



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 315 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY**

**FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER ARTICLES 165(5)(6) AND (7) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE COMPANIES ACT**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**REGISTRAR OF COMPANIES.....1<sup>ST</sup> RESPONDENT**

**MARY WANGUI KIARIE.....2<sup>ND</sup> RESPONDENT**

**DAVID GACHERU.....3<sup>RD</sup> RESPONDENT**

**JOHN MURAGE WANYEKI.....4<sup>TH</sup> RESPONDENT**

**WILLIAM MAINA MUGUIMA.....5<sup>TH</sup> RESPONDENT**

**GILBERT OTIENO.....6<sup>TH</sup> RESPONDENT**

**EX-PARTE:**

**MIDLANDS COMPANY LIMITED**

**RULING**

**Introduction**

1. Midlands Company Limited, hereinafter “the Applicant”, is a private company incorporated in Kenya under the provisions of the Companies Act, Cap 486 of the Laws of Kenya. It has sued the Registrar of Companies, which is a statutory office established by section 831

of the Companies Act, as the 1<sup>st</sup> Respondent herein. Also sued are various individuals whom the Applicant claims are its former Chairman, Directors and Company Secretary, as the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents respectively.

2. The Applicant filed a Chamber Summons application dated 31<sup>st</sup> July 2018, seeking leave to institute judicial review proceedings as against the Respondents for the following orders:

**(a) That this Court be please to grant leave to the Ex parte Applicant to apply for orders of mandamus to compel the 1<sup>st</sup> Respondent herein to receive and register the returns of the ex parte Applicant Company as submitted by John Gachanga Mungai the New Company Secretary of the company resolutions reached on 24<sup>th</sup> February 1018 and that the 1<sup>st</sup> respondent do issue a certificate of newly elected Directors.**

**(b) That this Court be pleased to grant leave to the Ex parte Applicant to apply for orders of Prohibition, that shall be directed at the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents restraining the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents from interfering with the management, administration, supervision, handling or in any way dealing with the affairs of the Ex parte Applicant and holding out as Board of Directors and/or as the company's certified Public Secretary until the hearing and determination of this matter.**

**(c) That the costs of this application be in the cause.**

3. This Court directed that the application for leave be heard and determined *inter partes*, and parties were directed to file their respective pleadings and submissions in this regard. The Applicant in this regard relied on its statement of facts dated 31<sup>st</sup> July 2018, and verifying affidavit sworn on the same date by John Gachanga Mungai, who described himself as the Applicant's Company Secretary. The said deponent also filed a further affidavit sworn on 5<sup>th</sup> December 2018. The advocates on record for the Applicant, Mutito Thiongo & Company Advocates, in addition filed submissions.

4. The 1<sup>st</sup> Respondent filed Grounds of Opposition dated 26<sup>th</sup> November 2018 opposing the application, which were supplemented by submissions dated 26<sup>th</sup> March 2018 filed by K. Odhiambo, a Litigation Counsel at the Attorney General's Chambers. The 2<sup>nd</sup> to 6<sup>th</sup> Respondents on their part filed Grounds of Opposition dated 8<sup>th</sup> October 2018, and a replying affidavit sworn on the same dated by the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> to 6<sup>th</sup> Respondents' advocates on record, Githara & Associates Advocates, filed submission dated 26<sup>th</sup> November 2018 on the said Respondents behalf

#### **The Applicant's Case**

5. The gist of the Applicant's case is that the 1<sup>st</sup> Respondent has declined to register its duly elected Board of Directors, after the Applicant requested it to do so in a letter dated 20<sup>th</sup> June 2018, and contrary to its mandate under the provisions of sections 3, 38(2) and 138 of the Companies Act 2015. The Applicant explained that it held Annual General Meeting in August 2012 and in January 2013, during which its shareholders approved the recruitment of new investors, and the amendment of its Articles of Association to accommodate an agreement entered into with a new investor, namely African Agricultural Capital Fund (AACF). Further, that the Applicant elected a new Board of seven (7) Directors in the Annual General Meeting held in January 2013.

6. However, that between 2013 and 2017 the said Board of Directors through neglect and total disregard of the law and the provisions contained in the Articles of Association, did not convene any yearly Annual General Meeting as required. Furthermore, that during that period, a total number of five (5) Directors resigned and the Board of Directors was left to operate with only two (2) directors, and could therefore not transact any lawful business. According to the Applicant, the remaining two directors could have appointed additional members to reinstate a quorum under the provisions of its Articles of Association, but abdicated their responsibility, and instead allowed AACF to do the appointing of two directors with a view of sabotaging the interest of the other shareholders. Further, that in spite of this addition, the board was still illegitimate and could not transact any lawful business under the Applicant's Articles of Association.

