REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. E.132 OF 2019

KENYA HOSPITAL ASSOCIATION...1ST PLAINTIFF

JOHN SIMBA..2ND PLAINTIFF

COUTTS OTOLO...3RD PLAINTIFF

ALLAN GACHUKIA..4TH PLAINTIFF

SAM NCHEERI...5TH PLAINTIFF

DR. CHARLES KARIUKI...6TH PLAINTIFF

MARGARET MUIGAI..7TH PLAINTIFF

ANUJA KAPILA..8TH PLAINTIFF

Vs.

MAXWELL OTIENO ODONGO...1ST DEFENDANT

DR. CHRIS M. BICHAGE..2ND DEFENDANT

DR. STEPHEN OCHIEL...3RD DEFENDANT

DR. WILFRED IRUNGU NDIRANGU....................................4TH DEFENDANT

ZAHRA BAHLEWA MOI...5TH DEFENDANT

SUSAN CHARR-HARTLEY..6TH DEFENDANT

RULING

1. Article 18 of the Articles of Association (the Articles) of Kenya Hospital Association (KHA)reads;-

> "*The Board of Management may, whenever they think fit, convene an extraordinary meeting, and they shall, on the requisition of the members of the Association representing not less than one-tenth of the total voting rights of all the members having at the date of the requisition a right to vote at general meetings of the Association, forthwith proceed to convene an extraordinary meeting of the Association and, in the case of such requisition, the provisions of Section 132 of the Act shall apply*".

2. The dispute herein revolves around the validity of a meeting of 15th May, 2019 of KHA requested by some members pursuant to the provisions of the aforesaid Article. Also impugned are the resolutions made in that meeting. The dispute pits the 2nd to 8th Plaintiffs, who assert are the true members of the Board of Management of KHA, against the Defendants who are said to have replaced them in an election conducted on that day.

3. Arising from those contested proceedings is this suit and two applications. This decision is in respect to the applications. As is apparent from the prayers sought in the two applications, to allow one application is to decline the other. Something about the latter application. It has been triggered by an order of injunction granted by Hon. Justice Kasango on 16th May 2019 restraining the Defendants from assuming office. That order has been extended from time to time and subsists at the time of writing this decision.

4. One is the Notice of Motion by the Plaintiffs of 16th May, 2019 for the following substantive prayers;-

> *1. Spent*
>
> *2. Spent*
>
> 3. THAT pending the hearing and determination of this suit an injunction be issued restraining the Defendants jointly and severally from assuming the office of a director of the first Plaintiff and or in any manner whatsoever interfering with the management and operations of the first Plaintiff.
>
> 4. THAT the costs of this application be provided for.

5. The second is the Defendant's Motion of 29th May, 2019 for the following prayers;-

> *1. Spent*
>
> *2. Spent*
>
> 3. THAT an order of temporary injunction be and is hereby issued restraining the 2nd to 8th Plaintiffs, from presiding over any or the Annual General Meeting of the Kenya Hospital Association slated for 17th June 2019, pending hearing and determination of this application inter-parties.
>
> 4. THAT the ex parte order of injunction issued by the Honourable Court herein on 16th May 2019, by the Honourable Lady Justice Kasango, be and is hereby set aside and vacated.
>
> 5. THAT an order of temporary injunction be and is hereby issued restraining the 2nd to 8th Plaintiffs, whether by themselves, agents, nominees or any other person whosoever, from holding themselves as, and in manner whatsoever performing the functions of directors of the Kenya Hospital Association, pending hearing and determination of the Counterclaim filed herein.
>
> 6. THAT an order of temporary injunction be and is hereby issued restraining the 2nd to 8th Plaintiffs, from presiding over any or the Annual General Meeting of the Kenya Hospital Association slated for 17th June 2019, pending hearing and determination of the Counterclaim filed herein.
>
> 7. Costs for this application be borne by the 2nd to 8th Plaintiffs.

6. KHA carries on the business of Health Care Management and is the proprietor of, amongst other institutions, the famous Nairobi Hospital. It is a company limited by guarantee and is managed by a board of management constituted pursuant to Article 39 of its Articles.

7. Some members have been unhappy about how the affairs of the company, generally, and that of Nairobi Hospital, in particular, are being managed. On 19th February 2019, the Company Secretary of KHA was served with a requisition to convene an Extraordinary General Meeting (**EGM**) for purposes of considering the removal of Board members and election of new ones.

