



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E 108 OF 2019

IBRAHIM HUSSEIN MAHADI1ST PLAINTIFF

MAHADI ENERGY LIMITED 2ND PLAINTIFF

VERSUS

FIRST COMMUNITY BANK LTD.....DEFENDANT

RULING

1. On 27th September 2019, this Court made the following orders:-

a) Mahadi shall within (seven) 7 days of this order file a proper resolution authorizing or ratifying the commencement of this suit failing which the suit by the 2nd plaintiff shall stand struck out without the necessity of a further court order.

b) In the event of striking out, costs of the suit shall be to the Defendant borne by the 1st plaintiff.

2. On 3rd October 2019 Mahadi Energy Limited (the 2nd Plaintiff) is said to have filed the required resolution. Of significance to the controversy at hand is that the seal said to be of the Company is alleged to have been affixed in the presence of Ibrahim H. Mahadi and Adan Abullahi Alio who are also said to be Directors of the Company who attended the meeting of 1st October 2019 in which the resolution was purportedly made.

3. The Defendant challenges the validity of that resolution and in the Notice of Motion dated 18th October 2019 seeks that it be struck out and or expunged from the Court record.

4. The plank of the application is that the resolution is purportedly signed by Ibrahim H. Mahadi (the 1st Plaintiff or Ibrahim) who is not a director of the Company. The Bank points to the search of records from the Company's registry as at 4th June 2019 as revealing the following persons to be directors:-

Adan Abdullah Aliow

Abdi Hassan Amin

Dormohamed Mohamed Dormahamed

5. The Bank makes an additional argument that Ibrahim holds a power of Attorney from Adan Abdullah Aliow but which cannot cloth him with directorship. I doubt the relevance of this additional assertion because in the impugned resolution, Aliow signs the resolution himself and not through the holding of his attorney, Ibrahim.

6. The outcome of the application has to turn on whether the Bank has proved that Ibrahim is not director of the company given that it does not seem disputed that the affixing of the seal to any instrument shall only be by authority of a resolution of two directors or at least one

director and the secretary or some other person authorized by the Board (See Article 26 of the Articles of The Company).

7. How does Ibrahim react to this? His affidavit of 19th November 2019 raises many issues but I rehash those relevant to the question whether he is a director of the company. He says that he incorporated the company with 2 nominees as co-owners and directors each having a share of 200 through their proxies and him retaining 200.

8. That Abdi Hassan Amin (Amin) (a shareholder of the company) resigned from the company on 22nd June 2011 and transferred all his shares to him. That subsequently he was registered as a director of the company in September 2011. That despite the above changes, the records of the company as held in the company registry have not been changed to reflect the actual position of the company in terms of its true directors.

9. It is his further disposition that, when his advocates carried out a search on the company directors sometimes in June 2019, they obtained a CR 12 which does not reflect the current position of the company. In regard to that CR 12 dated 4th June 2019 obtained by Mahadi himself, Mahadi states that it is system generated and that he had it procured only for purposes of confirming that Hussein Hassan Amin (notice that this is not Abdi Hassan Amin mentioned in the preceding paragraph) had never been a director of the company. An issue that was in contest at that time.

10. He avers that the company registry advised that its records could not be updated as the company had not been filing returns. He asserts that the current Directors of the company are himself, Adan Abdullah Aliow and Dor Mohamed Dor. Ibrahim asserts that company records held in the company registry do not hoist a directorship on a person who has in fact resigned from the company and that the authoritative evidence on directorship are documents held by the company.

11. This Court has considered the arguments for and against the application.

12. A good place to start is to recall why the order made on 27th September 2019 were necessary. The Bank is on the opposite side of the company in these proceedings and this Court observed that "...ordinarily, it is not the business of an adversary to inquire whether a company has due authority of its board to institute or defend a suit". The Court then justified the reason for departing from the ordinary rule. It held;

"14. Having said that there is something unique about the circumstances obtaining in this matter. The suit is instituted, partly, in challenge of the Bank's attempt to sell the Mahadi properties whose sale was expressly authorized by the Company a through a resolution of its board of directors. The Bank was therefore entitled to inquire about the apparent change of heart and if in doing so it turned out that the suit may have been instituted without due authority then it was perfectly in order to press for proof of a resolution."

13. As stated earlier, the crux of the matter is whether the Bank has proved that Ibrahim Hussein Mahadi is not a director of Mahadi Energy Limited. The law has always been that he who asserts must prove. It is the Bank that asserts that Ibrahim is not a director and the onus is on the Bank to prove this assertion.

14. The Bank places reliance on the letter of 4th June 2019 from the Registrar of Companies showing the following to be Directors and Shareholders of Mahadi Energy Limited as at 4th June 2019:

Adan Abdullah Aliow

Abdi Hassan Amin

Dormohamed Mohamed Dormahamed

15. Mr. Agwara for Ibrahim and the Company thinks the matter not to be that simple. He argues that Ibrahim is a member and Director of the company by virtue of transfer of shares and directorship by Amin, although the records of the Company at the registry have not changed to reflect the actual position of Directors.

