



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 11 OF 2015

DAVID CRISPO CHIGITI.....1ST APPLICANT

DAVID MURIUKI MIGWI.....2ND APPLICANT

STEPHEN KABUI.....3RD APPLICANT

VERSUS

REGISTRAR OF COMPANIES.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

GEORGE MAINA KABUI.....3RD RESPONDENT

KANGARA MUTUGI KAMAU.....4TH RESPONDENT

PERMINUS MWANGI NJUKI.....5TH RESPONDENT

MARY MUGWERU WAKINI.....6TH RESPONDENT

EMMANUEL GICHIRA NJAMUNO.....7TH RESPONDENT

RULING

1. **DAVID CRISPO CHIGITI, DAVID MURIUKI MIGWI and STEPHEN KABUI** (hereinafter to be referred to as applicants) are the applicants herein and have vide Chamber Summons dated 30th October, 2015 brought under **Order 53 Rule 1(3)** sought the following orders:
 - i. ***That the application be certified urgent and heard in the first instance in the absence of service.***
 - ii. ***That the applicants be granted leave to apply for judicial review order of certiorari to quash the 1st respondent's decision to register the 1st, 2nd, 3rd, 4th and 5th interested parties as Directors of Kerugoya Service Station Ltd.***
 - iii. ***That the leave so granted does operate as a stay of the decision to register the named interested parties as directors of Kerugoya Service Station Ltd pending the hearing and determination of Kerugoya High Court Civil Case No. 13 of 2014.***
 - iv. ***Costs of the application.***
2. The application is premised on the following grounds namely:

- a. *That the impugned decision is contrary to the principles of natural justice and contravenes the judicial principle of sub judice.*
 - b. *That the said decision ultra vires and a disregard to a consensus between the parties on 19th August, 2015 to forward a list of nominees to facilitate updating of the shareholders register.*
 - c. *That the decision of the 1st respondent to disregard the list of nominees from the applicants is unfair and in breach of natural justice.*
3. The applicants have through David Crispo Chigiti sworn an affidavit sworn on 30th October, 2015 deponing that there is a pending suit between the applicants and the interested parties pending in this Court in Kerugoya **High Court Civil Case No. 13 of 2014** dealing with the issue of meetings of the company and that it was wrong for the 1st Respondent to convene a meeting of the company despite objections raised by the applicants.
 4. The applicants have further contended that they forwarded a list of 3 nominees as directed to the 1st respondent but that despite that the 1st respondent while accepting the list sent by the interested parties herein, unfairly disregarded the applicants' nominees making them to miss the company's Annual General Meeting held on 19th August, 2015. They have nonetheless termed the meeting illegal.
 5. They have also faulted the 1st respondent's action saying the purpose for the meeting was subjudice as issues were pending in **Kerugoya High Court Civil Case No. 13 of 2014**.
 6. It is contended that the decision of the 1st respondent was against fair administration of justice as enshrined under **Article 47** of the **Constitution**.
 7. The respondents and the interested parties were accorded a chance to be heard by this Court pursuant to the provisions of **Order 53 Rule 1(4) Civil Procedure Rules** as I found that issues raised also touched on some issues that had been raised in **High Court Civil Case No. 13 of 2014** before this court.
 8. The 1st respondent through the affidavit of **COLLETA MAWEU** sworn on 6th November, 2015 opposed the application. The 1st respondent have justified her action to intervene and call for an Annual General Meeting as she depones that the last meeting the company called was in 2006 due to wrangles of the directors and shareholders. She deponed that failure to call for annual meetings was not only unlawful but had alienated the shareholders from the affairs of the company.
 9. The first respondent has contended that due process was followed in calling for the meeting and that the applicants opted on their own volition to skip the meeting. She further justified the action of streamlining the operations of the company by registering the interested parties as directors saying the 1st respondent acted in good faith, within the law and in the interest of the majority shareholders.
 10. The 1st respondent faulted the application now before court for being frivolous and improper opining that the same would only at best, serve to clog the judicial system.
 11. The interested party on their part through the affidavit of **Emmanuel Gichira Njamuno** sworn on 9th November, 2015 also opposed the application. They contended that the ruling of this Court in Kerugoya **High Court Civil Case No. 13 of 2014** did not bar meetings of the company. They have deposed that an Annual General Meeting was regularly held on 27th February, 2015 and that the applicants opted not to attend despite notice which is exhibited as E.G.N.1. The interested parties have contested the allegations that the 1st respondent acted improperly deposing that the 1st respondent acted within the law and that on their part they acted regularly pursuant to resolutions made during Annual General Meeting held on 16th October, 2015. They have added that the meeting recommended election of new 5 directors who were forwarded to 1st respondent for registration as procedure dictated. They have therefore defended election of new directors saying that the same was done legally and after active consultation with all the stakeholders of the company. In their view there is no basis to challenge the decision of the 1st respondent in effecting the changes.
 12. This Court has considered the application and the grounds upon which it has been made. I have

also considered the opposition by the respondents and the interested parties. The applicants are seeking leave to apply for orders of *certiorari* to quash the decision of the 1st respondent. *Certiorari* is a prerogative remedy usually sought to quash *inter alia* administrative decisions made *inter alia* by statutory bodies in exercise of their statutory functions. The law provides that leave must be sought first before an application to challenge such decisions is made and the rules under **Order 53 rule 2 Civil Procedure Rules** provide that such applications must be made within 6 months from the date of the decision sought to be challenged.

