



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.16 OF 2013

JAMES NEWTON KARANJA 1ST PLAINTIFF/ APPLICANT

AYUB MUGO NJOROGE.....2ND PLAINTIFF/ APPLICANT

KAGO NDUATI.....3RD PLAINTIFF/ APPLICANT

VERSUS

DAVID MUTHIGU.....1ST DEFENDANT/ RESPONDENT

PETER NDUNGU KIMANI.....2ND DEFENDANT /RESPONDENT

ELIJAH MUNGAI MUTUAMBUKI.....3RD DEFENDANT /RESPONDENT

JOSEPH NGACA NGANGA.....4TH DEFENDANT /RESPONDENT

RULING

The application dated 06/02/2013 seeks that:-

(a) The respondents by themselves, servants and/or agents be restrained from purporting to hold or holding a general meeting for the Mai Mahiu Kijabe Longonot Co. Ltd. and/or holding elections on 07/02/2013 or on any other date pending hearing and determination of the suit.

(b) The respondents be restrained from purporting to act and or presenting themselves as directors and office bearers of the said company pending hearing and determination of the suit.

The background to this is that the named company had been deregistered on 13th October 1988 by the Registrar of Companies, but it was reinstated by orders of the court made in **Nrb HCC Misc. Appl. No.86 of 1989** and thereafter a gazette notice was published to that effect.

Since its reinstatement, no elections have been held, and the shareholders have not appointed any office bearers. However the respondents filed returns with the Registrar of Companies, indicating that they and others were the validly elected office bearers of the company. On that pretext, the respondents begun harassing people in Mai Mahiu areas, with threats of having their titles cancelled.

The respondents introduced a different register of members whom they alleged to have “vetted” -

the vetting involved payment of money. The Registrar of Companies declared the offices of the company vacant and declared an election but the respondents prevented the election being held by creating chaos after realizing that they would not be able to manipulate the results. The Registrar of Companies thus cancelled the meeting and advised the parties to go to court.

Thereafter the respondents issued notices for an Annual General Meeting (AGM) although the notice was only circulated to a few individuals and not announced on radio.

The intended meeting is contested as illegal and irregular as:-

- (a) The method of determining members who will participate and have voting rights has not been agreed upon.
- (b) The respondents are illegally in office as they have never been elected, and in any case the offices of directors having been declared vacant by the Registrar of Companies on 26/10/2012, then the respondents have no mandate to call a meeting.
- (c) The notice given was not proper.

The applicants are members of the company who own various parcels of land situate in Mai Mahiu area, having been shareholders of the company whose venture was land buying. The company subdivided land amongst its shareholders and subsequently issued titles to its members who enjoyed quiet use and possession until the respondents began interfering. Apart from calling for the AGM, the respondents are accused of having used the company's name to file a suit **HCCC No.1672 of 2001** (Milimani) seeking reversal of the sub-division and cancellation of titles. The applicants desire that before the AGM is held, an independent person conducts the vetting of the participants and supervise the convening of such meeting. Further, that elections ought to be the main agenda of the meeting, and the area security and administrative personnel be ordered to ensure compliance of the order.

In opposing the application, the respondents rely on the replying affidavit sworn by Peter Ndungu Kimani who describes himself as a director of Mai Mahiu Kijabe Longonot Co. Ltd. and contends that the 1st and 2nd applicants, along with others, fraudulently procured the Nakuru Land Registrar to open a register in respect of the Company in the year 1985, yet the land owned by the Company had its own register at Ardhi House in Nairobi. Consequently the Company's property was sub-divided into 3777 plots which were illegally transferred to various persons including the applicants. Since the company has never passed a resolution to cancel the title at Ardhi House, the suit HCC 1672 of 2001 was filed in Nairobi High Court seeking cancellation of the titles issued and the subdivisions. That suit is on-going.

The respondents maintain that the company has had several Annual General Meetings, the last one having been held on 19th November 2011 where retired directors were replaced and other office bearers elected - copies of minutes of the AGM are annexed. The company also filed its annual returns, the last ones being for the year 20 11.