16. What then is the evidential value to be placed on the letter of 4th June 2019? On this Ibrahim asks the Court to turn to Section 105 of the Companies Act, 2015 (the Act) which reads:

"Until the contrary is proved, the register of members of a company is evidence of the matters required or authorised to be included in it".

17. As I understand it, Section 105 is in respect of the register of members not Directors. One can be a Director of a company and not a member and *vis-à-vis*. Indeed, Section 105 is found under part VII of the Act which are provisions on members and membership of companies. For that reason, the register of member, while very useful in providing proof of the information which ought to be entered in the register as required by Section 93, may be limited in proving directorship. This is because there is no requirement under Section 93 of the name of Directors to be entered in the register of members. That section provides;

93. Company to keep register of members

(1) Every company shall keep a register of its members which shall include information relating to beneficial owners of the

company, if any.

(2) A company shall enter in its register of members—

- (a) the names and addresses of the members;
- (b) the date on which each person was registered as a member; and
- (c) the date on which any person ceased to be a member;
- (d) the name and address of the beneficial owners, if any.

(3) If a company has a share capital, the company shall enter in its register of members, along with the name and address of each member, a statement of—

- (a) the shares held by the member, distinguishing each share—
 - (i) by its number if the share has a number; and
 - (ii) if the company has more than one class of issued shares, by its class; and
- (b) the amount paid or agreed to be considered as paid on the shares of the member.

(4) If the shares of a company are held jointly, the company shall ensure that the name of each joint holder is entered in its register of members.

(5) If a company does not have a share capital but has more than one class of members, it shall enter in its register of members, along with the names and address of each member, a statement of the class to which the member belongs.

(6) If a company purchases its own shares in circumstances in which section 526 applies—

- (a) the applicable requirements of this section need not be complied with if the company cancels all of the shares immediately after the purchase; and
- (b) if the company does not cancel all of the shares immediately after the purchase, any share that is so cancelled is to be disregarded for the purposes of this section.

(7) Subject to subsection (6), if a company holds shares as treasury shares, the company shall ensure that it is entered in its register of members as the member holding those shares.

(8) A company shall lodge with the Registrar a copy of its register of members including information relating to beneficial owners, if any, within thirty days after completing its preparation.

(9) A company other than a public limited company other than a public listed company shall lodge with the Registrar a copy of any amendment to its register of members within fourteen days after making the amendment.

(10) If a company fails to comply with a requirement of this section, the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding five hundred thousand shillings.

(11) If, after a company or any of its officers is convicted of an offence under subsection (10), the company continues to fail to comply with the relevant requirement, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding fifty thousand shillings for each such offence.

18. In respect to Directors, Section 134 (1) requires every company to keep a register of its Directors and Sub-sections (3) (4) and (5) provide:-

“(3) A company shall keep its register of directors open for inspection at its registered office or at some other place prescribed or authorised by the regulations.

(4) A company shall ensure that its register of directors is kept open during its ordinary hours of business for inspection by— (a) any member of the company without charge; and (b) any other person on payment of a fee (if any) not exceeding the amount prescribed for the purposes of this subsection.

(5) If a company refuses to allow a person to inspect the register, that person may apply to the Court for an order under subsection (6)”.

19. Section 138 imposes a duty on the company to notify the Registrar of any changes of Directors and their addresses. It provides:-

“(1) Within fourteen days after—

(a) a person is appointed or ceases to hold appointment as a director of a company; or

(b) any change occurs in the particulars contained in a company's register of directors or its register of directors' residential addresses, the company shall give notice to the Registrar of the appointment, cessation of appointment or change of particulars and of the date on which it occurred.

(2) The company shall—

(a) include in a notice of the appointment of a new director of the company a statement of the particulars of that director that are required to be included in the company's register of directors and its register of directors' residential addresses; and

(b) attach to or enclose with the notice a written consent by that director to act in that capacity.

(3) If, a company fails to comply with subsection (1) or (2), the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding two hundred thousand shillings.

(4) If, after a company or any of its officers is convicted of an offence under subsection (3), the company continues to fail to comply with the relevant requirement, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding twenty thousand shillings for each such offence.

20. While I agree with Counsel for the Bank that the failure of a company to comply with the provisions of Section 138 opens up the company and each of its officers to penal sanction, nothing in the statute suggests that the changes not notified are invalid for the reason of non-notification.

21. I then turn to other provisions of the Act. Section 832 of the Act sets out the function of the Registrar of Companies. An important function is his duty to keep a register of Companies. As to what comprises that Register, subsection 3 provides;

(3) The Register comprises—

a) the information relating to companies that is contained in documents lodged or filed with, or delivered to, the Registrar under this or any other Act;

b) certificates of incorporation issued by the Registrar; and

c) certificates of registration of company security rights.

