



**Kenya Hospital Association v Eyama & 399 others; Bichage  
& 13 others (Interested Party) (Civil Case E544 of 2024)  
[2024] KEHC 15196 (KLR) (Commercial and Tax) (2 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15196 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E544 OF 2024  
PM MULWA, J  
DECEMBER 2, 2024**

**BETWEEN**

**KENYA HOSPITAL ASSOCIATION ..... PLAINTIFF**

**AND**

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

**AND**

**CHRIS MUNGA NYAMARATANDI BICHAGE & 13 OTHERS .... INTERESTED  
PARTY**

**RULING**

**Introduction and Background**

1. On 4<sup>th</sup> November 2024, the court issued orders inter alia directing the Plaintiff (the Hospital) to proceed with the AGM scheduled as per the Notice dated 30<sup>th</sup> August 2024 and that the said AGM was to be held within 30 days of the court's ruling. Pursuant to these orders, the Hospital has published a notice in the Daily Nation Newspaper informing its members that the AGM which had earlier been scheduled for 27<sup>th</sup> September 2024 would proceed on 4<sup>th</sup> December 2024.
2. The Defendants have now filed an application dated 19<sup>th</sup> November 2024 seeking orders inter alia that the agenda on elections to the Board of Directorship and Trusteeship of the Hospital scheduled to take place in the AGM be conducted by a neutral independent party, that is, the Independent Electoral and Boundaries Commission (IEBC) or any other independent body. This application is supported by the affidavit of one of the Defendants, Dr. David Otieno, sworn on 19<sup>th</sup> November 2024 and has been responded to and opposed by the Hospital through its Notice of Preliminary Objection dated 28<sup>th</sup>



November 2024 and a replying affidavit sworn on the same date by the Hospital's Company Secretary, Gilbert Nyamweya. The application is also opposed by the Interested Parties through the replying affidavit of 1<sup>st</sup> Interested Party sworn on 27<sup>th</sup> November 2024.

3. The Defendants have also sought review orders in terms of mandatory injunction to compel the Hospital to include the Defendants' Notices of Special Business as part of the Agenda for the AGM. These orders are sought through its application of 26<sup>th</sup> November 2024 and supporting affidavit of the same date sworn by Dr. David Otieno. The Hospital has also responded to this application through the replying affidavit of its Company Secretary sworn on 28<sup>th</sup> November 2024. The Interested Parties have equally opposed the application through the replying affidavit of the 1<sup>st</sup> Interested Party sworn on 28<sup>th</sup> November 2024. The court directed that the two applications be disposed by way of written submissions which are on record

### **Analysis and Determination**

4. Having gone through the applications, the responses thereto and the submissions, I take the following views on the same. In the ruling of 4<sup>th</sup> November 2024, this Court stated in part that 'the AGM of the Hospital convened pursuant to the Notice dated 30<sup>th</sup> August 2024 shall be held within 30 days of the court's ruling.' I am inclined to agree with the Hospital and the Interested Parties that the Court has already pronounced itself that the AGM is to be held in accordance with the Notice of 30<sup>th</sup> August 2024 and not any other Notice as is being advanced by the Defendants.
5. Whereas it is correct that the Court noted that the issue of rotation and election of directors is part of the agenda of the AGM and held that parties should have an opportunity to participate in the same, it never meant that the same was now open to the parties to introduce new items on the agenda that were not part of the Notice of 30<sup>th</sup> August 2024. The position of the Court remains that the AGM will be as per the Notice of 30<sup>th</sup> August 2024 and that the participation of the parties in the AGM is limited to the agenda items indicated therein and the Hospital's Articles of Association and the [Companies Act](#).
6. I am in further agreement with the Hospital's submission that since the Defendants have proffered an appeal to the court's findings above, then they cannot also benefit from an order of review at the same time. This is the tenor and substance of Section 80 (a) and (b) of the [Civil Procedure Act](#) which makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party (see the Court of Appeal's decision in [Gerald Kitbu Muchanje v Catherine Muthoni Ngare & Gibson Nyaga Ngari](#) [2020] KECA 511 (KLR). Therefore, I find no merit in the Defendants' application dated 26<sup>th</sup> November 2024.
7. Turning to the issue of whether the IEBC should conduct the said AGM, Article 88(4) of the [Constitution](#) provides that the IEBC "...is responsible for conducting or supervising referenda and elections to any elective body or office established by this [Constitution](#), and any other elections as prescribed by an Act of Parliament..." The Defendants have not stated what provision of the [Constitution](#) or statute mandate the IEBC to conduct or supervise elections for the Hospital as provided for above.
8. Whereas the Defendants have submitted that the court can order the IEBC to conduct an election for both public and private enterprises, they have not presented any case where the IEBC has been so ordered to conduct an election for an entity not established by the [Constitution](#) or as prescribed by a statute.
9. The Defendants have also not answered the contention by the Hospital that IEBC is currently not fully constituted with Commissioners and therefore lacks the requisite quorum to be able to conduct an



election whether national or otherwise. In any event, the Defendants have not denied that the Hospital has engaged an independent party to provide a platform for electronic voting as provided for under Articles 22(b) and 30(a) of the Hospital's Articles of Association and that it has always appointed independent audit firms to conduct an audit of its elections. I therefore find no valid reason to order the appointment of another independent party to be part of the election when there is already one in place. For these reasons, I find that the Defendants' application dated 19<sup>th</sup> November 2024 is not merited.

### **Conclusion and Disposition**

10. In the upshot, the two applications by the Defendants dated 19<sup>th</sup> November 2024 and 26<sup>th</sup> November 2024 lack merit and are dismissed with costs.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER 2024.**

.....

**P. MULWA**

**JUDGE**

In the presence of:

Ms. Muyoka for Plaintiff

Mr. Otieno h/b for Mr. Bwire for Defendants

Mr. Mong'eri for Interested Parties (except the 7<sup>th</sup>)

Ms. Muthoni h/b for Mr. Kimathi for 7<sup>th</sup> Interested Party

Court Assistant: Carlos

