REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E 270 OF 2020

DR. FRANK K. MWONGERA ON BEHALF OF

MEMBERS OF THE KENYA HOSPITAL ASSOCIATION.....PLAINTIFF

VERSUS

THE BOARD OF MANAGEMENT KENYA HOSPITAL ASSOCIATION

T/A THE NAIROBI HOSPITAL..... 1ST DEFENDANT

THE CHAIRMAN OF THE BOARD OF MANAGEMENT KENYA HOSPITAL

ASSOCIATION T/A NAIROBI HOSPITAL.....2ND DEFENDANT

THE CHIEF EXECUTIVE OFFICER

KENYA HOSPITAL ASSOCIATION.....3RD DEFENDANT

AND

THE KENYA HOSPITAL ASSOCIATION

T/A NAIROBI HOSPITAL..... INTERESTED PARTY

RULING

1. We were all steeped in routine until the Covid 19 disruption. Then dullness and inertia became the new routine. Then uneasy with the new way of life, we longed for the recent past. Eager to get on with life, the Board of Management of Kenya Hospital Association t/a the Nairobi Hospital **(the Board or the 1st Defendant)** sought to have two General Meetings of the Kenya Hospital Association t/a the Nairobi Hospital **(the Interested Party or the Nairobi Hospital or the Company)** by way of virtual platform and were granted permission in Miscellaneous Application No. E 757 of 2020.

2. The Special General Meeting of 30th July 2020 of the Nairobi Hospital aggrieves a member, Dr. Frank Mwongera **(the Plaintiff)**. At the heart of it all are the amendments purportedly made at that meeting to the Memorandum and Articles of Association of the Company.

3. Although the Plaintiff had together with the filing of the Plaint also filed a Notice of Motion dated 30th July 2020, that Motion is all but spent because the orders sought were overtaken by events when the meeting of 30th July 2020 proceeded. The only prayer that would still be alive for consideration is prayer No. 5 which reads:-

> **"That upon hearing of this suit interparties, an order be issued directing the consideration and amendments of the Interested Party's Memorandum and Articles of Association at its Annual General Meeting scheduled for 3rd September 2020."**

4. As would be apparent that prayer is not interlocutory in nature and must await the main hearing.

5. So for consideration now is the Notice of Motion dated 10th August 2020 for the following prayers:-

1. Spent

2. THAT court grant leave for the applicant/plaintiff to continue and prosecute the foregoing suit as a derivative action against the Respondents.

3. THAT upon hearing of this suit inter-parties, an order be issued to extend and expand the time required for the process of nomination of new board members.

4. THAT upon hearing of this application, an order be issued to set aside all resolutions relating to the amendment of articles of association of the interested party passed at Special General Meeting held on 30th July 2020.

5. THAT leave granted should operate as stay against adoption of the resolutions relating to purported amendments to the memorandum and articles of association.

6. THAT the amendments of the articles be an agenda item for the AGM of the interested party scheduled for the 3rd September 2020 and members be allowed to consider and pass the amendments at the AGM.

7. THAT orders be issued for the stay of implementation of the amended articles pending determination of this suit.

8. THAT the costs of this Application be provided for.

6. I observe, this early, that as directions for the hearing of the application were given by Court and as the parties filed further documents and submissions and persisting at the highlighting of submissions, the Court sensed an effort by the Plaintiff to expand this dispute beyond the confines of the pleadings currently filed, which is the Plaint. What is before Court is an application for permission to proceed with this suit as a derivative action and for certain injunctive reliefs. As a rule, applications of that nature would have to be premised on grounds which are in consonance with the respective cases of the parties as constructed in the pleadings. Unless, of course, the parties embrace new issues and require the Court to determine them **(Odd Jobs –vs- Mubia [1970] EA 476)**. So as to keep this matter in the straitjacket, I begin by setting out what, in his pleadings, the Plaintiff states his case to be.

7. Article 38 of the Articles of Association of Nairobi Hospital establishes a Board whose mandate is to manage the affairs of the Hospital for the benefit of its members. The 1st Defendant is the current Board of the Hospital. The 2nd Defendant is the Chairman of the Board and the 3rd Defendant is the Chief Executive Officer of Nairobi Hospital. Nairobi Hospital itself is a company incorporated in the Republic of Kenya and limited by guarantee.

8. It is the Plaintiff's case that on 8th July 2020, the 3rd Defendant informed members, through electronic mail, that the company had been allowed to hold a virtual General Meeting and would hold a virtual SGM to pass amendments to its Memorandum and Articles of Association. That on 11th June 2020, and in apparent response to the communication, the Plaintiff informed the 3rd Defendant that General Meetings of Nairobi Hospital were convened by either the Chairman of the Board or the Company and that amendments to the Memorandum and Articles of Association were to be undertaken in accordance with the same Articles.

9. That subsequently, on 14th June 2020, members were informed by the Chairman that there would be a SGM on 30th July 2020 and an AGM on 3rd September 2020. An email of 15th June 2020, was to follow in which the Chief Executive Officer forwarded to members a communication relating to the general meetings, a draft of proposed amendments and the original Memorandum and Articles of Association of the Hospital.