8. On the same day the Company Secretary responded to the requisition and stated that it did not meet the law for the following reasons;-

> 1. The resolution lists the current Board members to be removed in totality.
>
> 2. The law requires that a resolution must also list the names of the candidates proposed to be elected at the same meeting. We draw your attention to sections 139(1) and (2) of the Companies Act, 2015.
>
> 3. The election of new members must further with Articles 38(a)(i) and 47 (b) of the KHA constitution.
>
> 4. The reason given for the requisition is too general and does not allow members to consider and make an informed decision.

We further note that the signatures of the requisitionists are presented in several sheets of paper most of which make no mention of the intended resolution. In addition, some members had signed on more than one paper. Company law practice provides that a reference to the resolution appears on every page so that it is clear to those signing and supporting the requisition the reasons for the resolution.

We therefore request you to consider the above constitutional and legal requirements and rectify the requisition. The Board will carry out its obligation to convene the general meeting once a valid requisition is received.

9. Undeterred, on 18th March 2019, the requisitionists, requested for certain proposal forms and informed the Company Secretary that they had taken her communication as refusal on the part of the Board to convene the meeting sought. Perhaps it needs to be explained that the proposal forms are the forms on which any member of KHA desirous of being elected a member of the board is proposed and seconded. This is a requirement of Article 47(b) of the Articles. In that same letter the requisitionists communicated their intention to convene the meeting themselves under the provisions of Article 18 and sections 139 and 279 of the Companies Act, 2015 (hereinafter the Act).

10. On 21st March 2019, KHA, through their lawyers, provided a copy of the proposal form to the lawyers representing the requisitionists.

11. In a Notice published in the Daily Nation of 23rd April 2019, the requisitionists through the firms of Echessa & Bwire Advocates LLP and Ataka, Kimori & Okoth Advocates gave Notice of an EGM to be held on 15th May, 2019.

12. Subsequently, through a letter of 25th April, 2019, the requisitionists, again, through their lawyers, wrote to the Company Secretary of KHA affirming their intention to proceed with the meeting of 15th May 2019. In that letter they also forwarded the proposals forms and profiles of persons nominated for the election to the board.

13. The meeting of 15th May 2019 proceeded as scheduled and the Defendants were said to have been elected to the Board in place of the 2nd to 8th Plaintiffs. Although it is common ground that only 4 of the 9 persons elected in that meeting insist on being members of the Board, the meeting set the stage for these proceedings.

14. The Plaintiffs' case is that the meeting and resolution passed on 15th May, 2019 contravened the constitution of the Company comprised in the Articles, and statute. In the main suit, the Plaintiffs seeks the following prayers;-

> 1. A declaration that the resolutions passed at the meeting held on 15th May, 2019 pursuant to the requisitions dated 19th February and 25th April 2019, are null and void.
>
> 2. A permanent injunction restraining the Defendants either jointly and severally from giving effect to the resolutions passed on 15th May 2019 by assuming or taking any action whatsoever as a director of the first Plaintiff and or interfering with business and or the management of the first Plaintiff.
>
> 3. Costs of this suit.
>
> 4. Any other or further order that the Court may find fit and just to grant.

15. At this interlocutory stage the Court is asked by the Plaintiffs to issue temporary orders of injunction and must therefore apply the time tested principles in **<u>GIELLA VS. CASSMAN BROWN</u>** [1973] EA 358 which are:-

> a) An Applicant must show a prima facie case with a probability of success.
>
> b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately compensated by an award of damages.
>
> c) If the Court is in doubt, it will decide an application on the balance of convenience.

16. The Court is mindful that at this stage of the proceedings it does not have the benefit of evidence which has been subjected to cross examination and should be careful not to draw firm conclusions. That is the true province of a trial Court. Important as well is that a party can only be permitted to urge a case that is consistent with its pleadings and should not use the session to expand or amend its case.

17. Having read the pleadings, the filed applications and responses and further taking into account the representations from both sides, I return the following view of the matter.

18. The numerical threshold to be reached for a lawful requisition is not less than one-tenth of membership representing the total voting rights of all members having a right to vote at a general meeting of the company. This requirement is to be found in Article 18 which is consistent with the provisions of section 277 of the Act which reads;-

> "(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.

19. At the hearing the Plaintiffs asked the Court to find that the requisitionists fell short of that number. The Court was asked to find that only 191 members out of 1205 petitioned for the EGM. In making this argument the Plaintiffs were echoing their pleadings in paragraph 13 of the Plaint that the notice of 25th April 2019 was defective, inter alia, because it failed to achieve the 10% threshold.

