REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 277 OF 2010

REPUBLIC .....APPLICANT

VERSUS

REGISTRAR OF COMPANIES.....RESPONDENT

ONESMUS K MWATI.....INTERESTED PARTY

EX-PARTE

UKAMBA AGRICULTURAL INSTITUTE (UKAI),

STEPHEN NDAMBUKI MULI,

ERIC MUTINDA MUTISYA,

MARY NDINDA.

RULING

The Republic as is the norm is the Applicant in these judicial review proceedings and the ex-parte applicants are Ukamba Agricultural Institute (UKAI), Stephen Ndambuki Muli, Eric Mutinda Mutisya and Mary Ndinda Kimwele. The Respondent is the Registrar of Companies ("the Registrar") whereas Onesmus K Mwati is an Interested Party.

On 20th August, 2010 the ex-parte applicants were granted leave to apply for an order of certiorari to remove into the High Court for quashing the decision of the Registrar as conveyed in the letter dated 6th July, 2010 revoking the list of directors of UKAI. The ex-parte applicants were also granted leave to apply for an order of prohibition prohibiting the Registrar from calling an annual general meeting for the purpose of electing directors of UKAI. The leave was to operate as stay.

Subsequently, the ex-parte applicants filed the substantive notice of motion on 9th September, 2010. Contrary to the assertion of Mr. Anampo for the Interested Party, the notice of motion was therefore filed within the 21 days prescribed by **Order 53 Rule 3(1) of the Civil Procedure Rules (CPR).**

Through a notice of motion filed in Court on 3rd November, 2011, Onesmus K. Mwati a member of UKAI applied to join these proceedings together with Titus Muthini Nguna and Joseph Mbiti Kilonzi as interested parties. I do not seem to place a finger on any particular court order which allowed that

application. However, Onesmus K. Mwati has since then participated in these proceedings as an interested party. His participation cannot be faulted as he is likely to be directly affected by the outcome of these proceedings.

On 7th February, 2012, the matter was mentioned before Warsame, J (as he then was) and he directed that the matter be mentioned on 13th February, 2012 for recording of consent. On 7th February, 2012, Mr. Mutisya held brief for a Mr. Nzioka for the Interested Party and Ms Maingi appeared for the 1st ex-parte Applicant. The file was not placed before the Judge on 13th February, 2012 and the Registry listed the matter for mention on 23rd February, 2012.

On 23rd February, 2012 Mr. Mutisya appeared for the Interested Party and Mr. Nzioka was for the 1st ex-parte Applicant. Mr. Rading appeared for the Respondent. Consent was entered as follows:

1. **The company's elections be held within 21 days after advertising.**
2. **The costs of advertisement to be borne by the directors of the company.**
3. **Each party to bear own costs.**

That consent is now the subject of the notice of motion application dated 3rd April, 2012 brought under **Section 1A(1), 1B(1) and 3A of the Civil Procedure Act and Order 51 Rules 1 and 15 of the CPR.** In the application, the ex-parte applicants pray that the order of 23rd February, 2012 be vacated and/or set aside.

The application is supported by the grounds on its face and an affidavit sworn on 3rd April, 2012 by Eric Mutinda Mutisya (the 3rd ex-parte Applicant) who identifies himself as the Director/Secretary of UKAI. The ex-parte applicants' case is that the consent of 23rd February, 2012 was entered without notice to their advocate on record namely Adere and Company Advocates. They claim that on the date the consent was recorded, no mention notice had been served on their counsel.

The ex-parte applicants also argue that the consent recorded in Court breached the **Companies Act Cap 486** by stating that the elections would be held within 21 days although the Act provides that elections can only be held after notice of 21 days.

The application was opposed through affidavits sworn by Nyamai Wambua and Onesmus K Mwati on 11th April, 2012. Onesmus K Mwati avers that he is a member and a former director of UKAI. He averred that UKAI was represented in this matter by the firm of Njenga Mwangi, Wachira and Partners. He swore that when the consent was recorded on 23rd February, 2012 Mr. Nzioka was holding brief for Mr. Mwangi who was on record for UKAI. He also averred that the consent was not in breach of the Companies Act. Onesmus K Mwati pointed out that by the time the consent was recorded, elections had not been held since 2006.