7. Consequently, that the shareholders of the Applicant requisitioned the Board of Directors to call for a general meeting in a letter dated 27<sup>th</sup> November 2017, which was served upon the chairman of the Board and the 1<sup>st</sup> Respondent pursuant to Section 277(1) of the Companies Act, and which the 1<sup>st</sup> Respondent ignored. That an extra-ordinary general meeting was nevertheless called and held on 24<sup>th</sup> February 2018, after it was duly convened by the shareholders. The Applicant averred that the 1<sup>st</sup> Respondent on 20<sup>th</sup> April 2018 then wrote to the former company secretary, namely Gilbert Otieno (the 6<sup>th</sup> Respondent herein), and copied the letter to John Gachanga Mungai (the new company secretary), asking for a clarification as to whether the 6<sup>th</sup> Respondent was privy to the said extraordinary general meeting, and for him to verify the Applicant's records held at the Companies Registry.

8. The Applicant averred that the new Company Secretary, Mr. John Gachanga Mungai, tried to file the statutory meeting documents among other documents after the outcome of the extraordinary general meeting on several occasions, but the Applicant's file went missing at the Companies Registry and nobody was willing to cooperate in tracing the records. Further, that the newly appointed Company Secretary only managed to have a limited access to the Applicant's account, before the same was also eventually frozen by the Company Registry.

9. The Applicant further averred that there was various correspondence between the newly appointed Company Secretary and the 1<sup>st</sup> Respondent on the resolutions from the extraordinary general meeting, culminating in a letter dated 6<sup>th</sup> June 2018 from the 1<sup>st</sup> Respondent informing that the said Company Secretary should make representations and clarify whether the threshold of Section 277 (2) and Section 249 of the Companies Act, 2015 had been met or complied with.

10. That the newly appointed Company Secretary accordingly responded as to how the threshold contemplated under Section 277(2) and

Section 249 had been met, and also pointed other malpractices being practised by 6<sup>th</sup> Respondent. However, that despite all the improprieties, malpractices and procedural failings by the Board in record, the 1<sup>st</sup> Respondent by a letter dated 20<sup>th</sup> June 2018, acted *ultra vires* by arrogating upon himself the powers of a court of law by purporting to make a determination on the validity of the extraordinary general meeting, voting rights, as well as the membership of the company.

11. Further, that the 1<sup>st</sup> Respondent also failed to observe the provisions of the Applicant's Articles of Association as read together with the Companies Act 2015, and the Applicant's shareholder's register as held at Registrar of Companies. According to the Applicant, the 1<sup>st</sup> Respondent's actions will have an adverse impact on the its actions and has reinforced the former Board of Directors illegal actions of failing to hold annual general meetings for five years.

### **The Respondents' Cases**

#### ***The 1<sup>st</sup> Respondent's Case***

12. The 1<sup>st</sup> Respondent opposed the application on the following grounds:

*(a) That the Chamber summon application is defective, has no merit and is based on a misconception of the law.*

*(b) That the application offends the provisions of Part XI of The Companies Act 2015.*

*(c) That this court has no jurisdiction to handle this matter. The substratum of the application in it's entirety is a commercial dispute which squarely falls within the ambit of Companies Act and therefore the right forum should be The Commercial & Admiralty Division of the High Court.*

*(d) That the application is an appeal disguised as a judicial review application yet a judicial review court does not sit as an appellate court so as to substitute its views with that of the respondent.*

*(e) That the matters raised in the application are matters that substantively require a merit review a function which this court cannot embark on as judicial review largely concerns itself with the decision making process.*

#### **The 2<sup>nd</sup> – 6<sup>th</sup> Respondents' Case**

13. The 2<sup>nd</sup> to 6<sup>th</sup> Respondents also opposed the application on the following grounds in their Grounds of Opposition:

*(a) The deponent of the verifying affidavit who purports to bring the application in the name of the Applicant lacks locus to file the proceedings either in his name or in the name of the Applicant.*

*(b) The Board of the Applicant has not authorized these proceedings to be instituted in the name of the company.*

*(c) The Application is in the nature of a derivative action but has not complied with part XI or Part XXIX of the Companies Act, 2015. The same is therefore incompetent and an abuse of the Court Process for failure to comply with the mandatory requirements of the Act.*