22. Under Section 852 a member of the public has a right to inspect the register and which right extends to the right to inspect originals of documents, subject to the limits imposed by sections 850 and 854. Again, a member of public has a right to be provided with copies of records that form part of the register upon payment of prescribed fees (Section 853) with exception to those not available for public inspection (section 854). Section 858 then provides:-

“(1) The Registrar shall certify copies of records provided in hard copy form under section 854 as true copies unless the applicant dispenses with the need for certification.

(2) The Registrar may not certify copies of records provided in electronic form under section 853 as true copies unless the applicant expressly requests that certification.

(3) A copy provided under section 853, certified by the Registrar to be an accurate record of the contents of the original document, is admissible in all legal proceedings as evidence of the contents of the original document.

(4) The regulations may determine the manner in which such a certificate is to be provided when the copy is provided in electronic form.

(5) A copy of a certificate provided by the Registrar may, instead of being certified in writing to be an accurate record, be sealed with the Registrar's official seal”.

23. The letter of 4th June 2019 from the Registrar is obviously not a document issued under Section 858. The opening words of the letter is telling as to the nature of the contents. It states, “according to the records reading to the below company held by the Companies Registry as at 4th Jun 2019.” The letter then sets out information, such as, the nominal share capital, names of directors and shareholders as reflected in the records held by registrar as at 4th June 2019. If, for some reason, the company has not notified the registrar of lawful changes made to directorship, then the letter would not mirror an up to date position of the directorship of the company. The inescapable conclusion to draw

is that the contents of a letter such as that of 4th June 2019 issued by the registrar is only prima facie evidence of the information it provides. Evidence to the contrary can disprove or rebut the information.

24. The contrary evidence offered by Ibrahim that he is a Director of the Company is the affidavit sworn by Abdi Hassan Amin on 22nd June 2011 which annexed to the affidavit of Ibrahim of 19th November 2019 .He states

"That I transferred my shares to one Ibrahim Hussein Mahadi holder of Post Office Box 17971-00500 Nairobi ,who received the whole value of shares and came in as new Director and a Shareholder of the said company with effect from 16th June 2011".

25. Other evidence has come from an unlikely quarter, the Bank itself. In attempting to show the hopelessness of the Company's action before Court, Claris Ajwang Ogombo, a legal officer of the Bank, swore an affidavit on 14th May 2019. In it is revealed that a bulwark of the Bank's defence is that on 2nd February 2016 the Company passed a resolution authorizing it to realize the securities it held through sales of LR Mainland North Section VI/4689 and Subdivision Number 998. The Resolution is annexed to the affidavit as CA05. The Resolution shows Ibrahim as having attended the meeting of 2nd February 2016 as a Director of Mahadi Energy Limited.

26. The other is the Bank's own application of 30th May 2019 in which grounds (e) reads:-

"The 2nd Plaintiff Company did not authorize the 1st Plaintiff Ibrahim Hussein Mahadi to swear the verifying affidavit and the affidavit in support of the application. The mere fact of being a director does not constitute one as an agent for purposes of suit".

The supporting affidavit of Yahya Dahir is to the same effect.

27. What the evidence tells the Court is that sometime on 22nd June 2011, Amin stated that Ibrahim assumed directorship on 16th June 2011. That as 2nd February 2016, the Bank recognized Ibrahim as a Director. Further, that by at least 30th May 2019, the Bank still acknowledged that Ibrahim was a Director of Mahadi. Of course the position may have changed by 4th June 2019 (the date of the letter of Registrar of Companies).However, and this is important, none of the persons who the Bank now accepts to be the current Directors of the Company have sworn an affidavit in support of the application now before Court unequivocally stating that Ibrahim's claim to directorship is just a phantom.

28. It seems to me that whether or not Ibrahim was truly a director on 1st October 2019, when the impugned resolution was made, is not a call this Court should or can make on the material before it. That requires a more involved inquire where the issue of Directorship of the Company is at the heart of the proceedings. This is not the substance of the main dispute in these proceedings. For the reason that the Bank has not provided cogent evidence which disproves Ibrahim as a director of the company, the Court finds no merit in the application.

29. In conclusion, the Court is inclined to make a comparison of this outcome and that in respect of Hussein Hassan Amin made in the Court's ruling of 27th September 2019. In the latter, there was the communication of the registrar showing that Hussein was not a director as at 4 June 2019. In an affidavit sworn on 24th June 2019, Hussein answers this by stating that he was a director by virtue of a power of attorney granted to him by his brother, Amin. He did not lay a claim to directorship on his own right. To that the Court held that the power of attorney could not cloth him with directorship. In the current matter the issue is whether Ibrahim, on his own right, is not a director.

30. In the end the application dated 18th October 2019 is dismissed with costs.

Dated, Signed and Delivered in Court at Eldoret this 13th Day of May 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mr. Agwara for the Plaintiffs.

Dr. Kenyariri for the Defendant.