10. The case pleaded is that some days later, on 3rd July 2020, the Chief Executive Officer forwarded a Notice of the Special General Meeting to the general members of the company. In Paragraph 11 of the Plaint, the Plaintiff sets out what he states to be the contents of the Notice:-

"11. The Notice of the SGM provided for a number of things including the following;

(i) the draft agenda for the SGM

(ii) the that (sic) registration for the SGM will commence on the 3rd of July 2020 and end at 11.00 am on the 28th July 2020.

(iii) That voting for the SGM will be on 30th July 2020 at 2.30pm

(iv) That voting may be by proxy

(v) That proxy forms are to be submitted by 29th July 2020 by 5.00pm

(vi) That proxy forms will be vetted and results of the vetting be communicated at 5pm on the 29th July 2020."

11. The Plaintiff avers that on 27th July 2020 at 9.20pm, that would be three (3) days to the meeting of 30th July 2020, the Chief Executive of the company issued an email communication with the following information:-

i. "An attachment of what was referred to as resolutions by the extraordinary meeting to be held on 30th July 2020 at 2.30.

ii. An attachment of amendments which differed with the earlier amendments forwarded to members.

iii. A notice of the meeting.

iv. Information that voting on resolutions would commence on 28th July 2020 at 11.00am and end at 2.30pm on 30th July 2020."

12. This Notice aggrieves the Plaintiff who perceives it as an amendment to the earlier Notice to members that voting was to be on 30th July 2020 at 2.30pm. Further, that the Notice greatly prejudiced members who had no time to review the new amendments and resolutions.

13. The Court is asked to note that many members of the company participate in SGMs by way of proxy and that feedback in proxy participation was not yet concluded by 5pm of 29th May 2020.

14. The Plaintiff states that a further email, sent at 8.52 pm on 29th July 2020, informed members that registration had stopped and voting on the resolutions had commenced. It is asserted that it was the expectation of members that, at the very least, they would be taken through the amendments clause by clause and a vote on them be taken at 2.30pm. The Plaintiff further argues that certification of quorum and adoption of an agenda must be done before the commencement of any meeting and so, in this instance, members were allowed to vote on items of the agenda before such certification by the secretary.

15. It is also averred that any amendments to the Articles ought to be considered at the AGM which is scheduled for 3rd September 2020 as this will allow members time to read, understand and vote in the proposed amendments. It is asserted that the actions of the Defendants are contrary to the Memorandum and Articles of Association of the company which allow no less than 45 days for members to peruse special business.

16. It is also stated that the Memorandum and Articles of Association provide that SGMs are to be requisitioned by members and that such requisition is absent here.

17. Ultimately the Plaintiff prays for the following orders and declarations:-

a) A declaration that the voting on the proposed amendments to the Interested Party's Memorandum and Articles of Association forwarded at 9.20pm on the 27th July 2020 is un procedural and inconsistent with the Interested Party's Articles of Association.

b) A declaration that there was no sufficient notice issued to the Plaintiff and members of the Interested Party to review the amendments introduced on the 27th July 2020 at 9.20pm.

c) A declaration that the any resolutions made or passed touching on the amendments forwarded to members on the 27th July 2020 at 9.20pm for consideration and voting on the 28th July 2020 are null and void.

d) A declaration that the Plaintiff and members of the Interested Party have a right to information and to sufficient notice as provided in the Memorandum and Articles of Association to review documents before passing of resolutions thereon.

e) A permanent injunction barring the Defendants from adopting any resolutions touching on the amendments to the Interested Party's Memorandum and Articles of Association following the SGM of 30th July 2020.

f) An order directed at the Defendants urging that members of the Interested Party consider. Review and pass amendments on its Memorandum and Articles of Association during its AGM on 3rd September 2020.

g) Any such other or further relied as this Honourable Court may deem appropriate.

18. In regard to what the Plaintiff seeks of the Court at this stage, the Court must first determine whether or not to grant permission for this matter to proceed as a derivative action. Only then can the application for injunction be considered.

19. It is opportune to set out the law on derivative actions. The law is now substantially statutory as comprised in part XI of the Companies Act, 2015. Sections 238 to 241 are relevant and read;

"238. Interpretation: Part XI

(1) In this Part, "derivative claim" means proceedings by a member of a company—

(a) in respect of a cause of action vested in the company; and

(b) seeking relief on behalf of the company.

(2) A derivative claim may be brought only—

(a) under this Part; or

(b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.

(3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

(4) A derivative claim may be brought against the director or another person, or both.

(5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

(6) For the purposes of this Part—

(a) "director" includes a former director;

(b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

239. Application for permission to continue derivative claim

(1) in order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.

(2) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—

(a) shall dismiss the application; and

(b) may make any consequential order it considers appropriate,

(3) If the application is not dismissed under subsection (2), the Court—

(a) may give directions as to the evidence to be provided by the company; and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(4) On hearing the application, the Court may—

(a) give permission to continue the claim on such terms as it considers appropriate;

(b) refuse permission and dismiss the claim; or

(c) adjourn the proceedings on the application and give such directions as it considers appropriate.

240. Application to Court for permission to continue claim as a derivative claim: how disposed of

(1) If—

(a) a company has brought a claim; and

(b) the cause of action on which the claim is based could be pursued as a derivative clain under this Part, a member of the company may apply to the Court for permission to continue the claim as a derivative claim on the ground specified in subsection(2).