*(d) The proceedings have wrongly and unlawfully been instituted in the name of the Applicant.*

*(e) The application on the face of it is an appeal against the substantive decision of the 1<sup>st</sup> Defendant and this Court and the proceedings filed are the wrong forum for the deponent of the verifying affidavit.*

*(f) No facts have been pleaded or evidence tendered to justify the grant of leave as sought.*

14. The 2<sup>nd</sup> Respondent stated in the replying affidavit she swore on behalf of the 2<sup>nd</sup> to 6<sup>th</sup> Respondents that she is a director of the Applicant Limited at an Annual General Meeting held on 12<sup>th</sup> January 2013, and the Chairman of the Board of Directors thereof having been so appointed in 2014, and had been authorized by her co-directors who are named as the 3<sup>rd</sup> to 6<sup>th</sup> Respondent's herein to swear the affidavit on their behalf. Further, that the deponent of the Applicant's verifying affidavit, John Gachanga Mungai, purports to bring the present application in his alleged capacity as the Company Secretary of the Applicant which he is not, neither is he a member of the Company nor does his name appear in the register of members of the Company.

15. Further, that the 6<sup>th</sup> Respondent is the Company Secretary of the Applicant, and that the issue of who is the rightful Company Secretary of the Company had been canvassed before the 1<sup>st</sup> Respondent and a ruling thereon issued on 20<sup>th</sup> June 2018. Therefore, that the said John Gachanga Mungai is a meddler and interloper in the Applicant company, and being neither a member nor an officer of the Applicant lacks any locus to bring the present application, which application should be struck out *in limine* for offending Parts XI and XXIX of the Companies Act, 2015.

16. On the decision of the 1<sup>st</sup> Respondent that is the subject matter of the present proceedings, the deponent stated that she was aware that in December 2017, her office received the requisition for an Extra-Ordinary General Meeting dated 27<sup>th</sup> November 2017, by persons purporting

to be members of the Applicant. That upon scrutiny, it was established that the requisition did not meet the threshold required under Section 277 of the Companies Act for various reasons which she enumerated, and that she duly notified the requisitionists as much. However, that the requisitionists purported to hold the said meeting and elect new directors in the absence of the duly elected directors of the Company. That the alleged new Directors then sought registration, whereupon the 2<sup>nd</sup> to 6<sup>th</sup> Respondents instructed the Company's advocates to issue a letter of protest to the 1<sup>st</sup> Respondent, who issued a notice to the Applicant's Company Secretary to clarify the issues raised in the letter of protest.

17. The 2<sup>nd</sup> to 6<sup>th</sup> Respondents contended that after various correspondences, visits and a meeting with the 1<sup>st</sup> Respondent, all the parties were heard and had an opportunity to canvass their issues, and that the 1<sup>st</sup> Respondent rendered a reasoned decision on the matter through a letter dated 20<sup>th</sup> June 2018. Therefore, that what the said John Gachanga Mungai is challenging is the substantive decision of the 1<sup>st</sup> Respondent, and that this is therefore not a proper matter for judicial review, but rather is a matter to be referred to the Company Court in the Commercial Division of this Court.

18. Lastly, the 2<sup>nd</sup> to 6<sup>th</sup> Respondents averred that from the representations made before the 1<sup>st</sup> Respondent in the meeting held on 12<sup>th</sup> June 2018, it is clear that the said John Gachanga Mungai who has instituted the present application is doing so in collusion with two former shareholders of the Applicant company namely Jung'ae Wainaina and his company Juanco Group Limited, who are plaintiffs in two cases namely **Nairobi Commercial HCC 93 of 2016 - Jung'ae Wainaina vs African Agricultural Capital Fund & Midlands Limited** and **Nairobi HCC 13 of 2018- Juanco Group Limited vs Midlands Limited & African Agricultural Capital Fund & Midlands Limited**. That this is for the reason that the advocates who act for the two plaintiffs in the two cases above, were the same ones who accompanied John Gachanga Mungai in making the representations before the 1<sup>st</sup> Respondent.

19. Furthermore, that there is yet a third suit filed by one Naphtali Mungai Mureithi in Nyahururu High Court being **Nyahururu High Court Civil Case No.1 of 2018 - Naphtali Mungai Mureithi vs African Agricultural Capital Fund & Midlands Limited** where the management and constitution of the Applicant's Board are in issue.

