



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 395 OF 2013
REPUBLIC.....APPLICANT
VERSUS
REGISTRAR OF COMPANIES..... RESPONDENT
AND
OCEANIAN VENTURES LIMITED.....1st INTERESTED PARTY
EAST AFRICAN PORTLAND
CEMENT CO LTD.....2ND INTERESTED PARTY
SYNOHYDRO TIANJIN
ENGINEERING LTD.....3RD INTERESTED PARTY

Ex-parte

THOMAS OCHIENG ALLOYCE

JUDGEMENT

1. On 4th November, 2013 this Court granted leave to the Applicant Thomas Ochieng Alloyce to commence judicial review proceedings and apply for orders of certiorari and mandamus as set out in the application dated 1st November, 2013. The Applicant's prayer that the leave granted do operate as stay of the impugned decision was not allowed.
2. On 6th December, 2013, the Applicant filed the notice of motion dated the same date in which he seeks orders as follows:

“1. THAT this Honourable court be pleased to issue an order of Certiorari to bring before this court and quash the decision of the Respondent dated 3rd May, 2013 refusing to recognise the Applicant as a Director of the 1st Interested Party herein by declining to amend its records to reflect the above change in the management of the 1st Interested Party.

2. THAT this Honourable court be pleased to issue an order of Mandamus compelling the Respondent herein to amend its records to reflect that the Applicant herein is a Director of the 1st Interested Party as per the notification of the change of Directors and Secretaries filed with the Respondent on the 21st February, 2013.

3. THAT the cost of this Application be provided for.”

3. The Respondent is the Registrar of Companies. Oceanian Ventures Limited is the 1st Interested Party. East Africa Portland Cement Company is the 2nd Interested Party whereas Sinohydro Tianjin Engineering Ltd is the 3rd Interested Party.
4. The Applicant's case is that on 5th December, 2012 he was appointed a director of the 1st Interested Party on the understanding that the said appointment would take effect from 31st December, 2012. The appointment was approved by the Board of the 1st Interested Party and all the requisite documents were prepared and lodged with the Respondent on 21st February, 2013 so that the Respondent could amend its records to reflect the changes in the management structure of the 1st Interested Party.
5. According to the Applicant, his appointment as a director of the 1st Interested Party was to enable the 1st Interested Party leverage on the skills of the Applicant to secure contract No. EAPC/063/2012 with the 2nd Interested Party for the outsourcing of Bisel Quarry Mining Operation. It is the Applicant's case that he thereafter worked tirelessly and secured the contract with the 2nd Interested Party.
6. After the contract was secured, it became apparent that the 1st Interested Party had no capacity to perform the contract and the Applicant again successfully negotiated to have the contract sub-contracted to the 3rd Interested Party.
7. It is the Applicant's case that once the transactions were completed, the Respondent on 3rd May, 2013 wrote to the Applicant purporting to reject the Applicant's appointment as a director of the 1st Interested Party. The Applicant asserts that the letter of 3rd May, 2013 was only meant to ensure that he did not benefit from the proceeds of the said contract.
8. The Applicant asserts that the Respondent's action breached his legitimate expectation to fair administrative action as provided by Article 47 of the Constitution; that the Respondent was influenced by external forces and irrelevant considerations in arriving at impugned decision; that the Respondent's decision is unreasonable in so far as it purports to nullify the Applicant's appointment by the Board of the 1st Interested Party; that the decision of the Respondent is ultra vires; and that the Respondent's decision was made in defiance of the rules of natural justice.
9. The Respondent opposed the application through a replying affidavit sworn on 8th April, 2014 by Colleta Maweu an Assistant Registrar of Companies. The Respondent contends that it is a regulator and/or custodian of the records of all companies and is responsible for the implementation of the Companies Act, Cap 486. It is the Respondent's case that the 1st Interested Party is registered as a company under Registration No. C167333. Ms Maweu avers that it is the duty of the directors of a company to notify the Respondent of any change of particulars of the company including any changes in shareholding and directorship so as to ensure that the records held at the registry are accurate and up to date.
10. She deposes that on 22nd January, 2013 she received a special resolution, a notification of change of directors dated 31st December, 2012, an annual return for the year 2012, minutes of a board of directors meeting held on 31st December, 2012, various letters of resignation, affidavits and share transfer forms whose import was that Thomas Alloys Ochieng and Tetralink Taylor & Associates had been appointed as directors and shareholders of the 1st Interested Party while George Mathenge had resigned as a director.
11. Before effecting the changes the Respondent received a letter dated 17th April, 2013 from the original directors terming the documents filed on 22nd January, 2013 fraudulent and objecting to any changes in the directorship or shareholding of the company. The Applicant was informed of this development through a letter dated 2nd May, 2013 and told that no changes would be effected

