served on 2nd August 2024 in accordance with section 279(1) of the *Companies Act* and the Hospital's Articles of Association.
8. Further to the foregoing, the Hospital avers that the said notice was further published at page six of the Daily Nation Newspaper edition of 3rd September 2024 and purported to call for an EGM of the Hospital's members on 18th September 2024 at Radisson Blu Hotel Upperhill. The notice further included a proposed resolution for the removal of the 1st to 10th Interested Parties and the appointment of a "caretaker board" to hold office for six (6) months pending the appointment of a substantive board. It is the Hospital's case that the proposed resolutions contained in the notice published on 3rd September 2024 are not only contrary to the Hospital's Articles of Association but also contravene the *Companies Act*. Furthermore, that the Notice of Meeting is *prima facie* void for reasons that it does not meet the threshold for calling the meeting for the reasons that it is not signed by half of the members who signed the requisition as it purports; two (2) persons signed it are not members of the Hospital and that forty-two (42) other members that signed the Notice of Meeting did not sign the requisition notice served on 2nd August 2024. Furthermore, the Hospital claims that six (6) of these members are not paid up.
9. The Hospital claims that the Notice of Meeting published on 3rd September 2024 does not issue a notice 21-day notice as required by Article 17 and 19, and it purports to move a resolution for the removal of the 4th and 11th Interested Parties as members of the Board contrary to Article 38(b) as read together with Regulation 9 of the Regulations for ASA. That the Notice of Meeting purports to move a resolution for the creating of a "caretaker board for six months", which is inconsistent with the Articles of Association and that it purports to move a resolution for the election of certain members to the Board contrary to Article 47(b) of the Articles. The Hospital contends that the proposed members have not been proposed nor seconded by two members of the Hospital nor have they delivered the said proposal within 14 days of the said meeting to the Hospital's Company Secretary.
10. The Hospital adds that the list of the members proposed for election to the Board and published in the Notice of Meeting is not published by the Hospital's Company Secretary contrary to Article 47(c) of the Articles. That the firm of Ahmednasir Abdullahi Advocates through various letters to the Hospital and in particular its letter dated 3rd September 2024 has insisted that the said meeting be attended in person contrary to Article 22(b)(1) of the Articles. That this expressly discriminates and denies the



Hospital's members who are entitled to be at the said meeting and vote from taking part in the meeting should they be unable to attend physically.

11. The Hospital also contends that the Notice of Meeting purports to rely on the requisition issued on 2nd August 2024 contrary to a valid court order issued in MCCC E4166 of 2024, and further purports to move a resolution for the removal of the 4th Interested Party from the Board of the contrary to a valid court order issued on 5th May 2024 in Milimani Commercial HCCC No E233 of 2024, that the Notice of Meeting and the proposed resolution have not been served upon the 1st - 11th Interested Parties within 28 days of the said meeting contrary to section 139(2) as read together with sections 279(4) and 287(1) of the Companies Act, the Notice of Meeting does not provide for a 21-day notice as required under section 141(4) of the Companies Act, the Notice of Meeting is premised on a requisition that contains frivolous and vexatious allegations contrary to section 277(6) of the Companies Act and that the firm of Ahmednasir Abdullahi Advocates LLP is not a member of the Hospital to convene a meeting within the meaning of section 279 of the Companies Act.
12. The Hospital therefore avers that the purported actions to requisition for and convene an extraordinary meeting of its members pursuant to the Requisition Notice and the Notice of Meeting are null and void to the extent that they breach its Articles of Association and the Companies Act. That despite several notices and without any colour of right, the Defendants are hellbent on convening the impugned Extraordinary General Meeting therefore necessitating this suit and for these reasons it seeks various declaratory and permanent injunctive orders against the Defendants jointly and severally.
13. Contemporaneously with the Complaint, the Hospital also filed the Notice of Motion dated 12th September 2024 made under sections 139(2), 141(4), 278, 281, (1) & (3), 287(1) and 1011 of the Companies Act, section 63 (c) and (e) of the Civil Procedure Act and Order 40, Rule 2(1) of the Civil Procedure Rules seeking to restrain the Defendants from holding the EGM of the Hospital on 18th September 2024 pursuant to the Notice of Meeting or any EGM pursuant to the requisitions of 2nd August 2024 pending hearing and determination of the application and the suit.
14. The Hospital's application is supported by the grounds on its face and the supporting affidavits by Dr. Wilfred A. Mutubwa, an advocate in conduct of this matter on behalf of the Hospital and; Gilbert Nyamweya, the Hospital's Company Secretary sworn on 12th September 2024 and 16th September 2024 respectively.
15. On 12th September 2024 the court issued injunctive orders stopping the EGM called by the Defendants and planned for the 18th September 2024. The suit and application prompted the Defendants to file two applications dated 16th September 2014 and 19th September 2024 where they primarily seek to set aside and stay the execution of the orders of 16th August 2024 and 12th September 2024 and restrain the Hospital from calling, conducting and presiding over the AGM that was scheduled for 27th September 2024.
16. These applications are supported by the grounds on their face and the affidavit of Robert Francis Shaw, the 144th Defendant, sworn 16th September 2024. The applications are opposed by the Hospital through the replying affidavit sworn on 20th September 2024 by Gilbert Nyamweya Omoke, the Notice of Preliminary Objection of the same date and the Grounds of Opposition dated 23rd September 2024. The applications are also opposed by the Interested Parties through the replying affidavit sworn on 21st September 2024 by the 1st Interested Party, the 7th Interested Party through the replying affidavit sworn on 7th October 2024 and the Grounds of Opposition dated 23rd September 2024. On 24th September 2024 the court issued an order restraining the Hospital from calling, conducting and presiding over the AGM scheduled for 27th September 2024.