### The Determination

20. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

**“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.**

21. The Applicant in this regard submitted that the Respondents had juxtaposed jurisdiction to forum, and cited the cases of **Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Ltd , Mombasa Civil Appeal No. 50 of 1989** and **Samuel Kamau Machaia & Another v Kenya Commercial Bank Ltd & 2 Others (2012) eKLR**, for the position that a court's jurisdiction flows from either the Constitution or legislation or both, and that that more than one court may have jurisdiction over a certain case. That on the other hand, the appropriate forum is a matter governed mostly by statutes and court rules, and is the place where it would be most convenient for the parties to have the matter heard by a court with the requisite jurisdiction.

22. According to the Applicant, by dint of Article 165(3)(a) of the Constitution of Kenya, 2010, the High Court has unlimited original jurisdiction over civil and criminal matters, and as regards the issue of forum, Section 11(1) of the High Court (Organization and Administration) Act No. 27 of 2015 has administratively partitioned the High Courts in Kenya into various divisions for effective administration of justice. Further, as the matter-in-issue stems from a decision made by the 1<sup>st</sup> Respondent which was procured by a faulty reasoning in the decision-making process, it is therefore not a commercial dispute, but rather recourse sought by the Applicant over a public officer's decision. That the right forum therefore is the Judicial Review Division of the High Court of Kenya.

23. In addition, that this matter is not peremptorily an appeal, as the decision of the 1<sup>st</sup> Respondent was administrative and the relief from such can only be *via* judicial review. Further, that the application is not a derivative action as it is not sought by shareholders with respect to a wrong perpetrated against the company by persons in charge of the company, but is a case where the Applicant is aggrieved by the decision of a third-party, namely the 1<sup>st</sup> Respondent.

24. The 1<sup>st</sup> Respondent on its part submitted that this court is not the right forum to preside over this matter and therefore does not have jurisdiction to preside over this matter, as the matter is a contest between various factions laying claim to directorship of the Applicant which is a private company. According to the 1<sup>st</sup> Respondent, judicial review deals with the decision making process and does not delve into merit review of a contested decision or of contested facts as in this case, and to grant leave would cause the judicial review court to embark upon an examination and appraisal of the evidence of who is a director or not of the company with a view to establishing their claim.

25. Therefore, that judicial review would not be the best tool to resolve the dispute in court due to its limited scope. That in those circumstances, the best course would be to file a suit at the Commercial & Admiralty Division of the High Court where parties would have an opportunity to present their contested facts to the court. Reliance was placed on the decision in **Republic v Attorney General & 2 others Ex-parte Xplico Insurance Company Limited [2014] eKLR** for this proposition.

26. In addition, that there are other yet-to- be-concluded court cases relating to control and directorship of the Applicant at the Commercial & Admiralty Division of the High Court, being **Nairobi High Court Commercial Civil Case No 93 of 2016, Nairobi High Court Commercial Civil Case No. 13 of 2018** as well as in **Nyahururu High Court Civil Case No 1 of 2018** between various parties involved in the contest for control of the Applicant. That it is therefore clear that the Applicant company is embroiled in a dispute of directorship which it now seeks to ventilate in this forum, which amounts to forum shopping and therefore an abuse of court process.

27. Lastly, the 1<sup>st</sup> Respondent submitted that the application is an appeal from the 1<sup>st</sup> Respondent's decision disguised as a judicial review application. That the Applicant is effectively asking the court to rectify the register of the company under section 863 of the Companies Act, by compelling the 1<sup>st</sup> Respondent to accept the heavily contested returns which it has already declined as they do not meet the statutory requirements. Therefore, that the application is an appeal disguised as a judicial review, and this court is ill equipped to make a determination on the matter.

28. The 2<sup>nd</sup> to 6<sup>th</sup> Respondents' contended in their submissions that it is trite law that for a company to institute a suit or proceedings, a resolution would have to be made by its Board of Directors authorizing the institution of the suit, and that this is a mandatory requirement of the law. Various judicial decisions were cited in support of this position, including **Kenya Commercial Bank Limited vs Stagecoach Management Ltd, [2014] eKLR, Affordable Homes Africa Limited vs Ian Henderson & 2 Others, HCC 524 of 2004, Assia Pharmaceuticals vs Nairobi Veterinary Centre Ltd, HCC 391 of 2000, and the rule in Foss vs Harbottle [1843] 67 ER 189.**

29. Further, that in exceptions such as in the case of derivative suits, it was held in **Ghelani Metals Limited & Others vs Elesh Ghelani Natwarlal & Another [2017] e KLR** that one of the clear requirements for anyone to bring a derivative suit on behalf of a company is that the suit must be brought by a member of the Company. That John Gachanga Mungai is therefore attempting to bring what would in effect be a derivative suit in the name of the Applicant, but while lacking any locus, as he is neither an officer nor a member of the Applicant company.

