



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 25 OF 2017

(FORMERLY ELC 97 OF 2017)

NYANDARUA PROGRESSIVE AGENCIES.....PLAINTIFF/APPLICANT

-VERSUS-

FRANCIS WAINAINA MUGO

CHARLES MOMO MAINA

PETER MACHARIA NJOROGE .

MICHAEL NJORE THIONG'O

JOHN KAMAU KUBAI

STANLEY KABACHIADEFENDANTS/ RESPONDENTS

DAVID MANYARA KARANJA

LAWRENCE MUNGAI NG'ETHE

DANIEL KIMANI KIBE

REGISTRAR OF COMPANIES

AND

JANE WANJIRU KAMAU &

OTHERS.....INTERESTED PARTIES/RESPONDENTS

RULING

Background to application dated 13th July 2018 by the plaintiff

1. On the 15th February 2018, the court (Korir, J) directed that the plaintiff company hold an Annual General Meeting(A.G.M) for purposes of election of directors within 45 days, and to be presided by the Nakuru County Commissioner. The meeting was held on the 13th April 2018 at Arutani Primary School and directors of the company were elected.

2. At the same time, the court directed by an order that no subdivision sale or dealing in the suit properties should be undertaken pending determination of the suit or further orders of the court.

I have confirmed that the Nakuru County Commissioner filed a report on the meeting held on dated 13th April 2018 on the 3rd July 2018, where company officials were elected.

3. Following thereafter, on the 22nd May 2018, some persons describing themselves as interested parties/shareholders of the plaintiff company by their advocates Mirugi Kariuki and Company Advocates approached the court by Notice of Motion seeking *inter alia* to be enjoined in the suit as they are registered members and shareholders of the plaintiff company.

4. They further sought an order to stay and suspend the resolutions passed in the meeting held on the 13th April 2018 where Directors and other officials were elected by restraining them from taking over office, transacting or dealing with the company properties pending hearing of their application. They further urged that a fresh meeting be held with their participation, to be presided by the Nakuru County Commissioner.

5. Grounds for their application were stated on the face of their application in which they fully supported orders of the court given on the 8th March 2018 (Hon. Korir J) due to the numerous management wrangles between the parties. They contented that as shareholders they were left out of the register of members and therefore did not participate in the election of the officials among other reasons.

6. The application was served for interpartes hearing by order of the court on the 18th June 2018 in the presence of all counsel.

In particular, Mr. Waweru Advocate appeared for the plaintiff company. He was granted seven(7) days to file responses to the application and a hearing date taken for the 12th July 2018.

7. On the hearing date, 12th July 2018, the respondent had not filed any responses to the 22nd May 2018 application.

8. The 10th Defendant, the Registrar of Companies by its advocate Mr. Kirui supported the interested parties application.

The Companies Advocate Mr. Waweru advocate or any representative from his law firm, or any other advocate failed to attend court, and no reason was advanced as to why the plaintiffs legal representatives were not in court.

9. There being no opposition to the prayers sought by the applicants, the intended interested parties, and being satisfied that indeed that the parties had interest in the affairs of the company as shareholders, I proceeded to allow their application as unopposed. They were thus enjoined in the case and proceedings. To preserve their interests in the company, I allowed the application for injunction to allow a fresh A.G.M to be held and with their participation elect their officials. That was on the 12th July 2018.

10. **The Application dated 13th July 2018**

Soon after the orders above, on the 13th July 2018, the plaintiff brought the present application seeking

(1) Spent

(2) That an order do issue to set aside and/or review orders issued on the 12th July 2018.

The application is based on provisions of **Order 45 of Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act.**

11. The main ground advanced by the applicant is that failure by the Advocate to attend court is that Mr. Waweru Advocate had instructed another Advocate one Peter Chege who came to court late, or was sitting in a different court when the application was called out heard and orders granted in his absence. An affidavit by the said Advocate Peter Chege was filed to explain the alleged circumstances.

The application was strenuously opposed.

The interested parties filed their replying affidavit on the 26th July 2018.

12. I have considered the affidavit in support and in opposition to the application, as well as Advocate's rival submissions before me.

The applicants submission was that the advocate he instructed, by mistake went to a different court and that such mistake ought not be visited upon the client. I have stated that the applicant invoked provisions of **Order 45 of the Civil Procedure Rules** that deal with **Review of court orders, rulings and judgments**. The respondents urged that no new or important matter of fact were disclosed by the applicant to warrant a review order to set aside the 12th July 2018 orders.