17. The Defendants' case is that the ex parte orders issued on 12th September 2024 were issued for more than 14 days contrary to Order 40 Rule 4(2) of the *Civil Procedure Rules* and therefore, the same were issued without jurisdiction and are a nullity. That the court has no obligation but to set aside the said order as it contravenes mandatory law and egregiously derails and offends administration of justice. The court directed that the applications be canvassed by way of written submissions which are now on record and I will make relevant references to them in my analysis and determination.

Analysis and Determination

18. As stated, there are three applications for the court's determination; one by the Hospital that seeks to forestall any EGM called by the Defendants pursuant to the requisition notices of 2nd August 2024 and Notice of Meeting of 3rd September 2024 and; two by the Defendants that seek to review and/or set aside interim orders issued on 16th August 2024 and 12th September 2024 and strike out the suit dated 15th August 2024 for want of jurisdiction.
19. I propose to first deal with the applications by the Defendants. From their submissions in respect of the application dated 16th September 2024, the Defendants concede that the only residual prayers left for the court's determination are inter alia the one that seeks to restrain the Hospital from calling, conducting and presiding over the AGM scheduled for 27th September 2024. Whereas the Defendants submit that this injunctive relief is sought pending the determination of their counterclaim, the face of the application states otherwise as the relief is sought pending hearing and determination of the application. There was no counterclaim on record by the time the Defendants were filing their application so the court could not speculate that the same would be filed by the time of the ruling as urged by the Defendants.
20. I am in agreement with the Hospital that this application should have been anchored on a suit and it is an abuse of the court process for the Defendants to file the application while being well aware that there is no counterclaim. As submitted by the Hospital the Court of Appeal in *Scope Telematics International Sales Limited v Stoic Company Limited & Co-operative Bank of Kenya* [2017] KECA 545 (KLR) did not countenance such a procedure and it was held that discretion and Article 159 of the *Constitution* cannot be used as a shield to override a mandatory statutory provision. Order 40 Rules 1 and 2 of the *Civil Procedure Rules* provide that injunction orders must be anchored in a suit and it was incumbent for the Defendants to anchor their application dated 16th September 2024 in a suit. The court cannot exercise discretion in favour of the Defendants under the guise of Article 159 as the manner of initiating a suit cannot be termed as a mere case of technicality.
21. In any event, as I had stated in the introductory part, the court has already issued the injunction order pending hearing and determination of the application and therefore, it is my finding that this prayer is spent. What remains is the prayer for costs and any other order the court may deem expedient in the circumstances of this case. In my view, these prayers can only be answered later once I determine the other applications but as of now, the application of 16th September 2024 is largely spent.
22. Turning to the application dated 19th September 2024, it is clear that Order 40 Rule 4 (2) of the *Civil Procedure Rules* provides that "An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days". It is indeed correct that when the court issued the ex parte injunction on 12th September 2024 and going by Order 40 Rule 4(2) above, the same ought to have lasted for 14 days, that is until 26th September 2024. The record indicates that the said orders were only extended on 8th October 2024.