13. The decision that the applicants are seeking to challenge in their application is unclear. This is because the respondent made a decision vide a letter dated 1st September, 2015 directing the applicant's counsel Mr. Duncan Okubasu and the interested parties herein to participate in compiling a list of shareholders in readiness of an Annual General Meeting. It is apparent that in view of the failure by the applicants to forward their nominees on time the Registrar nominated Emmanuel Gichira, George Maina and Kangara Mutugi as committee members to prepare the updated list of all the shareholders. This is clear from the exhibit "CM3" in the affidavit of Colleta Maweu and exhibit "DC7" of the affidavit of David Crispo Chigiti. The applicants have also exhibited a letter dated 22nd October, 2015 that had been from the 1st respondent addressed to their counsel confirming that the new directors had been registered pursuant to annual returns dated 16th October, 2015 received by the 1st respondent. The applicants have not indicated which of the two above decisions aggrieved them. It is only indicated on the body of the application that the decision to register the interested parties is the subject of this application but the indication is not specific.
14. The applicants added further confusion in their application through their annexure marked exhibit 'DC6' which is a letter dated 8th January, 2014 forwarding a list of names of David Chigiti, David Migwi and Stephen Kabui as representatives to the Registrar (or the 1st respondent). This is a letter which the applicants claim was ignored and/or disregarded. The letter appeared to have been received by the 1st respondent on 24th August, 2015. Again it is not clear whether the letter is wrongly dated January 8 2014. It is difficult to tell since no explanation was given for the anomaly and one would have expected that the letter dated 2nd September, 2015 marked 'DC 8' would perhaps shed some light on the error if the letter was erroneously dated and clarify the position. Be that as it may, the letter dated 22nd October, 2015 exhibited as 'DC 9' does appear to be a response to a letter by the applicants' counsel letter dated 16th October, 2015. The letter is a notification of change of directors as put by the applicants in their affidavit. Again they have not candidly stated that they are seeking to challenge that notification.
15. This Court finds that there is a fatal omission in the application in that no specific decision has been listed for challenge. They have in effect made it hard for this Court to determine with clarity whether they have an arguable case which is a necessity in granting leave. In the case of **MEIXNER & ANOR -VS- AG [2005] 2KLR 189**, the Court of Appeal held that leave of court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter the frivolous applications and that such leave is a matter of judicial discretion. Furthermore in the case of **M'RUKI KARIUKI -VS- AG CIVIL APPEAL NO. 70 OF 1991 [1990-1994] E.A. 156 & [1992] KLR 8** the court gave a guide on the exercise of that discretion by the following observations:

"If the applicant fails to show when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty the court would be in error if it granted leave."

16. This Court has further considered the decision in the case of **EXPARTE KONDO & 57 OTHERS MOMBASA M.C.A. NO. 384 of 1996** which was quoted with approval by hon. Justice G. O. Odunga in **RE JOHN WACIRA WAMBUGU -VS- DISCIPLINARY TRIBUNAL, LSK NRB H.C. M.A. NO. 161 of 2015** in making the following observation which I fully agree with;

"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 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 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 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 applicants.....”

17. It is clear from the foregoing authorities that a grant of leave to commence judicial review proceedings is not a mere formality. The court does not grant such leave as a matter of course even if the application is made *ex parte*, an applicant is therefore under an obligation to demonstrate to the court that he/she has a *prima facie* or an arguable case for grant of leave without going into the depth of the application.
18. I have considered the grounds upon which leave is sought in this application and I must say that I am not convinced that they have established *prima facie* case. The applicants have contended that the decision which they seek to challenge contravenes the principles of subjudice and have pointed out a ruling which this court made in **Kerugoya H.C.C.C. No. 13 of 2014** claiming that I ruled that the company should not hold meetings. This is misleading because the converse is what I found. I encouraged the company with the assistance of the 1st respondent to be holding regular meetings as per their Articles of Association in order to trash out some of the differences that were unnecessarily being brought to court. The ruling I made is very clear on the meetings and my mind is still clear on this as I made the decision less than a year ago.
19. I am further not convinced that a decision of an administrative or statutory body can be challenged for being *ultra vires* a consensus reached by parties. A decision can only be challenged if it is made outside the ambits of the law or regulations of an administrative or statutory body. A consensus unless it is anchored on the law or regulations is a different proposition altogether.
20. On the aspect of infringement of their constitutional right under **Article 47** of the **Constitution**, the applicants have also not demonstrated or even suggested in the body of their affidavit how the decision of the respondent infringed on their rights. It is not enough to just say that there was a constitutional infringement without showing specific actions that clearly infringed on the specific constitutional right. In the absence of the same an arguable case is lacking in this application.
21. I am further not convinced that the operations of a company should be stalled because there is a pending suit unless there is a justifiable reason. This Court takes judicial notice of the fact that **Kerugoya H.C.C.C. No. 13 of 2014** is pending for hearing and determination but this Court has not ordered in that case that the internal operations of the company which include meetings should be stayed. The actions of the respondent in calling for an Annual General Meeting upon prompting of the interested parties did not infringe any rules on subjudice in any way.
22. The long and short of this is that this application cannot be sustained for want of specificity. The applicants as I have found have not stated in their application that they are seeking to challenge a specific decision by the 1st respondent made on a specific date. The application is too general and broad to be considered and tested on the aforesaid standard to determine whether it meets the threshold. Under such circumstances leave cannot be granted.
23. In the premises, I find that the application dated 30th October, 2015 lacks merit. The same is dismissed with costs.

Dated and delivered at Kerugoya this 10th day of March, 2016.

R. K. LIMO

JUDGE

10.3.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Okubasu for the applicant present

No appearance for the Respondent.

COURT: Ruling signed, dated and delivered in the open court in the presence of Okubasu for the applicant and in the absence of the respondents.

R. K. LIMO

JUDGE

10.3.2016