(2) The ground is that—

(a) the manner in which the company commenced or continued the claim amounts to an abuse of the process of the Court;

(b) the company has failed to prosecute the claim diligently; and

(c) it is appropriate for the member to continue the claim as a derivative claim.

(3) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—

(a) shall dismiss the application; and

(b) may make any consequential order that it considers appropriate.

(4) If the application is not dismissed under subsection (3), the Court—

(a) may give directions as to the evidence to be provided by the company; and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(5) On hearing the application, the Court may—

(a) give permission to continue the claim as a derivative claim on such terms as it considers appropriate;

(b) refuse permission and dismiss the application; or

(c) adjourn the proceedings on the application and give such directions as it considers appropriate.

241. Application for permission to continue claim as a derivative action

(1) If a member of a company applies for permission under section 239 or 240, the Court shall refuse permission if satisfied—

(a) that a person acting in accordance with section144 would not seek to continue the claim;

(b) if the cause of action arises from an act or omission that is yet to occur-that the act or omission has been authorized by the company;

(c) if the cause of action arises from an act or omission that has already occurred — that the act or omission—

(i) was authorised by the company before it occurred; or

(ii) has been ratified by the company since it occurred.

(2) In considering whether to give permission, the Court shall take into account the following considerations:

(a) whether the member is acting in good faith in seeking to continue the claim;

(b) the importance that a person acting in accordance with section 143 would attach to continuing it;

(c) if the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—

(i) authorised by the company before it occurs; or

(ii) ratified by the company after it occurs;

(d) if the cause of action arises from an act or omission that has already occurred-whether the act or omission could be , and in the circumstances would be likely to be , ratified by the company

(e) whether the company has decided not to pursue the claim;

(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the

member could pursue in the member's own right rather than on behalf of the company.

(3) In deciding whether to give permission, the Court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest (direct or indirect) in the matter.

20. Regarding this matter, the Plaintiff filed the proceedings on 30th July 2020 but without bespeaking permission. It was only through the post-filing application of 10th August 2020 that he does so. Yet the timing suffers no infraction because an application for leave to continue an action as a derivative suit can be brought either at the commencement of the suit or after its filing. Judge Ngugi expounds on this in Isaiah Waweru Ngumi and 2 others -vs- Muturi Ndungu [2016] eKLR;

"16. Does the fact that the Applicants herein file the suit without leave of the Court render the suit fatally defective? I would think that the answer is in the negative. That answer is provided both by a plain reading of the statute as well as our jurisprudence on the matter – including, ironically, the two authorities cited to me by the Respondent and Interested Parties.

17. First, the statute uses the word "continue" not "commence" in section 239. Mr. Githinji attempted to argue that in this particular instance "continue" means "commence". We see no reason, under any known canon or method of statutory interpretation to come to that conclusion. We believe that what the legislature wanted to ensure is that derivative actions are not brought flimsily such that they interfere with the quotidian management of companies. The legislature most certainly did not intend to create a technical dragnet to ensnare the technocratically naïve shareholders with genuine concerns. The purpose of the leave requirement is so that the Court can, prima facie, balance between invading the discretionary field of the management of a corporation and the need to hold faithless directors accountable for actions or omissions which fall outside the ambit of the protection of the business judgment rule. While derivative actions can provide effective remedies against faithless officers and directors as well as third parties who may have injured the corporation and whom the corporate managers have refused to pursue, they also run the risk of needlessly diverting the attention and energies of corporate officers and directors from their primary role of managing the business to deal with litigation. The requirement for leave strikes the balance between the two. If this is the policy objective of the rule, there is no reason to dogmatically require that the leave must be obtained at the point of commencement rather than at any point before the suit goes for hearing on its merits.

18. Second, our case law comports with this reading of the statute. Even considering that the cases were decided before the Companies Act, 2015 became effective, they were interpreting similar provisions of the previous statute. Hence, in both Altaf Abdulrasul Dadani & Another v Amin Akeberali Manji & 3 others [2004] Eklr and Kuldeep Singh Sehra & Another v Bullion Bank Ltd & 2 Others [2014] eKLR, the High Court decided that leave of the court can be granted after a derivative action has already been commenced. Indeed, both cases, which, interestingly were cited to me by the Respondent and Interested Parties, treated the time of request for leave as a technical question not a substantive one. In the former case (Altaf Abdulrasul Dadani & Another), Mwera J. (as he then was) directed that the proper procedure for a derivative action is to file suit and then seek the leave of the Court. I agree and I find it unnecessary to belabour the point."

21. The journey to obtaining permission is two stepped. One, the applicant must satisfy the Court that its action discloses a prima facie case. Of this first step, Onguto J., in Ghelani Metals Limited & 3 others -vs- Elesh Ghelani Natwarlal & another [2017] eKLR explained;

"The court must first satisfy itself that there is a prima facie case on any of the causes of action noted under s.238(3). S.239(2) of the Act provides that the application for permission will be dismissed if the evidence adduced in support "do not disclose a case" for giving of permission. The essence of judicial approval under the Act is to screen out frivolous claims. The court is only to allow meritorious claims. All that the a0Bpplicant needs to establish, through evidence, is a prima facie case without the need to show that it will succeed."