30. Reliance was also placed on the decision in **Apex Finance International Limited & Another vs KACC [2012] eKLR**, that the juristic status of an applicant and the proper parties in an application for judicial review is an important question that goes to jurisdiction of the court. Also cited in this regard was the decision in **Wilmot Mwadilo & Others vs Eluid Timothy Mwamunga & Another , (2017) e KLR.**

31. According to the 2<sup>nd</sup> and 6<sup>th</sup> Respondents, the Applicant is being used to leverage on the interests of plaintiffs in previous suits involving the Directors of the Applicant company, namely Nairobi HCCC 13 of 2018 as well as Nyahururu HCCC 1 of 2018. In addition, that the present application does not challenge the procedural fairness of the process undertaken by the 1<sup>st</sup> Respondent, but challenges the substantive decision issued by the Registrar on 20<sup>th</sup> June 2018 declining to register the persons purporting to have been elected Directors of the Company. Therefore, that the judicial review proceedings are the wrong forum for such a challenge.

32. Lastly, on the issue of costs, the 2<sup>nd</sup> to 6<sup>th</sup> Respondents urged the court to find that since John Gachanga Mungai filed the suit without authority, he should personally bear the costs of the application, and cited the decision in **Wilmot Mwadilo & Others vs Eluid Timothy Mwamunga & Another (supra)** in this regard.

33. I have considered the arguments made by the parties on the issue of leave, as well as the criteria for granting leave which is multifarious. The relevant factors to be considered in the grant of leave can be summarized as the capacity and interests of the applicant, the nature of the applicant's claim, the merit or otherwise of the applicant's claim, and the propriety of judicial review proceedings to resolve the claim. In the present application, as regards the first factor, it is evident that the directorship of the Applicant is disputed, and there is on-going litigation on the same. It has therefore not been established that the Applicant has the legal capacity to bring the instant judicial review proceedings, and the dispute as to its *locus* and capacity needs to be resolved first.

34. The nature of an applicant's claim is also relevant to the issue of leave, as there are certain decisions and actions that many not be amenable to judicial review, particularly arising from the requirement the decision or actions should emanate from the exercise of a public function. In the present application the dispute between the Applicant and 2<sup>nd</sup> to 6<sup>th</sup> Respondents emanates from the statutory functions of the 1<sup>st</sup> Respondent under the Companies Act, and is therefore one that would ordinarily fall under the jurisdiction of this Court as granted by Article 165(3) of the Constitution.

35. However, this fact notwithstanding, this Court notes that the subject matter of the impugned decision by the 1<sup>st</sup> Respondent is also the subject of other court cases that are on-going. The deponent of the Applicant's verifying affidavit, as its alleged company Secretary, ought to have known about the on-going litigation, and it is instructive in this regard that he did not deny knowledge of or dispute the existence of some of the cited cases, and that there also non-disclosure of the said litigation in his initial pleadings. There is thus the risk of this Court being *sub judice* and issuing contradictory orders to those issued by Courts of concurrent jurisdiction. To this extent, this application is also an abuse of the process of Court

36. This brings into play the last factor canvassed by the parties as regards whether this Court is the proper forum to hear the Applicant's claim. The grounds raised by the Applicant are disputed by the Respondents, and will require the adducing of evidence and resolution of the dispute as regards the bona fide directors of the Applicant. This is not a matter that is amenable to judicial review for two reasons.

37. Firstly, it is notable that the exercise of supervisory jurisdiction and grounds of judicial review pursuant to which this supervision is conducted, are premised on the application and interpretation of the law and applicable legal principles on uncontested facts and evidence. It

is normally the case that the body whose decision is under challenge is the primary fact finder and decision maker, and the judicial review Court role is limited to a review of the facts and decisions already made, and is not envisaged as the initiator of the said facts or decisions.

38. Secondly, there are alternative fora that are more appropriate to resolve the factual disputes raised in this application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review.

39. In the premises, I find that the Applicant's Chamber Summons Chamber Summons application dated 31<sup>st</sup> July 2018 is not merited, and is hereby dismissed with costs to the Respondents.

40. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY 2019**

**P. NYAMWEYA**

**JUDGE**