13. It was further urged that even if the advocate had attended court, no grounds of opposition or a replying affidavit had been filed upon which he would have had audience upon, despite the court having granted the applicant time to file, hence nothing would have changed as he would not have had audience on the application – **Re Estate of Benson Muriu Kamonde (deceased) (2008) e KLR.**

14. In the said case, the court held that:

“----attendance of Counsel for the applicant and/or the applicant on that occasion would not have made any difference to the fate of the application as they had neither filed grounds of opposition or replying affidavit to the application. The court having looked at the application which it deemed as unopposed in the absence of any grounds of opposition or replying affidavit as well as the record and the law found favour with the application and granted it.”

15. **Order 45 Rule 1 of the Civil Procedure Rules** presupposes that the applicant must have **discovered new and important matter or evidence which after exercise of due diligence was not within its knowledge** and could not be produced **at the time of hearing or a mistake on the face of the record.**

16. Looking at the grounds stated in the application, it is difficult to find any of the above, and none was demonstrated.

What was new, and not within the applicant's knowledge?

Did the advocate exercise any measure of due diligence by checking the day's causelist if he indeed attended court?

Had the advocate bothered to look at the day's causelist, he would not have spoken of a mistake. Due diligence by an advocate involves attending court at the right courtroom after confirming from the daily causelist, and doing so at the appointed time – See **National Bank of Kenya Ltd Case – vs- Ndungu Njau – Appeal No. 211 of 1996.**

17. Even at time of arguing this application, the applicant did not urge the court on why no replying affidavit or grounds of opposition had been filed in opposition to the application despite extension of time by the court to the applicant to file his responses. I am not persuaded that any good reason or at all was adduced to warrant the court to exercise its discretion in the applicant's favour -

Zacharia Somi Ng'ang'a -vs- KCB & 3 Others (2008) e KLR.

18. The plaintiff's suit may have raised serious and weighty issues. So does the defendants and the interested parties interest in the case. These diverse interests are well captured in the various pleadings. Looking at the order sought to be set aside that enjoined the interested parties and shareholders, in their hundreds, in the suit, it is not clear why it should be set aside – as no reasons or at all were adduced. A meeting of shareholders was called and elections of directors held without their participation.

19. If the applicant had a problem with the interested parties being added as parties to the suit and be allowed to exercise their democratic election of the company officials, they would have very readily opposed the application. It is that the interested parties are not shareholders? If so, why would it have been so hard to file objection to their enjoinder?

Is the applicant not the custodian of all the company records?

I have not seen any error on the face of the orders, and none were pointed out to me. It is not enough to state.

20. By reason of the foregoing I find that the application has not passed the test for the grant of an order of Review – **National Bank of Kenya Ltd -vs- Ndungu Njau – Appeal No. 211 of 1996.** In its totality the applicant has not made out a case or met the threshold for the grant of an order for review or setting aside this court's orders dated the 12th July 2018.

It is dismissed with costs.

21. By order of the court **dated the 15th February 2018**, the applicant was directed to hold an Annual General meeting for members to elect their officials. Parties agreed on the manner of the conduct of the election. This is not in contention. Being aware that there is an order restraining the current directors from dealing or conducting the affairs of the company, and being aware also that the company ought to operate by and through its elected officials in an Annual General Meeting and for purposes of progressing the affairs of the company, I find it my duty in line with the court's orders of 15th February 2018 (Korir J) and pursuant to provisions of **Section 280(2) of the Companies Act No. 17 of 2015, to order that a General Annual Meeting be called and to be presided by the Nakuru County Commissioner (as earlier agreed by all parties) and whose primary agenda will be the election of the company directors, within 45 days of today's ruling.**

22. For avoidance of doubt the AGM shall be held at the **Arutani Primary School** (earlier on agreed upon) **with participation of the interested parties/shareholders enjoined to these proceedings by order of this court on the 12th July 2018.**

23. Upon the election of the company officials and directors, the Nakuru County Commissioner shall compile and file a report on the exercise within 15 days thereafter.

24. **Mention** for compliance with the above orders on the **29th November 2018.**

Orders accordingly.

Dated, signed and delivered this 4th Day of October 2018.

J.N. MULWA

JUDGE