22. Should the application muster step one, then it will be screened against the factors set out by Ngugi J., in Isaiah Waweru Njumi (supra);

"In making that determination, the Court is guided by the considerations stipulated in section 241(2) of the Companies Act. Among other things, the Court considers the following factors:

a. Whether the Plaintiff has pleaded particularized facts which plausibly reveal a cause of action against the proposed defendants. If the pleaded cause of action is against the directors, the pleaded facts must be sufficiently particularized to create a reasonable doubt whether the board of directors' challenged actions or omissions deserve protection under the business judgment rule in determining whether they breached their duty of care or loyalty;

b. Whether the Plaintiff has made any efforts to bring about the action the Plaintiff desires from the directors or from the shareholders. Our Courts have developed this into a demand or futility requirement where a Plaintiff is required to either demonstrate that they made a demand on the board of directors or such a demand is excused;

c. Whether the Plaintiff fairly and adequately represents the interests of the shareholders similarly situated or the corporation. Hence, a shareholder seeking to bring a derivative suit in order to pursue a personal vendetta or private claim should not be granted leave. In the American case of Recchion v Kirby 637 F. Supp. 1309 (W.D. Pa. 1986), for example, the Court declined to let a derivative lawsuit proceed where there was evidence that it was brought for use as leverage in plaintiff's personal lawsuit;

d. Whether the Plaintiff is acting in good faith;

e. Whether the action taken by the Plaintiff is consistent with one a faithful director acting in adherence to the duty to promote the success of the company would take;

f. The extent to which the action complained against – if the complaint is one of lack of authority by the shareholders or the company – is likely to be authorised or ratified by the company in the future; and

g. Whether the cause of action contemplated is one that the Plaintiff could bring as a direct as opposed to a derivative action."

23. To that list Onguto J., in Ghelani Metals Limited (supra) added the following three,

"53. Firstly, the court should always also consider the seriousness of the alleged wrong-doing by conducting a cost-benefit analysis of the intended action. The court ought to satisfy itself that the litigation will not disrupt the company business and additionally that the cost of the intended litigation is not burden-some to the company. Likewise the court ought to reflect on the reputational damage, if any, the company is likely to suffer in the event the claim fails.

54. Secondly, I would hasten to add that of critical import is also the factor that the derivative suit ought to be allowed if it is in best interest of the company. This factor should be of the highest concern especially when ss. 143 & 144 of the Act are read into context. Both sections advocate the duty of the director to act in a way as to promote the success of the company for the benefit of its members.

55. Finally, the existence of alternative remedies and the view of independent members of the company where the court has invited such evidence pursuant to s.239 (4) & (5) of the Act ought to also be considered before granting or disallowing an application for permission to continue a derivative suit: see also s. 241(3) of the Act."

24. This Court has taken time and effort to reproduce the Plaintiff's case as cast in his pleadings. It is within the beacons of those pleadings that the Plaintiff was expected to demonstrate a prima case. Yet in the supporting affidavit of 10th August 2020 and supplementary affidavit of 18th August 2020, the Plaintiff builds a more expanded case way outside the pleadings. The Plaintiff's case mutates. For example, he takes up the Notice giving members five (5) days to nominate members for election into the board and seeks to injunct the proposed elections. Then the choice of form of meeting is sought to be impugned and an argument is made that the SGM was not the virtual meeting as legitimately anticipated. These and other unpleaded matters only serve to muddle the proceedings and this Court will overlook them in considering the application.

25. In respect to whether the Plaintiff has established a prima facie case with a probability of success, the Court sees the following as issues arising out of the Plaintiff's case:-

Whether the SGM was properly convened?

Whether the voting at the SGM was unlawful?

26. Although there may have been earlier communication from the Defendant as to the intention to hold a Special General Meeting, the starting point for purposes of interrogating the lawfulness of the meeting of 30th July 3030 would be the Notice of the meeting issued by the 3rd Defendant to the general membership on 3rd July 2020. Save for the notes accompanying it, the rest of the notice is reproduced, it reads:-

"THE NAIROBI HOSPITAL

NOTICE OF AN EXTRAORDINARY

GENERAL MEETING

(SPECIAL GENERAL MEETING)

Notice is hereby given pursuant to Article 19 of the Kenya Hospital Association Articles of Association and vide an order issued by the High Court of Kenya in Miscellaneous Application No. E 757 of 2020 that the Kenya Hospital Association shall hold a virtual Special General Meeting on 30th July 2020 at 2.30pm to conduct the following business.

AGENDA

1. To table the proxies and apologies and note the presence of a quorum.

2. To read the Notice convening the meeting.

3. To consider and approve the proposed amendments to the Kenya Hospital Association's Memorandum and Articles of Association by voting for each proposed amendment.

Dr. W. Irungu Ndirangu

Chairman Board of Management".

27. Reading the Plaint, I have not understood the Plaintiff to be complaining about this notice other than pleading that the Memorandum and Articles of Association provide that SGMs are to be requisitioned by members who had in this instance not done so (Paragraph 26 of the Plaint).