20. In the further affidavit sworn by Mercy Mbijiwe on 3rd June 2019, she depones;-

"*16. That the notice issued by the said firm of advocates was in my view incurably defective for the following reasons;-*

(a) It was in breach of sections 277 (1), (2) and 278 (1) by failing to give the Plaintiffs 21 days to consider the requisition and thereafter call a meeting within 28 days.

(b) The threshold under Article 18 of the first Plaintiff's Constitution that the requisition should be signed by minimum of 10% of the paid up members had not been met. The list forwarded in the said letter is signed by 78 paid up members out of the 1206 fully paid up KHA members. There is now produced and annexed hereto the list as at 26th April 2019 of the fully paid up members pages 35-63.

(c) The requisitionists had attached the signatures of the members who had signed the earlier Petition of 19th February 2019, which Petition was invalid.

(d) I verily belief that some of the members and their signatures appearing in the requisitioning made on 19th February and 25th April, 2019 may have been falsified. I am informed by Major Rtd K. Karebe M No. 2800 and Mr. Joseph Kigwe M No.922 which information I believe to be true, that both never signed the 19th February 2019 and 25th April, 2019 requisitions. There is now produced and shown to me true copies of their affidavits for Major Rtd K. Karebe filed in the proceedings pending before this Honourable Court and Mr. Joseph Kigwe in these proceedings annexed at pages 31-34 of this affidavit".

21. How did the Defendants react to this allegation? In paragraph 7 of the affidavit of the 4th Defendant he states;-

"7. With regard to the list of paid up members of the Kenya Hospital Association, I aver that the list produced in the Replying affidavit is the alleged list as at April 2016, which is different for different from the list of members furnished in Miscellaneous E097 of 2019, which in turn is not the list as on 19th February 2019, when the Requisition was signed and presented to the Company Secretary. Further and in any event, the Company Secretary has not identified which members that signed the Requisition and Notice for Special General Meeting were unpaid up members, to enable a specific response from those members".

22. The Court makes two observations. First, the Defence case is that it is the notice of 19th February 2019, and not that of 25th April 2019, that petitioned for a Meeting. An argument can therefore be made that for purposes of determining the threshold, it is the number of persons who signed the petition of 19th February, 2019 which should be considered. In so far as the Plaintiffs criticise the numbers in the list that

accompanied the notice of 25th April 2019, their argument would somewhat be weaker. Second, in reacting to the petition of 19th February 2019, the Company Secretary wrote a letter of 7th March 2019. Another letter of 21st March 2019 by the lawyers of KHA followed that communication. To be noted is that in neither of the letters did the Plaintiffs raise the issue that the one–tenth rule had been breached. The Court is reluctant to make any firm finding on this crucial matter in the absence of cogent evidence one way or other. The Court prefers to leave this contested matter for determination on a later occasion when parties will have opportunity to fully present their respective evidence.

23. I turn to interrogate the process adopted by the requisitionists in bespeaking the meeting. The requisition of 19th February 2019, reads;-

> 19 Feb 2019
>
> REASON FOR REMOVAL OF CHAIRMAN AND BOARDMEMBERS OF KENYA HOSPITAL ASSOCIATION.
>
> There is total loss of confidence in the Chairman and all members of KHA board.
>
> KHA Members signature attached.
>
> REQUISITION BY MEMBERS FOR AN EXTRAORDINARY GENERAL MEETING.
>
> To the directors of the Kenya Hospital Association Limited (the "Company")
>
> We, the undersigned, representing [more than] one tenth of the total voting rights of all the members of the Company having at the date hereof a right to vote at general meetings of the Company hereby require you to forthwith to proceed to convene an extraordinary general meeting of the Company for the purpose of considering the removal of the members of the Board of Management and election of new members of the Board of Management and (if thought fit) passing the following resolution:
>
> 1) THAT the following members of the Board of Management be removed as members of the Board of Management of the Company:
>
> 1. Dr. John P Simba – Chairman
> 2. Mr. Coutts Otolo – Vice Chairman
> 3. Mr. Allan Gachukia – Director
> 4. Mr. Sam Ncheeri – Director
> 5. Dr. Eric Kahugu – Director
> 6. Dr. Charles Kariuki – Director
> 7. Mrs. Margaret Muigai – Director
> 8. Dr. Anuja Kapila – Director, and
> 9. Lady Justice Joyce Aluoch – Director
>
> Date:
>
> Signatures of requisitionists:
>
> a) Name: Bernard Mwangi Mbai
>
> Signature: *Signed*
>
> b) Name: Dre. Stephen Ochel
>
> Signature: Signed
>
> c) Name: Eng. Jude Loveday
>
> Signature: *Signed*

24. For purposes of testing whether that request passes muster, subsection 5 of section 277 is important and is reproduced;-

"(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".