- until there was consensus between the original directors and the Applicant over the changes. Further, that the Respondent received a letter dated 3rd July, 2013 indicating that the issue of the changes had been resolved. The Respondent expunged the documents of 22nd January, 2013 and informed the Applicant accordingly.
12. It is Maweu's assertion that the Respondent does not have jurisdiction to interfere with the day to day running of private companies or the decisions made by the companies and changes of the records cannot be effected without the sanctioning of the directors. Further, that the Respondent was not privy to the negotiations between the Applicant and the interested parties and cannot be said to have colluded with anybody or to have written the letter dated 2nd May, 2013 in bad faith. Further, that the Respondent gave an opportunity to the parties to resolve the dispute.
 13. Ms Maweu averred that the Respondent acted within the law in rejecting the changes which had been disputed by the directors on record. The Respondent asserts that this is not a judicial review matter as the same attacks the merits of the decision. In her view, this is a private dispute between the Applicant and the 1st Interested Party.
 14. The 1st Interested Party opposed the application through a replying affidavit sworn by its director/secretary Patrick Macharia Nderitu on 26th November, 2013. He averred that the Applicant has never been a director or a shareholder of the 1st Interested Party and at no time had the company ever discussed or considered his directorship or membership as a shareholder. He deposed that the documents exhibited in Court by the Applicant were forgeries.
 15. It is the 1st Interested Party's case that any negotiations entered into between the Applicant, the 2nd Interested Party and the 3rd Interested Party were entered into in the Applicant's private capacity and not as a director of the 1st Interested Party. The 1st Interested Party's asserted that any money received by the Applicant from the 3rd Interested Party was never remitted to the 1st Interested Party and this demonstrates that the Applicant had no relationship with the 1st Interested Party. The 1st Interested Party submitted that the Respondent was under no obligation to register the Applicant as its director.
 16. The 2nd Interested Party opposed the application through grounds of opposition dated 11th December, 2013 and further grounds of opposition dated 12th February, 2014. What stands out is the assertion that the notice of motion dated 6th December, 2013 should be struck out as it was filed out of time which is in breach of Order 53 Rule 3 of the Civil Procedure Rules, 2010 (CPR) which requires the notice of motion to be filed within 21 days from the date leave is granted to commence judicial review proceedings.
 17. The 2nd Interested Party also submitted that leave was not granted to commence these proceedings. I will, however, state at this point that this assertion is misplaced as leave to commence judicial review proceedings was granted on 4th November, 2013.
 18. The 3rd Interested Party opposed the application through grounds of opposition dated 26th November, 2013. It is the 3rd Interested Party's case that the Applicant in his pleadings did not establish any nexus between it and the proceedings. For that reason it asserts that the application is incompetent, bad in law, frivolous, vexatious and an abuse of the court process.
 19. There are two issues to be addressed in this judgment. The first issue is whether the Respondent's decision conveyed through the letter dated 2nd May, 2013 is amenable to judicial review. Although the Applicant refers to a decision conveyed on 3rd May, 2013, it is agreed by all the parties that the decision is contained in a letter dated 2nd May, 2013. Through that letter, the Respondent communicated to the Applicant as follows:

“RE: CHANGE OF PARTICULARS OCEANIAN VENTURES LIMITED”

We refer to the above matter and the changes of particulars on directorship and shareholding of the above referenced company filed on 22nd January 2013.

On 17th April 2013 we received an objection from the original directors of the company to the effect that they did not sanction any changes in the company with

regard to directorship and or shareholding.

In light of the foregoing we are unable to effect any changes until there is consensus between you and the original directors and shareholders regarding the changes. In this regard this office is willing to facilitate a reconciliatory meeting in order to reach an amicable solution.

20. Through the said letter, the Applicant is informed that the changes requested through the Applicant's communication of 22nd January, 2013 would not be effected as there was an objection from the original directors of the company. The Respondent's communication cannot be termed illegal or irrational and cannot be said to be in breach of the rules of natural justice so as to attract judicial review orders. Any change of particulars of directorship or shareholding can only be done by the Respondent after confirming that the same is correct and genuine. Where there is a dispute, the Respondent needs to verify the information. No illegality, irrationality or breach of the rules of natural justice has been established in regard to the Respondent's decision of 2nd May, 2013 so that the same can attract judicial review orders.
21. The second question is whether there is a valid application before this Court. It is not disputed that leave to commence these proceedings was granted on 4th November, 2013. The substantive notice of motion dated 6th December, 2013 was filed in Court on the same date. Order 53 Rule 3(1) of the CPR provides that **"[w]hen leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court..."**
22. The Applicant did not file the substantive notice of motion within twenty one days. He also did not apply for extension of time to file the substantive notice of motion out of time. The leave granted to commence judicial review proceedings expired on 26th November, 2013 which was 21 days after 4th November, 2013. There is therefore no proper application before this Court. This means that all the parties and this Court have been engaged in a futile exercise.
23. In short, the Applicant's case collapses and the same is dismissed with costs to the Respondent and the interested parties.

Dated, signed and delivered at Nairobi this 13th day of May , 2015

W. KORIR,

JUDGE OF HIGH COURT