28. It is common ground that the SGM of 30th July 2020 was convened by the Board of Management of the company. Article 18 of the Articles does expressly allow the Board of Management to, whenever it thinks fit, convene an extraordinary meeting. This is in addition to its obligation to convene an extraordinary meeting on requisition of members representing not less than $^{1}/_{10}$ of the total voting rights of all members having those rights at the date of the requisition.

29. Article 19 is the provision on notices of meetings of the Company that would include an extraordinary meeting. It requires that all general meetings and meetings calling for the election of the Board of Management be called through a written notice of at least 21 days.

30. My impression is that the Board of Management cannot be faulted for convening a special general meeting to consider the amendments to the Articles of Association and the Notice issued on 3rd July 2020 for a meeting of 30th July 2020 was more than the required 21 days.

31. As I turn away from the Notice of 3rd July 2020, the Court considers a further assertion by the Plaintiff that the members required Notice of no less than 45 days in respect to any special business. If that were so, then the 27 day Notice would be an infraction of the law.

32. The Plaintiff's assertion would be premised on Article 21 which reads:-

"All business shall be deemed special that is transacted at an Extraordinary General Meeting, and also all business that is transacted at an ordinary meeting, with the exception of the consideration of the income and expenditure account, balance sheets and the ordinary reports of the Board of Management and the Auditors, the declaration of the results of the Election of members of the Board of Management and the other officers in the place of those retiring, by rotation, the appointment of the Auditors and the fixing of the remuneration of the Auditors.

Notice of any special business must be given in the form of a resolution to the secretary of the Association not less than forty five days before the date of the ordinary meeting at which it is to be raised."

33. The answer by the Defendants is that the provision refers to instances where a member wishes to have a special business/agenda, aside from ordinary business, discussed at a general meeting. Such member, it is argued, is obliged to give a Notice in form of a resolution to the secretary. The secretary would then include it in the agenda being sent out to members with the Notice of the meeting of not less than 21 days to the meeting.

34. The Plaintiff appears to have mischaracterized the 45 days' notice required by Article 21. The article itself makes provisions for proceedings at General Meetings. General Meetings are of two types. An Ordinary Meeting and an Extraordinary Meeting. The article deems all business transacted at an Extraordinary Meeting to be special business. In regard to business at an Ordinary Meeting, all business save for those specified in the article are of special nature. Now, the need for a 45 days' Notice is only in respect to special business to be transacted at an Ordinary Meeting. For clarity, I set out that part of the provision:-

"Notice of any special business must be given in the form of a resolution to the secretary of the Association not less than forty five days before the date of the <u>ordinary meeting</u> at which it has to be raised."

(My emphasis)

35. It being common ground that the meeting of 30th July 2020 was an Extraordinary Meeting, the 45 days' Notice was inapplicable and unnecessary.

36. The communications coming after the Notice of 3rd July 2020 are impugned by the Plaintiff as being problematic and that it caused the meeting of 30th July 2020 to be unlawful.

37. On 27th July 2020, the 3rd Defendant sends out an email to members. It reads:-

"Dear KHA Member,

We hope that you have been able to register successfully for the forthcoming virtual KHA Extraordinary General Meeting which will be held on 30th July 2020. Please note that registration will officially be closed tomorrow, 28th July 2020 at 11.00am as indicated in the attached Notice.

After the registration has been closed, voting will be opened and members can vote for the resolutions herein attached using their phones as prompted. Please do not hesitate to reach us in the event you encounter any difficulties or you are unable to register.

Kind regards,

KHA office."

38. The Plaintiff in the Plaint, impeached the Notice as amending the earlier notice that had informed members that voting would be on 30th July 2020 at 2.30pm. Second, that there were new amendments and resolutions which members would not have had time to review. In addition, that many members participated by proxy and that feedback on proxy participation was to be concluded by 5pm on 29th July 2020.

39. The Defendants have their view of the email of 27th July 2020. In the replying affidavit Dr. Allan Pamba he explains that the email again notified members of the 12 proposed amendments to the Memorandum and Articles of Association. A schedule was sent of each proposed Resolution and juxtaposed against the Memorandum or Article and providing that each Article be vote for as Yes or No. The Defendants contend that they were the very proposals that had been fed in the virtual voting platform enabling members to vote on each of the proposals.

40. On the issue of vote opening, the Defendants state that, on the authority of the Chairman of the Board, registered members were informed that voting was open, so that they could cast their votes and voting would continue until the close of the SGM on 30th July 2020.

41. The first issue to consider is whether the Notice of 27th July 2020 amended the proposed amendments sent earlier and if so, its impact on the validity of the SGM. The allegation is made by the Plaintiff and is denied by the Defendants. The Plaintiff would therefore have an obligation to prove its assertion.

42. In his affidavit of 10th August 2020, the Plaintiff alludes to the amendment to resolution 1 and in his submissions argues as follows:-

"The Defendants irregularly and unlawfully changed resolution number one which was only discovered during the time of voting.