25. One criticism taken up by the Plaintiffs is that the Notice abridges those provisions. In this regard it was argued that under section 141 of the Act, a director served with a motion for removal has a right to be heard at the meeting. I understand the Plaintiffs to be arguing that the reasons given for the requisition were too general that it breached the rights of the 2nd to 8th Plaintiffs to fair administrative action under Article 47 of the Constitution and the provisions of the Fair Administrative Act, 2015.

26. So as to consider this argument regard must be given to the provisions of Sections 139 and 141 of the Act. Section 139 reads:-

"(1) A company may, by ordinary resolution at a meeting, remove a director before the end of the director's period of office, despite anything to the contrary in any agreement between the company and the director.

(2) However, a special notice is required for a resolution to remove a director under this section or to appoint a person to replace the director so removed at the meeting at which the director is removed.

(3) A person appointed to replace a director who is removed under this section is, for the purpose of determining the time at which the person is to retire from office, taken to have become a director on the day on which the director in whose place the person is appointed was last appointed as a director.

(4) A vacancy created by the removal of a director under this section, if not filled at the meeting at which the director is removed, can be filled as a casual vacancy.

(5) A person who ceases to be a director continues to be subject to the duty—

(a) to avoid conflicts of interest with regard to the exploitation of any property, information or opportunity that the person became aware of while a director; and

(b) not to accept benefits from third parties with regard to things done or omitted to be done by that person before ceasing to be a director

(6) This section does not—

(a) deprive a person removed under it of compensation or damages payable in respect of the termination of the person's appointment as director; or

(b) limit any power to remove a director that may exist apart from this section.

27. While Section 141 on a director's right to protest against removal provides;-

"(1) On receipt of notice of a motion for a resolution to remove a director under section 139, the company shall send a copy of the notice to the director concerned.

(2) The director, whether or not a member of the company may be heard on the discussion of the motion at the meeting.

(3) Subsection (4) applies when notice is given of a proposed resolution to remove a director under section 139.

(4) Within twenty-one days after the notice is given, the director may make, with respect to the motion representations in writing to the company and request that the members of the company be notified of the director's representations.

(5) On receipt of any such a request, the company shall, unless the representations are received by it too late for it to do so—

(a) in any notice of the resolution given to members of the company, state the fact of the representations having been made; and

(b) send a copy of the representations to every member of the company to whom notice of the meeting is sent, whether before or after receipt of the representations by the company.

(6) If a copy of the representations is not sent as required by subsection (5) because the representations were received too late or because of the company's default, the director may orally require the representations to be read out at the meeting.

(7) If the company or a person affected claims that the representations made by the director contain defamatory matter, the company or the person may apply to the Court for an order under subsection (9).

(8) The director is entitled to be served with a copy of such an application and to be heard at the hearing of the application by the Court.

(9) On the hearing of such an application, the Court shall, if satisfied that the representations of the director contain defamatory matter, make an order that they need not be sent out to the company's members and need not be read out at the meeting, but if not so satisfied, it shall dismiss the application.

(10) If the Court has made an order under subsection (9)—

(a) copies of the director's representations need not be sent out to the company's members; and

(b) those representations need not be read out at the meeting".

28. To be gleaned from these provisions is that, a director who is sought to be removed from office before the end of his or her term, must be sent a copy of a notice of the removal motion. This provides a director who wishes to protest the removal an opportunity to make any representations on the removal motion.

29. Critical, however, in respect to the argument under consideration is at what point the notice has to be sent to the affected director. It has to be remembered that the process of removal herein was initiated through a request for an EGM pursuant to the provisions of section 277. The provisions of sub-section 5 thereof gives the requester the option to include the text of a resolution that is proposed to be put to the meeting. Other than the request stating the general nature of the business to be dealt with at the meeting, the law does not require the giving of any other notice at this stage. This Court is unable to trace any obligation that a notice for removal of a director needs to be sent to the concerned director at the point of request. That would have to await the later stage of the process when the notice for the meeting is given. There is no merit in the 2nd to 8th Plaintiffs insisting on compliance with the provisions of section 141 at the time the requisition for the EGM was made.

