REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

MISC. CIVIL APPLICATION NO. E 682 OF 2020

IN THE MATTER OF:

SECTION 280 OF THE COMPANIES ACT NO. 17 OF 2015 LAWS OF KENYA

IN THE MATTER OF:

HOLDING AN ANNUAL GENERAL MEETING FOR RADIO FREQUENCY SYSTEMS (EA) LIMITED

IN THE MATTER OF:

APPOINTMENT OF ADDITIONAL DIRECTOR AND MANAGING DIRECTOR UNDER ARTICLES 26, 27, 28 AND 32 OF RADIO FREQUENCY SYSTEM (EA) LIMITED COMPANY'S ARTICLES OF ASSOCIATION

RADIO FREQUENCY SYSTEMS (EA) LIMITED.....1ST APPLICANT

MICHAEL JOHN MWAURA.....2ND APPLICANT

VERSUS

SIMON HORNER.....1ST RESPONDENT

THE ADMINISTRATOR OF THE ESTATE OF

SAMSON MUIRURI MBURU.....2ND RESPONDENT

THE REGISTRAR OF COMPANIES.....3RD RESPONDENT

RULING

1. These proceedings are, partly, an invitation to this Court to order a meeting under the provisions of Section 280 of the Companies Act. The section reads;

"S280. Power of Court to order general meeting to be convened

(1) This section applies if for any reason it is impracticable—

(a) to convene a meeting of a company in any manner in which meetings of that company may be convened; or

(b) to conduct the meeting in the manner required by the articles of the company or this Act.

(2) The Court may, either on its own initiative, or on the application—

(a) of a director of the company; or

(b) of a member of the company who would be entitled to vote at the meeting, make an order requiring a meeting to be convened, held and conducted in any manner the Court considers appropriate.

(3) If an order is made under subsection (2), the Court may give such ancillary or consequential directions as it considers appropriate.

(4) Directions given by the Court under subsection (3) may include a direction that one member of the company present at the meeting be regarded as constituting a quorum.

(5) A meeting convened, held and conducted in accordance with an order under this section is taken for all purposes to be a meeting of the company properly convened held and conducted."

2. The substance of this provision is similar to section 371 of English Companies Act 1985. In a Jersey case of **In the Matter of Inter-Channel Pharmaceuticals Ltd [2002] JRC 116A (10 June 2002)**, the Court observed as follows, regarding the Courts power under that provision;

"We have been referred to three English Authorities namely, In Re El Sombrero Limited [1958] 3 WLR 900, In Re H.R. Paul & Son Limited (1974) 118 SJ 166, and In Re Opera Photographic Ltd [1989] 1 WLR 634. In Re El Sombrero made it clear that the question raised by the word "impracticable" in the statutory provision is merely whether, in the particular circumstances of the case, the desired meeting of the company could as a practical matter be conducted. The case went on to hold that, if it was impracticable, a discretion then arose in the court as to whether it should make an order as sought. In the El Sombrero case the applicant held 90% of the shares and the two respondents the remaining 10%. They were also the only directors. By absenting themselves from any meeting they were effectively preventing the majority shareholder from exercising the rights attaching to his 90% shareholding to change the board of directors. The court made an appropriate order to convene a meeting and allow it to proceed in the absence of the quorum required by the articles.

10. In all three English decisions to which we have been referred the court in effect made it clear that the quorum provisions should not be regarded as a right vested in the minority to frustrate the wishes of the majority. The facts in In Re Opera Photograph Limited were very similar to those in the present case. The majority shareholder wished to dismiss a director, but was prevented from doing so because the director, who was also the other member, declined to attend the meeting of members so that the meeting was without a quorum.

11. In our judgment the principles to be extracted from the above three English cases are equally applicable in Jersey in relation to Article 94 of the 1991 Law. We conclude on the facts of this case that it is indeed impracticable, within the meeting of Article 94 (1), to conduct the relevant meeting because of the failure of Mr Oguz to attend and form a quorum."