This Court is directed to refer to three (3) documents in this regard as follows:-

i. The amendments sent on the 3rd July 2020 with the SGM Notice at item 1 was on the proposed new clause 1(b) on clarity of the objectives of KHA

ii. A copy of the resolutions for voting sent to members on the night of 27th July 2020 proposes a new clause 1(b) states clarity of the role of MAC.

iii. A copy of what was proposed during the voting as in the online system was the proposed new clause 1(b) which read to amend the clause 1b …. to give the role of MAC in running the Hospital.

43. Yet, and this is typical of how the Plaintiff has approached this matter, what happened at the SGM itself is not part of what was pleaded as the Plaint was filed prior to the holding of the SGM. Matters or issues that arose after the filing of the Plaint would have to be brought within the fold of this discussion by impleading them through amendments to the Plaint. And no difficulty would have arisen in making the amendments as leave of Court was not required, pleadings not having closed. To bring the matter back on track the Court focuses on the Plaint.

44. The specific complaint in respect to the second notice is that the 3rd Defendant attached to it proposed amendments which differed with those sent in the earlier communications. The Court has looked at the proposed resolution 1 as set out in the communications of 3rd July 2020 and 27th July 2020. The Court is concerned with the substance of the proposed amendments themselves. That of 3rd July 2020 reads:-

"The Kenya Hospital will elect the Board of Management which will run the Hospitals affairs as indicated in the Memorandum and Articles of Association and in collaboration with the Medical Advisory Committee as elected by the Admitting Staff Association."

That of 27th July 2020 is to the following effect:-

"The Kenya Hospital Association will elect the Board of Management which will run the Hospitals affairs as indicated in the Memorandum and Articles of Association <u>under the Mandatory collaboration</u> with the Medical Advisory Committee elected by the Admitting Staff Association."

45. The wordings of the two are no doubt at variance. One simply requires the running of the Hospitals affairs to be in the hands of the KHA in collaboration with the Medical Advisory Committee and the other makes the collaboration mandatory. Counsel never made arguments as to whether the differences were material or decisive. However, my observation is that there is certainly a difference in the words used and possibly a difference in the substance and meaning to be attached. This Court is therefore unable to agree with the submission by Counsel for the Defendants that other than reduction in the number of proposed amendments, there was absolutely no change in the substance of the proposed amendments that were conveyed to members on 27th July 2020.

46. Another argument made by the Defendants is that the Board had no obligation to furnish the details of the proposed amendments to members prior to the meeting and only did so in a disposition of responsibility and transparency. As a counter to this proposition, the Plaintiff's counsel cited sections 22 and 285 of the Companies Act.

47. Section 22 provides;

> **"22. Amendment of articles**
>
> **A company may amend its articles only by special resolution."**

While section 285 reads;

> **"285. Contents of notices of general meetings**
>
> **(1) In giving notice of a general meeting, a company shall specify—**
>
> **(a) the time and date of the meeting;**
>
> **(b) the place of the meeting; and**
>
> **(c) the general nature of the business to be dealt with at the meeting."**

48. The Companies Act does not define a special resolution but it would be a resolution whose acceptance depends on a specified percentage of votes in favour (see Black's Law Dictionary Tenth Edition). As to the nature of notice to be given by the Board when proposing amendments to the articles, I am unable to locate a statutory obligation other than the requirement to specify the general nature of the business to be dealt with. Yet it seems that the objective of the rule is the need to give members such information as would enable them prepare for and participate effectively at the general meeting, and to make informed decisions. For that reason, what amounts to a statement of the general nature of business will depend on the type of business to be deliberated. I take the view that if the business involves amendments to be made to the Memorandum and Articles of the Company an outline of the proposed amendments needs to be shared with members in advance so that they can have a meaningful reflection on their effect. To merely notify members that an intended meeting will be discussing amendments to the Memorandum and Articles without setting out the nature of the proposed amendments, even in general terms, will not help members prepare for the meeting. To provide sufficient information to members is to act in congruence with the tenets of good governance and not an act of grace as suggested by the Defendants.

49. Even if I be wrong in my finding, I hold that, where like here, the Board decides to provide detailed information to its members, that information must be a true mirror of what is to be discussed at the general meeting. It must not mislead. To that extent the Board's conduct of sending out information, just 3 days before the SGM, that deferred in substance with, at least, one proposed amendment sent with the Notice calling for the meeting could be viewed as an act in bad faith.

50. Let me turn my attention to the allegation that persons who voted by proxy were prejudiced because voting commenced before the proxies were verified. Notification of proxies was not to be later than 28th July 2020 at 5.00pm. Any proxy registration that was rejected would be communicated to the members concerned not later than 29th July 2020 at 5.00pm to allow time for any hitches to be addressed. Noteworthy, however, was that voting continued until 30th July 2020 at 2.30pm. In so far as there is no evidence that any proxy who had not been rejected was prevented from voting then this allegation seems frivolous.

51. It is common ground that voting commenced on 28th July 2020 before the date of the meeting. The Defendants explain that advance voting was to allow all registered members to interface within the virtual system and to patiently exercise their legal and democratic right to vote. That because of the vast number of members and the numerous proposals posited to be voted on, care was taken to ensure that no challenge would arise at the meeting that would affect the process, including tallying of the votes and declaration of results to members.

52. How does this explanation fare?

53. It is submitted by the Plaintiff that the Board did not have any authority to allow early voting and this would be ultra vires the powers donated to it by the Memorandum and Articles of Association.