30. The request stated that the purpose of the meeting was to consider the removal of nine named board members. In terms of subsection 5 the request, in my view, sufficiently stated the general nature of the business to be dealt with at the meeting. Statute does not require the request to take any particular form or to be in any particular detail. The request is sufficient when the general nature of the business to be transacted is disclosed. That said, the disclosure of the proposed business should be reasonably clear so that the directors to whom the request is made are able to discern, without difficulty, the reason why the requester seeks to have the meeting convened. Put differently, the request should not be so imprecise that a reasonable person reading it cannot be able to tell in general terms what is intended to be discussed at the proposed meeting. In the request before Court the nature of the business was disclosed as being to consider the removal of nine members of the board. The name of each of the nine members was given. Further, the corollary purpose for the meeting being election of new members was disclosed. I see no reason to fault the request on this score.

31. It is common ground that the special notice required by section 139(2) obligates the giver of the notice to identify, by name, both the director sought to be removed and the proposed nominee. Although, Mr Ngatia appearing for the Plaintiffs had argued that the notice with both sets of names should have been in the requisition, this Court agrees with Mr. Bwire that the information would be in the notice convening the meeting. That in fact is really the requirement of section 139 of the Act.

32. One other reason that the Company Secretary gave for refusing to accede to the requisition was that it did not comply with the provisions of Article 47(b). That sub-article reads:-

"*(b) Any member of the Association desirous of being elected a member of the Board of Management shall be proposed and seconded in writing on a form ("a Proposal Form") approved by the Board of Management (and to be made available by the Secretary of the Association on request) signed by two members of the Association duly qualified to be present and to vote at the General Meeting at which the election of members of the Board of Management ought to take place and the proposed candidate shall not less than twenty one days before the date of such General Meeting deliver the duly signed Proposal Form attaching his or her personal details, professional qualifications if any, working experience together with a notice in writing to the Secretary informing the Secretary of the fact that he has been proposed as a candidate and that he is willing to stand for election".*

33. Again, it is a question of timing. On a plain reading of the requirements of that sub-article, the proposal form together with all personal details and acceptance notice ought to be delivered to the Company Secretary not less than 21 days before the date of the General Meeting. There is no requirement that the said documents be delivered together with a request under the provisions of section 277 even where the meeting sought is to conduct an election to the Board.

34. On the material before this Court, i unable to find any deficiency in the request of 19th February 2019.But a full-fledged trial may reveal otherwise!

35. Which then takes the discussion to the next part of the process leading to the meeting of 15th May, 2019. The law contemplates that directors who have been requested by members to convene a meeting may fail to do so. Section 279 of the Act is the fall back available to such members and reads;-

"(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)".

36. The provisions of subsection 4 of section 279 are not idle. Even though the directors will have failed to convene a meeting, the meeting convened by the requisitionist must as nearly as practicable be convened and conducted as if it was a meeting convened by the directors. The meeting must meet the requirements of the constitution of the company and the provisions of the Companies Act. Although convened by a section of the membership, the meeting is nevertheless a meeting of the company and must therefore, in as much as possible, resemble a conventional meeting convened and conducted by directors. For that reason a requisitionist who takes up the mantle of convening a meeting under the provisions of section 279 of the Act assumes a heavy duty. A duty akin to that of a director. That said, the law acknowledges that not being a director of the company a requisitionist may not have the tools to convene the meeting in exactly the same manner as directors would. For example, the register of members and their addresses may not be readily available to the requisitionist. Where it is impractical to meet the letter of the law, the onus is on the requisitionist to demonstrate that in the circumstances of the case it was not practical to adhere to the letter of the law but that nevertheless the meeting was convened as nearly as practicable in the manner in which the law requires. It is against this standard that the Court examines the manner in which the impugned meeting was convened.

37. As a preamble, a determination of what convening of a meeting within the provisions of section 279 entails is necessary. The Companies Act neither defines the word 'convene' nor does it specifically state what it involves. However, section 278, which is a provision in respect to the directors' duty to convene a General Meeting required by members, provides:-

"(1) If requested to convene a general meeting of the company, the directors shall —

(a) do so within twenty-one days from the date on which request was made; and

(b) hold the meeting on a date not more than twenty eight days after the date of the notice convening the meeting.

(2) If such a request includes a resolution intended to be moved at the meeting, the directors shall include in the notice of the meeting a copy of the proposed resolution.

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

(4) If the resolution is to be proposed as a special resolution, the directors are taken not to have duly convened,the meeting if they do not give the required notice of the resolution in accordance with this section".