3. On the same provisions, Lord Justice Peter Gibson, in Union Music Limited & another v Russell John Watson & another[2003] EWCA civ 180 stated;

> **"I venture to make a few preliminary observations about section 371. It is a procedural section plainly intended to enable company business which needs to be conducted at a general meeting of the company to be so conducted. No doubt the thinking behind it is that a company should be allowed to get on with managing its affairs, and that should not be frustrated by the impracticability of calling or conducting a general meeting in the manner prescribed by the articles and the Act."**

4. It would seem that the overarching purpose of section 280 is to provide an inexpensive and speedy procedural remedy to overcome technical difficulties in a company convening, holding or conducting a meeting. It aids in the proper management of a company in the face of technical obstacles. Lately, and in the plight of unprecedented challenges presented by the Covid pandemic, the provisions have been invoked to order for convening, holding and conducting of virtual meetings even where articles of companies did not provide.

5. With this in mind, I get on with the Application before Court.

6. Radio Frequency Systems (EA) Limited (the company) is a limited liability company incorporated under the auspices of the repealed Companies Act Cap 486 Laws of Kenya. The company has three shareholders namely Simon Horner, Michael Mwaura and the Estate of Samson Mburu with 40, 30 and 30 shares respectively. There is, clearly, a fall out between some of the shareholders of the company and one of them Michael Mwaura brings these proceedings in his own name and in the name of the Company (as the 2nd Applicant). Although one of the reasons why the application is opposed is the legal propriety of the suit by the Company, this Court chooses to delve into the substance of the matter.

7. These proceedings commenced by way of a Notice of Motion dated 20th April 2016 seeks the following orders:-

> ***"2. THAT pending the hearing and determination of this Application the Honourable Court be pleased to appoint the 2nd Applicant Mr. Michael John Mwaura to act as the 1st Applicant's (Company) Managing Director/CEO.***
>
> ***3. THAT pending the hearing and determination of this Application the Honourable Court be pleased to appoint Mr. Jackson Mutiso Mwalali (Technical Manager) as an additional director.***
>
> ***4. THAT pending the hearing and determination of this Application the Applicant and the Additional director be at liberty to execute all functions of the Board of Directors and/or any of such functions as the Court may deem fit in the interest of justice.***
>
> ***5. THAT the Honourable Court be pleased to make an order for the convening, holding and conduct an Annual General Meeting within such time and conditions as it may deem fit.***

8. Simon Horner (a British citizen) is the Managing Director or Chief Executive Officer of the company. The applicant states that Horner became ill in the year 2015 and had to leave Kenya for England and his absence has caused a myriad of difficulties to the company. The 2nd Applicant says that because of that, the company is unable to honour its obligations and is in breach of various contracts and statutory obligations like tax.

9. Basically the request by the Applicants is twofold. For the Court to appoint directors for the company and order for the holding of an Annual General Meeting. This Court is unable to grant both prayers and these are the reasons.

10. It is true as pointed out by counsel for the 1st Respondent that Articles of the company provides for

the manner of appointment of a director of the company. Articles 27 and 28 of the Articles of the Company provide:-

> "**(27) The Board may, at any time and from time to time, appoint a person to be a Director to fill a casual vacancy or as an addition to the existing Directors but so that the total number of Directors shall not at any time exceed the maximum number fixed by or in accordance with these Articles.**
>
> **(28) The Company may, by Ordinary Resolutions, appoint another person in place of a Director removed from office under Article 26 and, without prejudice to the powers of the directors Under Article 27, the Company may, by Ordinary Resolutions, appoint any person to be a Director either to fill a casual vacancy or as an additional director. Regulation 88 and 97 inclusive of Part 1 of Table A shall not apply."**

11. As regards, the appointment of a Managing Director Article 32 reads:-

> **"(32) The Board may from time to time appoint one or more of its body to the office of Managing Director or Manager for such period and upon such terms at it thinks fit and, subject to the provisions of any agreement entered into in any particular case, may revoke such appointment. The appointment of a Director holding such office shall (without prejudice to any claim he may have for damages for breach of any contract of service between him and the company) ipso facto determine if he ceases from any cause to be a Director. Regulation 107 of Part 1 of Table A shall not apply."**

12. The Court is not told of any attempts made by the 2nd Applicant to move the Board for purposes of taking the path permitted by Articles 27, 28 and 32 of the Articles of Association. It is not enough for the Applicant to simply state that:-

> **".....given that the Board cannot raise a quorum I am left without any option but to move this Honourable Court to intervene by granting the orders sought for in the interim period and or as the Court may deem fit to direct to save the company from apparent financial and reputational turn."**

13. The Applicant has not demonstrated that he has invoked the option open to him under Article 29 to requisition for a Board meeting.