54. A further argument is made that the manner of voting violated Paragraph 8 of the Notice of the SGM to the effect that:-

> **"….. duly registered members may vote (when prompted by the Chairman) via the live stream platform on each resolution. A poll shall be concluded for each proposed amendment to the Memorandum and Articles of Association."**

The Plaintiff takes it that the amendments were to be read one by one, considered, and voted upon, one after the other.

55. That technology does fail is hardly a truism. Given that the SGM was conducted on a virtual platform it would be understandable and indeed expected that the Board would employ appropriate technology and process that enabled members to participate effectively in the meetings and to vote, if so required.

56. When the Court, in E 757 of 2020, allowed Nairobi Hospital to hold virtual general meetings, it made it subject to compliance with the provisions of the Companies Act and the regulations and guidelines issued by the registrar on hybrid and virtual meeting ("Guidelines on conduct of Hybrid and Virtual General Meetings by companies"). The Court has looked at those guidelines and finds them to be comprehensive, progressive and innovative. Regarding virtual conduct of meetings and online voting ,in particular, the Director General gives the following guideline:-

> **"4(c) The online voting process must be able to allow members to cast their votes in time during the proceedings of the general meeting."**

57. While the language in the guide presupposes that voting be during the proceedings of the general meeting and therefore during the meeting, emphasis is given to the need to enable the members vote in time. If technology were to fail in the course of the meeting, then that could take away a member's right to vote. It is against such reality that advance voting can be countenanced. Yet that should not be allowed to compromise other requirements that make a meeting valid. These include the need for a quorum and that only members present in person or through proxies participate in voting.

58. The Court takes a view that a meeting should only proceed once attendees are properly identified, quorum confirmed as existing and maintained throughout the meeting. Once these prerequisites are met then there should be no reason to disallow the votes cast prior to the commencement of a meeting to count, as long as they are cast by members who attend the proceedings of the meeting.

59. Now, in so far as the Plaintiff does not complain that there was no quorum on 30th July 2020 or that members who cast their votes earlier were not in virtual attendance of the meeting, nothing much may turn on his grievance about early voting.

60. As to the argument that the amendments should have been read out one by one and considered and voted on one after the other, again the challenges that would emerge from strictly adhering to that procedure have been explained. This is because the voting was online, the membership of the Company is large and there were at least a dozen proposals to be voted on. I do not hear the Plaintiff say that the amendments as voted do not speak to each other or are incoherent because a particular sequence of voting was not adopted.

61. In my estimation the Plaintiff has failed to establish a prima facie case on a very substantial part of his action. Indeed, the only argument that has made a good impression is the allegation that there was a difference in at least one item of the proposals sent out to members and that may have compromised the opportunity and ability of members to make informed decisions on the amendment. Should this complaint be permitted to proceed as a derivative action? So as to answer this question, the complaint is subjected to further scrutiny in light of the considerations set out in the decisions of Isaiah Waweru Ngumi(supra) and Ghelani Metals Ltd (supra).

62. First, I observe that amendments that are carried out to the Memorandum and Articles of Association of a company in breach of the law aggrieves the Company because it amounts to a change in the constitution of the Company in a manner that does not accord with the law. The importance attached to amendment of articles is underscored by the statutory requirement that it can be done only by way of special resolution (Section 22o of the Companies Act). An action that legitimately questions the manner in which the Memorandum and Articles of association have been amended is an action that can belong to either the members of the company or the Company itself or to both. In this instance, the impugned rule seems to partly cede or divest part of the management of the hospital to another body. That no doubt is a matter of some gravity and would concern the Company.

63. If it were to be found, at trial, that the proposals sent to members just 3 days before the SGM, when read side by side with the proposals sent earlier, were misleading, then the Board would have failed in its duty of good faith to the members.

64. As to whether the Plaintiff made any effort to bring the intended action to the attention of the Board and to demand amends before commencing the suit, this Court would excuse such a demand in view of the timelines involved. The impugned information was communicated to the Plaintiff, just as to other members, three days to the meeting.

65. Does the Plaintiff fairly and adequately represent the interests of the shareholders similarly situated or the corporation? While the Defendants have suggested that the Plaintiff is pursuing a personal agenda, no evidence has been placed before me that corroborates that assertion. I see no contradiction in the Plaintiff participating in the impugned meeting and at the same time challenging its legality in this forum. That said, the heading of the Plaint seeks to give the impression that the Plaintiff also speaks for other members yet he has not presented any evidence that any other member supports this cause. But I choose not to make much of that because the Plaintiff is entitled to go it alone. As a fact, the very essence of a derivative action is to give relief to a minority shareholder even if he were to stand alone.

66. The Court is also required to carry out a cost benefit analysis of the proceedings to the Company before granting leave. In this matter, at least three factors are brought to bear in making that evaluation. First, it has not been argued that the continuation of this suit is so disruptive to the operations or business of the Company that to grant permission is inimical to the interests of the Company. That is a tick in favour of the application

67. Second. Every suit to be pursued or defended attracts an expense. If there are *bonafides* reasons for taking out a derivative action, then it benefits the Company and there should be no reason why the Company should not meet the costs of the litigation. If, on the other hand, it turns out that the claim was wholly unmeritorious and that the permission to continue should never have been granted, then an order made at the stage of granting permission that costs should be borne by the Company can be recalled. In which case harm caused to the company in that manner can be somewhat mitigated. In this matter the Applicant has not sought to have the company bear costs of the litigation at this stage. To that extent the Company bears no expense of prosecuting an unmeritorious claim.