38. Reading subsection 1, it is clear that convening of a meeting entails giving of the notice to hold a meeting and holding the meeting itself. Holding of the meeting would necessarily include conducting the meeting. In *Black's Law Dictionary 10th Edition*, to convene means,

"*1. To call together, esp. for a formal meeting; to cause to assemble 2. To summon to respond to an action*"

This Court holds that the requisitionists were required by the provisions of section 279(4) of the Act to call for, hold and conduct the EGM in a manner that was as nearly as practicable the manner in which the directors of the Company were required to do. That is the obligation that was placed on them by statute.

39. The notice calling for the meeting was published in the Daily Nation of 23rd April, 2019. For its importance it is hereby reproduced:-

To: ALL MEMBERS & DIRECTORS OF THE KENYA HOSPITAL ASSOCIATION

NOTICE OF EXTRA ORDINARY GENERAL MEETING OF KENYA HOSPITAL ASSOCIATION

In accordance with section 282(1(, 285 and 287(3)(a) of the Companies Act, No.17 of 2015, Laws of Kenya, and in accordance with Article 18 of the Kenya Hospital Association Constitution and section 278 of the Companies Act, No.17 of 2015, laws of Kenya, Notice is hereby issued for an Extra Ordinary General Meeting of the Kenya Hospital Association, to be held:

Date: 15th May, 2019

Venue: The Convention Centre, Nairobi Hospital

Time: 3.00pm

Notice is hereby given that the Agenda for the Meeting shall be:

1. Resolution for reconstitution of the Board of Directors of the Kenya Hospital Association, by removal from the Board the following members:

a. Dr. John Simba – Chairman

b. Mr. Couts Otolo – Vice Chairman

c. Mr. Allan Gachukia – Director

d. Mr. Sam Ncheeri – Director

e. Dr. Charles Kariuki – Director

f. Mrs. Margaret Muigai – Director

g. Dr. Anuja Kapia - Director

2. Resolution for election to the Board of Directors of the Kenya Hospital Association, of the following nominated/proposed persons:

a. Mrs. Tabitha Munyiva Oduori – OGW

b. Mr. Maxwell Otieno Ondongo

c. Mr. Jeremy Ikindu Ngunze

d. Hon. Dr. Chris M. N. Bichage

e. Dr. Stephen Ochiel

f. Dr. Wilfred Irungu Ndirangu

g. Mrs. Sahra Bahlewa Moi

h. Mrs. Susan Carr-Hartley, KRN, RN,CCN

i. Mr. Richard Omwela, OGW

This Notice of Convention has been signed by over 50% of members of the Kenya Hospital Association who signed the Petition for Requisition for the Extra Ordinary General Meeting delivered to the Company Secretary of the Kenya Hospital Association on 19th February 2019. The Notice with full names and details of member requisitionists has been deposited with the Company Secretary of the Kenya Hospital Association and Section 282 (1) of the Companies Act, NO.17 of 2015, Laws of Kenya.

Issued for and under instructions of the Member Requisitionists, by retained Counsel:

Echessa & Bwire Advocates LLP Ataka Kimori & Okoth

17th Floor, 4th Avenue Towers Advocates

P.O. Box 50307-00100 Upper Hill Gardens,

NAIROBI suite No.E01, 3rd Ngong

Avenue P.O. Box 12337-00100, NAIROBI

40. In compliance with the law, the notice named the directors to be removed and those proposed to replace them. Secondly, the notice was sufficient in time. That is not faulted.

41.What however has been assailed is that the notice was issued by the advocates for the requistionists and not the requistionists themselves. An argument that not being members, the advocates could not validly issue the notice. This Court does not think that much turns on that because the Advocates were acting as agents of the requisitionist but even more critical is that the notice informed members that the full

names and details of the requisionists had been deposited with the Company Secretary. A common fact.

42. Other issues have been raised in respect to the manner in which the meeting was convened. That it violated the rights of the 2 nd to 8th Plaintiffs. It is in that regard that the provisions of section 141 of the Act were cited. The provisions, again, read:-