On 1st September 2012, the directors of the company were summoned to Sheria House by the Assistant Registrar of Companies because the applicants had complained that the directors had refused to hold AGM and to involve members in meetings. The Registrar after hearing them held that the applicants recognised the respondents as the directors. It is contended that the issue of membership is easily verified from the members list filed with the Registrar of Companies and the Company's clerks cross checked by screening names of members against their national identity cards, the company register and individual share certificates. It is further explained that persons who had received share certificates from their parents or those who had bought shares from a member and transferred them were allowed to attend the meeting.

It was then that the applicants demanded that persons without share certificates be allowed to attend and vote, even though they were not registered members.

The respondents point out that the Company's Articles of Association are clear that only members issued with share certificates are allowed to attend company meetings and vote. However the Registrar of Companies overruled that and allowed anyone who had a title document to vote. The members pleaded with the Registrar that the company had a rotational retiring signature of three directors every year from 1997, but this was ignored. As a result, no elections were conducted and no annual returns were filed.

Further, that under **Clause 100** of the **Articles of Association**, the directors are to hold office until the conclusion of the next AGM, and under **Article 116**, in the event that the directors are not chosen at the subsequent AGM, the retiring directors are declared to still be in office and **Article 117** gives the company power to determine in what rotation the directors would hold office.

The respondents therefore argue that they are validly in office as directors and have the authority to call for the AGM. They fault the Registrar for ignoring the provisions of the company's Articles. They however acknowledge that whereas the members are only 2,576, the title holders are 15,000 and that it is necessary to hold the AGM because as a going concern, the company cannot function without holding meetings so as to run its affairs, otherwise the company would have to be dissolved.

The court directed that the application be disposed of by way of written submissions but as of 27/05/2014, only the respondent's counsel had filed written submissions. The issue here is very simple - should the respondents be allowed to hold the AGM in their capacity as directors? Who should determine the agenda? I think with regard to the issue of surrender of title, the resulting subdivisions and the transfers in respect of the 3777 portions, my view is that it would be premature to determine or even comment on this as there is already a suit No.1672 of 2001 (Milimani) pending, relating to this issue.

Although the applicants claim that no elections had been held since 1989, the respondents annexed minutes and resolutions of the latest AGM held on 19/11/2011, which show that the respondents were elected to the office. The applicants do not claim to have been unaware of the meeting nor did they file suit in court contesting the said elections.

Apart from that, following complaints by the applicants, the Registrar of Companies presided over this dispute and in her ruling dated 18th September 2012, she made orders that:-

"The Directors (the respondents herein) shall call for an Annual General Meeting of the Company by issuing a 21 days' notice to be held on 26th October 2012."

The meeting was to address the issues and elect the directors of the company in which the Registrar would attend to vet the members.

I have no hesitation in concurring with the respondent's counsel that the meeting held on 26/10/2012 essentially recognised that the respondents were the directors of the company stated as much in her ruling. The last AGM held by the company was on 19th November 2011 and the officer bearers are the respondents.

Furthermore, by virtue **Articles of Association** of the **Company, Article 100**, gives the respondents authority to hold office until the elections are held as it provides:-

Clause 100 ".....Any appointed Director shall hold office only until the conclusion of the next following Annual General Meeting of the Company....."

Clause 116 provides that in event of a vacancy falling by virtue of a director's retirement, if the same is not filled up by electing a person, then the retiring director shall be deemed to have been re-elected.

I am therefore clear in my mind that the last AGM held on 19th November 2011 saw the respondents assume office as Directors. The next AGM which should have been held in 2012

was derailed due to the complaints raised by applicants, so since no AGM was held, the respondents remained in office. However recognising that the company needed to hold elections, they called for a meeting in 2013 and that is when the applicants moved to court to stop the meeting. I find no basis whatsoever to bar the respondents from calling for the company's AGM and I decline to issue the orders sought. The application is dismissed with costs to be borne by the applicants.

The respondents are at liberty to give notices for the next AGM- within a reasonable period, and publish the notice by sending flyers and putting them in open public places, as well as making an announcement over the radio. Since they have the Articles of Association that ought to guide them on who will be allowed to attend and vote. The Registrar of Companies is directed to send a representative to attend the meeting and help in vetting the members and supervise the elections. The County Commissioner Nakuru and the OCS Mai Mahiu police station shall provide security.

Delivered and dated this 11th day of July, 2014 at Nakuru.

H.A. OMONDI

JUDGE