23. While I agree that the ex parte orders issued on 12th September 2024 lapsed by operation of law on 26th September 2024, the same were extended on 8th October 2024. I refuse to accept that the extension was without jurisdiction as the Rule above allows the court to extend such ex parte orders once, which is what was done on 8th October 2024 and that this extension was within the exercise of the court's jurisdiction and discretion and was done given the statutory salutation in section 63 of the [Civil Procedure Act](#) so as to prevent the ends of justice from being defeated. I therefore find that the court had jurisdiction to extend the ex parte orders issued on 12th September 2024 and I find no valid reason to review and set aside the same.
24. I now turn to the Hospital's application dated 12th September 2024. For the Hospital to obtain the injunctive orders sought, it has to satisfy the conditions set out in the case of *Giella v Cassman Brown & Co., Ltd.* [1973] E.A. 358 by demonstrating a *prima facie* case with a probability of success, that it will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Hospital is expected to surmount sequentially. It means that if a *prima facie* case is not established then irreparable injury and balance of convenience do not require consideration (see [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2013] KECA 347 (KLR))
25. As to what constitutes a *prima facie* case, the Court of Appeal in [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) [2003] KECA 175 (KLR) explained as follows:
- “A *prima facie* case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
26. The gist of the Hospital's complaint can be inferred from their pleadings, more so the Complaint which I have summarised above. In sum, the Hospital has stated that the Defendants' requisition notices and Notice of Meeting are in breach of the Hospital's Articles of Association and the [Companies Act](#). For instance, it avers that the Notice of Meeting does not issue a 21-day notice as required by Article 17 and 19, that it seeks to remove some members of the Board who are not appointed by the Hospital but are co-opted therein by the ASA, that it seeks to create a caretaker board for six months which is not provided for in the Articles of Association, that the proposed members for election in the impugned extra ordinary general meeting had not been proposed or seconded by two members of the Hospital contrary to Article 47(b), that the list of the proposed members for election have not been published by the company secretary contrary to Article 47(c) and that the meeting seeks the physical and personal attendance of members contrary to Article 22(b)(1).
27. Further, that the requisition is not properly authenticated as required by section 277 (7) (b) of the [Companies Act](#) as some members who are alleged to have signed the requisition have since disputed the signatures appearing on the requisition, that the same defames some of the Board directors contrary to section 277(6) (c) of the [Companies Act](#) and that the Defendants have failed to serve a special notice contrary to section 139 (2) as read with section 279 (4), section 287(1) and section 1011 (1) and (2) (a) of the [Companies Act](#).
28. In my view, the above are averments and allegations that call for a rebuttal from the Defendants. I say so because the exercise of convening an EGM on requisition is procedural and it is set out in statute (sections 277,278 and 279 of the [Companies Act](#)). For instance, the requisition/call for the meeting must be done by members of the company. In this case, the Hospital has stated that some of the



requisitioners are not members of the Hospital and it has annexed letters of some members protesting their inclusion as requisitioners. Two, a resolution cannot be moved at a general meeting if the same defames a person or is frivolous and vexatious. The Hospital has stated that the meeting could not proceed for reasons that there were injunctive orders issued in Milimani CMCC No E4166 of 2024 which restrained most of the Defendants herein from disseminating or circulating or publishing any defamatory information on any platform including any meeting of the Hospital, the said requisition letter of 2nd August 2024 and its contents. Therefore, the said requisition and resolutions therein cannot be relied upon at least going by the aforementioned court orders.