On his part, Nyamai Wambua averred that he had on 13th January, 2012 together with other members of UKAI signed a letter instructing the firm of Njenga Mwangi, Wachira and Partners to represent UKAI. He also averred that he was aware that UKAI had previously been represented by Okeyo, Otieno and Company Advocates and not Adere and Company Advocates as alleged by the ex-parte applicants.

In a further affidavit sworn on 8th May, 2012, Onemus K Mwati averred that the application has been overtaken by events since a Special General Meeting was held on 20th April, 2012 in accordance with the court order issued on 23rd February, 2012. In support of this averment, he annexed a letter dated 25th April, 2012 addressed to the Registrar by the District Commissioner, Starehe District informing the Registrar that elections were held peacefully at Kariokor Social Hall on 20th April, 2012 and office bearers elected. He averred that the ex-parte applicants were intent on permanently paralyzing the operations of UKAI as they had not taken any step to prosecute the substantive notice of motion after obtaining the stay order.

The Registrar responded to the application through a replying affidavit sworn by Colleta Maweu on 16th August, 2013. The Registrar admits being a party to the consent in question but contends that this was done on the presumption that all the advocates in Court had proper instructions to appear for their respective clients and enter into the said consent. The Registrar leaves to the Court the issue as to whether the 1st ex-parte Applicant had proper representation on the material day.

By way of submissions filed by the parties, the Court was informed that a Memorandum of Appearance for the 1st ex-parte Applicant was filed by the firm of Njenga Mwangi, Wachira and Partners on 17th January, 2012. It was also brought to the attention of the Court that the firm of Njenga Mwangi, Wachira and Partners did indeed file a Notice of Change of Advocates on 19th April, 2012. I do not see this information in the affidavits sworn in regard to the application. The information has therefore not been placed before the Court in the accepted manner. However, the documents referred to forms part of the court record and the Court is entitled to consider them.

One of the grounds for setting aside a consent order is where the same is obtained by fraud. The key question to be answered in this case is whether the firm of Njenga Mwangi, Wachira and Partners was formally on record for the 1st ex-parte Applicant on 23rd February, 2012 when the consent was recorded.

A perusal of the file clearly shows that Adere & Company Advocates filed these judicial review proceedings on behalf of the four applicants. The only way to change an advocate on record is by filing a notice of change of advocates as per **Order 9 Rule 5 CPR** and serving the notice on every other party to the cause or matter and on the former advocate as required by **Rule 6** of the same Order.

A memorandum of appearance can only be filed by or on behalf of a defendant-**see Order 6 Rule 2 CPR.** The firm of Njenga Mwangi, Wachira and Partners could not have come on record for the 1st Applicant by way of a memorandum of appearance. The only conclusion is that at the time the consent order in question was entered, the advocate on record for the 1st ex-parte Applicant was Adere & Company Advocates.

Even without considering the legal capacity of the Interested Party and his team to appoint an advocate for the 1st ex-parte Applicant, and assuming that the firm of Njenga Mwangi, Wachira & Partners was properly on record for the 1st ex-parte Applicant on the date the consent was recorded, the consent would still not have stood the test of time for the simple reason that it was entered to the exclusion of the 2nd, 3rd and 4th ex-parte applicants who were parties to the proceedings.

The only conclusion is that the consent of 23rd February, 2012 was fraudulent. Any elections held on 20th April, 2012, if indeed any elections were held, were held contrary to the stay order granted by the Court on 20th August, 2010. A fraudulent consent order cannot be used to sanitize such elections.

Before I make my orders, I must state that I agree with the Interested Party that the substantive notice of motion ought to have been prosecuted by the ex-parte applicants on priority basis. Societies such as the 1st ex-parte Applicant are often formed with the aim of improving the welfare of members. The affairs of a society should be taken seriously by those elected to be in charge. Elections should be held regularly as required by the law. There is therefore need to dispose of this matter without undue delay.

I have already reached the conclusion that there is no proper consent and there is no need to address the other issues raised by the parties. The application dated 3rd April, 2012 succeeds. Costs will be in the cause.

Dated, signed and delivered at Nairobi this 16th day of July , 2014

W. KORIR,

JUDGE OF THE HIGH COURT