68. But another peril that litigation carries is possible reputational harm to the Company and more so if the action crumbles. This is the more difficult to cure. Yet because the issue raised by the Plaintiff is of fairly great importance to the Company, this Court comes to the conclusion that to grant permission overawes the possible reputational risk that may come with the litigation.

69. On another front, the Defendants argue that the Plaintiff has an alternative remedy which lies with the Plaintiff seeking a special meeting to discuss further amendments to the articles or seeking them in a future general meeting as a special business. With respect, that cannot be an alternative remedy. Amendments through the normal procedure provided by the Memorandum and Articles of Association are not a panacea to amendments that have been achieved through defective process. That argument suggests that a Court should never intervene to correct or rectify an illegality committed by a Company or its Board simply because subsequent general meetings of the Company can address the issue.

70. The Court now turns to consider the injunctive reliefs sought by the Plaintiff.

71. Prayer 3 asks the Court to extend and expand the time required for the process of nomination of new board members. As noted earlier, the issue of nomination of Board members was not pleaded and the prayer is not grantable as it is out of step with the pleaded case.

72. Prayers 5 and 7 can be considered together. The former bespeaks a stay against the adoption of the resolutions relating to the amendments. The latter is for stay of implementation of the amended Articles. In appearance they seem to be prayers of an interlocutory nature, that is to restrain the happening of something. The Defendants do not agree. They point out that what is sought to be restrained has already happened and these prayers have been overtaken by events.

73. As the Court understands it, a vote on the amendments of the Articles was the core business at the SGM. A vote on each amendment was taken and all proposed amendments were passed. In a letter of 7th August 2020, the Company notified the Registrar General of the amendments. At this latter point the amendments were formalized as part of the Memorandum and Articles of the Company and the general public would be deemed to have notice of the changes. There is no need for further adoption or of any other formality for implementation. While it is true that part of the agenda of the proposed annual general meeting of 3rd September 2020 is to approve the minutes of the SGM, that meeting cannot reverse what already transpired at the SGM. I have to agree with the Defendants. The train has left the station and there nothing to be stopped by way of a temporary injunction. That also makes prayer 6 of the application unfeasible. It is a request that the amendments of the Articles be an agenda for the AGM and that members be allowed to consider and pass the amendments at the forthcoming meeting.

74. The remaining prayer is prayer 4 which seeks to set aside the resolutions relating to the amendments passed at the SGM. This is a plea for a mandatory injunction at an interlocutory stage and must therefore meet a high threshold before it is granted. The Court of Appeal in **Lucy Wangui Gachara v Minudi Okemba Lore** [2015] eKLR sets out that threshold and gives its rationale;

> **"It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage."**

75. Is this one of those clear or exceptional instances in which the Court is assured that, on the material before it, such a drastic order should be granted?

76. First, I observe that while the Plaintiff seeks the setting aside of all resolutions, it has only demonstrated an arguable case in regard to resolution 1. As to that resolution, the Court is reluctant to set it aside at this stage for two reasons.

77. The evidence that emerges is that the Plaintiff noticed the changes to this resolution before the SGM and hence the filing of this suit. Then in the course of the SGM he noticed a further change but which for now is not part of the dispute as it has not been pleaded. The member himself had not moved for amendments to the Articles and it can be argued that having noticed changes in the proposal then he had the option not to vote in favour of the changed proposal. It is not clear if the Plaintiff voted and this may be clearer at trial. What the trial Court will have to decide is whether it matters that the changes were noticed before and not after the vote was taken and therefore the weight to attach to the possible lapse on the part of the Board. For now, I am not certain that the answer is that the resolution must go.

78. My other reluctance stems from the fact that Articles of a company will often have to be read as a whole so as to construe the true meaning of individual articles. Other than the change that resulted from resolution 1, there were other 11 changes made. I think that it will be irresponsible on my part to set aside one change without a full appreciation of how, if at all, that will impact on the other articles. This was not addressed at all by the parties and I choose to err on the side of caution.

79. Ultimately, I make the following Orders;

1) The Application dated 30th July 2020 is dismissed with Costs.

2) Leave is granted to the Plaintiff to continue with this suit but only in respect to the cause of action relating to changes made by the communication of 27th July 2020 to the proposals of the amendments earlier sent on 3rd July 2020.

3) The Plaintiff shall bear the Costs of prosecuting the suit in the first instance and any further order on costs shall be made at the determination of the suit or as the Court shall order.

4) All the other prayers in the application of 10th August 2020 are dismissed.

5) Costs of the Application of 10th August 2020 shall be in the cause.

Dated, Signed and Delivered in Court at Nairobi this 1st Day of September 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:

Ms Obat instructed by Lumallas Achieng & Kavere Advocates for the Plaintiff.

Mr Bwire instructed by Echessa & Bwire Advocates, LLP for the Defendants and Interested Party.