14. The request for the Court to order for the convening, holding and conducting of an Annual General Meeting is also premature and perhaps more misguided. The 2nd Applicant is not just a Director of the company. He is also a shareholder. He professes a handicap in controlling the affairs of the company because he says he is in the minority. But is he really that helpless? What then is the purpose and value of Section 277 of the current Companies Act? That Section reads:-

> **"277. Right of members to require directors to convene general meeting**
>
> **(1) The members of a company may require the directors to convene a general meeting of the company.**
>
> **(2) The directors are required to convene a general meeting as soon as practicable after the company has received requests to do so from —**
>
> > **(a) members representing at least the required percentage of such of the paid-up capital of the company as carries the right of voting at general meetings of the company; or**
> >
> > **(b) in the case of a company not having a share capital, members who represent at least the required percentage of the total voting rights of all the members having a right to vote at general meetings.**

(3) The required percentage for the purpose of subsection (2) is ten percent, except as provided by subsection (4).

(4) In the case of a private company, the required percentage is five percent if—

(a) more than twelve months has elapsed since the end of the last general meeting convened in accordance with a requirement under this section; or

(b) in relation to which members had, in accordance with an enactment or the company's articles, exercised a right to require the circulation of a resolution in respect of the meeting at their request.

(5) A request for the directors to convene a general meeting is only effective if it states the general nature of the business to be dealt with at the meeting. However, such a request may include the text of a resolution that is proposed to be put to the meeting.

(6) A resolution may not be moved at a general meeting if—

(a) it would, if passed, be void because of inconsistency with any written law or the constitution of the company or otherwise;

(b) it defames a person; or

(c) it is frivolous or vexatious.

(7) A request for the directors to convene a general meeting is not effective unless it is—

(a) in hard copy form or in electronic form; and

(b) authenticated by the person or persons making it."

15. The 2nd Applicant holds 30% of the total voting rights because by dint of Article 13, every member shall have the vote for each share of which he is the holder. The 2nd Applicant ought to have invoked the right available to him under Section 277 of the Act and in the event of failure by the Board to convene the meeting, to proceed under Section 279 which reads:-

"279. Power of members to convene general meeting at the expense of the company

(1) If, after having been required to convene a general meeting under section 277, the directors fail to do as required by section 278, the members who requested the meeting, or any of them representing more than one half of the total voting rights of all them, may convene a general meeting.

(2) If the requests received by the company included the text of a resolution intended to be moved at the meeting, the members concerned shall include in the notice convening the meeting the text of the intended resolution.

(3) The members concerned shall ensure that the meeting is convened for a date not more than three months after the date on which the directors were requested to convene a meeting.

(4) The members concerned shall convene the meeting, as nearly as practicable, in the manner in which meetings are required to be convened by directors of the company.

(5) The business that may be dealt with at the meeting includes a resolution of which notice is given in accordance with this section.

(6) The company shall reimburse the members concerned for all reasonable expenses incurred by them because the directors failed to convene a meeting as required by section 278.

(7) The company shall deduct from the remuneration .payable to the directors who were in default the amount of expenses reimbursed to members under subsection (6).”

16. The applicant has not demonstrated that he has used the avenue available under statute to call for a meeting and that he has been unable to marshal a quorum. In a word, he has not demonstrated that it has been impracticable to convene, hold and conduct a meeting.

17. The entire application is without merit and the Motion of 20th April 2020 is hereby dismissed with costs. Costs to be paid, not by the company, but solely by the 2nd Applicant.

Dated, Signed and Delivered in Court at Nairobi this 2nd Day of November 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:

Ogado for Applicant.

Nyamweya holding brief for Midesa for Respondent.

Nyamweya for Interested Party.