> "(1) On receipt of notice of a motion for a resolution to remove a director under section 139, the company shall send a copy of the notice to the director concerned.
>
> (2) The director, whether or not a member of the company may be heard on the discussion of the motion at the meeting.
>
> (3) Subsection (4) applies when notice is given of a proposed resolution to remove a director under section 139.
>
> (4) Within twenty-one days after the notice is given, the director may make, with respect to the motion representations in writing to the company and request that the members of the company be notified of the director's representations.
>
> (5) On receipt of any such a request, the company shall, unless the representations are received by it too late for it to do so—
>
> > (a) in any notice of the resolution given to members of the company, state the fact of the representations having been made; and
> >
> > (b) send a copy of the representations to every member of the company to whom notice of the meeting is sent, whether before or after receipt of the representations by the company.
>
> (6) If a copy of the representations is not sent as required by subsection (5) because the representations were received too late or because of the company's default, the director may orally require the representations to be read out at the meeting.
>
> (7) If the company or a person affected claims that the representations made by the director contain defamatory matter, the company or the person may apply to the Court for an order under subsection (9).
>
> (8) The director is entitled to be served with a copy of such an application and to be heard at the hearing of the application by the Court.
>
> (9) On the hearing of such an application, the Court shall, if satisfied that the representations of the director contain defamatory matter, make an order that they need not be sent out to the company's members and need not be read out at the meeting, but if not so satisfied, it shall dismiss the application.
>
> (10) If the Court has made an order under subsection (9)—
>
> > (a) copies of the director's representations need not be sent out to the company's members; and
> >
> > (b) those representations need not be read out at the meeting".

43. So as to exercise the right to protest against removal as guaranteed by section 141 above, the directors sought to be removed needed to be sent a copy of the motion of removal. In the letter of 25th April, 2019, the lawyers for the requisitionists inform the Company Secretary that the notice of 23rd April, 2019 had been made in compliance with sections 282(1), 285 and 287(3)(a) of the Act.

44. My attention is drawn to the provisions of section 287 which reads:-

> "(1) If a provision of this Act requires a special notice of a resolution to be given, the resolution is not effective unless notice of the intention to move it has been given to the company at least twenty-eight days before the meeting at which it is moved.
>
> (2) The company shall, if practicable, give its members notice of any such resolution in the same manner and at the same time as it gives notice of the meeting.
>
> (3) If it is not practicable to give that notice, the company shall give its members notice of the resolution at least fourteen days before the meeting—
>
> > (a) by advertisement in a newspaper having a wide circulation in the area in which the company carries on business; or
> >
> > (b) in any other manner allowed by the company's articles.
>
> (4) If, after notice of the intention to move such a resolution has been given to the company, a meeting is called for a date twenty eight days or less after the notice has been given, the notice is nevertheless taken to have been effectively given even though it was not given within the required period".

45. The Court therefore understands the requisitionists to be saying that the notice of the motion for removal of the 2nd t0 8th Plaintiffs was contained in the notice of 23rd April, 2019. Ordinarily, by dint of the provisions of section 141(1) of the Act, the company ought to send the said notice to the concerned director. Yet, here, the Company secretary had made it clear that she did not accept that the requisition for the EGM had complied with law. It was obvious that she would not cooperate in convening the meeting, much less in sending out any notices required by the law to effectuate the Meeting. The onus was therefore on the requisitionists, as conveners, to send a copy of the notice to the 2nd to 8th Plaintiffs.

46. However, on reading the Plaint the Plaintiffs do not complain about not receiving the notice. The challenge to the notice is in paragraph 12 of the Plaint. One of the reasons for asserting that the notice was unlawful and invalid is that it did not state any grounds for removal of the 2nd to 8th Plaintiffs. It is argued that for that reason the Plaintiffs had been deprived of any information to assist them in considering the requisition and making an informed decision one way or other.

47. In the submissions before Court the 2nd to 8th Plaintiffs pressed that this violated their rights under Article 47 of the Constitution. The Article provides:-

> "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
>
>> (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
>>
>> (b) promote efficient administration".

Cited further were sections 4(1) and 4(2) of the Fair Administrative Action Act which are of similar effect.

48. In reply, the Defendants asserted that the notice of 23rd April, 2019 stated that there was an intention to remove the 2nd to 8th Plaintiffs and that notice had satisfactorily dealt with the requirements of section 141.

49. Under the provisions of section 141 a director who is sought to be removed and wishes to protest the removal must make written representations to the removal Motion within 21 days after the notice of the motion is sent to him or her. Subsection 6 however allows the making of oral representations in certain circumstances. It seems rather plain that a director will be handicapped in preparing his or her representations if he/she is not made aware of the reasons sought for removal. It cannot be the law that section 141 gives a director a right to protest by way of making representations for removal but at the same time does not require that the concerned director be sufficiently informed of the reasons for the proposed removal. To hold otherwise is to render the right to protest under section 141 inefficacious or wholly redundant. It is for this reason that the Court holds that a notice of a motion of resolution to remove a director under section 139 of the Act should give reasons for the proposed action to enable the director have a fair chance to protest it. Having said so the Court does not suggest that the reasons should be given or furnished in any prescribed detail, form or elegance. It should however sufficiently disclose the reasons why ouster is sought before the end of tenure to allow the director answer to the reasons and protest the removal if he or she so wishes.