29. Further, since the requisitions sought the removal of members of the ASA who assume membership of the Board by virtue of their election under the regulations therein and are neither elected by the Hospital nor appointed and/or co-opted by the Board, it can be stated that *prima facie*, the requisitions are frivolous and vexatious. Three, the requisitions ought to be authenticated by the persons making it. The Hospital has stated that the requisition is not properly authenticated and that some members alleged to have signed the requisition have since disputed the signatures appearing therein. Four, the Notice of Meeting provides for a notice period of 14 days rather than 21 days as provided for by Article 19 of the Articles of Association and contrary to section 279(4) which provides that such meetings are to be convened "...as nearly as practicable, in the manner in which meetings are required to be convened by directors of the company".
30. Whereas the Defendants argued that the resolution for removal of directors was a special resolution that required only 14 days under section 287, my reading of the said provision states that special notices of resolutions require a 28-days' notice and that the 14 days is only applicable if it is impractical to issue the 28-days' notice. Such a demonstration that it was impractical to issue the 28-days' notice is a matter for trial.
31. This court, in *Agricultural Development Corporation of Kenya v Tum & another* [2014] KEHC 7545 (KLR) held that a requisition that does not comply with the procedural and substantive provisions of statute and the company's Articles of Association is sufficient demonstration of a *prima facie* case and I similarly so find in the present case. It will be prejudicial to the Hospital if the meeting convened in *prima facie* violation of the *Companies Act* and the Articles of Association is allowed to take place before the issues in controversy are adjudicated upon and resolved by the court.
32. In any event, allowing the EGM to proceed might be impactful and consequential in the management and business affairs of the Hospital in a manner that cannot be reversed if there were to be institutional and individual harm to the Hospital and its directors which could be difficult to compensate by way of damages considering the personal reputations of some Board members and the Hospital as a whole are at stake. As such, prudence demands that an injunction do issue against the proposed EGM requisitioned by the Defendants.
33. However, that is not the end of the matter. The parties agree that the Hospital had called for the AGM as per the Notice of 30th August 2024. The importance of an AGM cannot be over emphasized. It is through such a meeting that a company accounts to its shareholders, discusses its challenges and comes up with resolutions in the running of its affairs (See *Kirobon Farmers Limited v Benjamin Chesulut* [2018] KEHC 1527 (KLR)).
34. Gikonyo J., in *Agricultural Development Corporation of Kenya v Tum & another* (*supra*) held as follows:

“Accountability to the shareholders is best described by the activities which take place in an Annual General Meeting and include; presentation of profit and loss account, and balance sheet; relevant information on the assets and operations of the company; directorship; share



dividend and public share issue, if any, is to be undertaken. Compliance with the law is assessed on the company's adherence to the legal requirements set out in the Companies Act especially the making of returns on its operations; the general meetings and resolution it has made during the year, tax returns, directorship of the company, shareholding and so on and so forth. If it does not do the things set out in law, the law has prescribed the penalty thereto."

35. In short, an AGM discusses important facets in the operation of the corporate entity including its directorship. As such, I find that it will be in the interest of justice and progression of this matter that the AGM proceed as set out in the Notice of 30th August 2024 where the issue of rotation and election of directors is part of the agenda. I believe the parties herein will have an opportunity to participate in the AGM in accordance with the Hospital's Articles of Association and the Companies Act.

Conclusion and Disposition

36. For the aforementioned reasons, the Court issues the following dispositive orders:

1. The Defendants' applications dated 16th September 2024 and 19th September 2024 are dismissed.
2. The Plaintiff's application dated 12th September 2024 is allowed.
3. An order of a temporary injunction be and is hereby issued restraining the Defendants/ Respondents, whether by themselves, their servants or agents and/or anyone claiming through them, from convening, holding or taking any steps towards the convening or holding of an extraordinary general meeting of the Plaintiff pursuant to the requisition received by the Plaintiff on 2nd August 2024.
4. The interim orders of the Court issued on 24th September 2024 restraining the Hospital from calling, conducting and presiding over the Annual General Meeting (AGM) scheduled for 27th September 2024 are hereby discharged and the AGM of the Hospital convened pursuant to the Notice dated 30th August 2024 shall be held within 30 days of the court's ruling.
5. The Plaintiff shall report back to the court within 30 days after the meeting has been held.
6. Costs of the applications shall abide with the final judgment.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2024.

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P. MULWA

JUDGE

In the presence of:

Dr. Mutubwa for Plaintiff

Mr. Bwire & Mr. Cohen for Defendants (also h/b for Mr. Oduol)

Mr. Mong'eri for Interested Parties (except the 7th)

Ms. Muthoni for 7th Interested Party

Court Assistant: Carlos