50. It is in this regard that the notice of 23rd April, 2019 falls short of the expectation of the law. It does not give any reason whatsoever why it is proposed that the 2nd to 8th Plaintiffs be removed from directorship. It has not been explained by the Defendants why the notice did not contain the reasons or why a notice with the reasons could not have been sent to the directors. This Court is not told that the giving such notice was impractical or so onerous that it would be unreasonable to expect or require the requistionists to do so. In a word it has not been demonstrated that on this aspect, the meeting proceeded "as nearly as practicable' 'in the manner contemplated by the Articles of the company and the Act.

51. In reaching a decision that the EGM was convened in breach of the provisions of section 141, this Court bears in mind that the plank of the Defence case, as set out earlier, was that the petition of 19th February 2019 was simply a requisition for a meeting and should be treated as such. But even if the Court was to find that the petition contained the removal motion there is no evidence that the petition was sent to the concerned directors as required by section 141. Service of the petition on the company cannot be deemed to be sending of the notice to its directors as the Act provides specific procedure for service of documents upon directors.

52. That procedure is in section 1011 of the Act which reads;-

> "(1) A document may be served on a person to whom this section applies by leaving it at, sending it by post to, the person's registered address.
>
> (2) This section applies to the following persons:
>
>> (a) a director or secretary of a company;
>>
>> (b) in the case of a registered foreign company — the local representative of the company in Kenya (or the designated local representative if there is more than one local representative);

(c) a person appointed in relation to a company in any other capacity prescribed by the regulations for the purpose of this subsection.

(3) This section applies whatever the purpose of the relevant document, and is not restricted to service for purposes arising out of or in connection with the appointment or position referred to in subsection (2) or in connection with the company concerned.

(4) For the purposes of this section, a person's registered address is the address (if any) for the time being shown as the person's current address in the company's register of directors, secretaries or members.

(5) Service may not be effected under this section at an address of a person to whom subsection (2)(a) or (c) applies if notice has been registered of the termination of the person's appointment in relation to the company and the address is not a registered address of the person in relation to any other appointment.

(6) Service may not be effected under this section at an address of a person to whom subsection (2)(b) applies if the foreign company is no longer registered as such in Kenya.

(7) Nothing in this section affects the operation of any enactment or rule of law under which permission is required for service of process outside Kenya".

53. For that reason the contention by the 2nd to 8th Plaintiffs that their right to fair hearing protected by section 141 of the Act has been infringed is not a trifle. But that would not be all to the matter because this Court believes that, from the perspective of company law, there is a greater objective of the provisions of section 141 which transcends the rights of the director. Members of a company are entitled to information that will assist them make informed decisions at a General Meeting. If it is about the removal of a director before the end of his tenure, members may be interested to hear what the concerned director has to say about it or the director's answer to any adverse reasons advanced against the director. It is possible that upon considering such representations members may vote to retain the concerned director. The provisions of section 141 can facilitate a meaningful discourse as to the suitability or otherwise of a director to continue in office. From that vantage the provisions of section 141 are as good for the concerned director as they are for the members and the company.

54. The conclusion the court reaches is that the Plaintiffs have made out a prima facie case with a probability of success and have passed the first test in Giella *(supra)*.As to whether the loss that may ensue if an injunction is not granted is adequately compensable by an award of damages, this court has noted that the infraction that has so far been revealed is not just about individuals but about KHA itself. If in fullness of time this court's finding is vindicated, then possibility that the affairs of the company will have been managed by persons who were not validly elected may not be a matter which can be adequately cured by an award in damages. For reason that the 2nd to 8th Plaintiffs may have been ejected from office in a flawed process, this Court is inclined to order that they remain in office pending the hearing and determination of this matter.

55. The upshot the Defendants' application dated 29th May, 2019 is hereby dismissed with costs. The application of the Plaintiffs dated 16th May, 2019 is hereby allowed in terms of prayers 3 thereof. Costs on the allowed application to the Plaintiffs.

Dated, Signed and Delivered in Court at Nairobi this 13th day of June, 2019.

....

F. TUIYOTT

JUDGE

PRESENT;

Bwire & Ataka for Defendants

Gachuhi for Plaintiffs

Nixon – Court Assistant