Gheewala v Nyaku Limited & 2 others; Registrar of Companies & 2 others (Interested Parties) (Miscellaneous Application E361 of 2023) [2024] KEHC 850 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 850 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E361 OF 2023

FG MUGAMBI, J

JANUARY 30, 2024

BETWEEN

SHIRKESH GHEEWALA ..... APPLICANT

AND

NYAKU LIMITED ..... 1ST RESPONDENT

ELESHKUMAR CHANDRAKANT GHEEWALA ..... 2ND RESPONDENT

PRAFULLA ELESHKUMAR GHEEWALA ..... 3RD RESPONDENT

AND

REGISTRAR OF COMPANIES ..... INTERESTED PARTY

MUKTA CHANDRAKANT GHEEWALA ..... INTERESTED PARTY

MAMTA CHANDRAKANT GHEEWELA ..... INTERESTED PARTY

RULING

1. The dispute before the Court is one amongst a series of very similar disputes emanating from discord over control and management of family businesses. This one relates to Nyaku Limited, the 1st respondent company which forms part of the estate of the late Chandrakat S. Gheewala. The applicant, 2nd respondent and 3rd proposed interested party are siblings. The deceased is their father and the 2nd proposed interested party is their mother. The 2nd and 3rd respondents are spouses. The applicant and the 2nd respondent are also directors of the 1st respondent company. At the heart of the dispute is the appointment of the 3rd respondent as a director following a directors meeting held on 14th June 2022.

2. This is the subject of the first application to which this ruling relates. The application was filed on 28th April 2023 and seeks the nullification of the resolutions of 14th June 2022 for being illegal and particularly the appointment of the 3rd respondent as director. The applicant's bone of contention is that as one of the directors of the 1st respondent, he was not notified about the meeting of 14th June 2022.

3. It is also his case that the meeting took place despite status quo orders issued by the probate court on 20th December 2018. The applicant further claims that the appointment of the 3rd respondent is meant to further the 2nd respondent's ulterior motives to the detriment of the estate.

4. The 1st respondent opposed the application vide a replying affidavit and further affidavit both sworn by its Chairman, the 2nd respondent, on 22nd and 30th November 2023 respectively. It is the 1st respondent's case that the notice of 8th June 2022 was sent to all directors by post, in the addresses listed in the CR12. The said notice advised the directors of a meeting scheduled for 14th June 2022. It is the 1st respondent's case that the notice was sufficient. The 1st respondent confirms that the meeting took place in the absence of the applicant, at which the resignation of Charles Maingi as a director was discussed and the appointment of the 3rd respondent to replace Charles Maingi was also resolved.

5. The 1st respondent further argues that the meeting was quorate and was carried out in accordance with the Memorandum and Articles of the 1st respondent. It reiterates that the resolutions are therefore valid. The 1st respondent takes issue with the consistent non-attendance to meetings by the applicant, despite being served with notices.

6. The 2nd respondent, in response to the application also reiterates the applicant's disservice by continuously failing to attend meetings even when he has been notified, to the detriment of the 1st respondent company. He confirms that the applicant was notified of the meeting by way of a notice sent to him via registered mail. The 2nd respondent confirms that the meeting of 14th June 2022 was quorate and proceeded in the absence of the applicant, at which the 3rd director of the company resigned and was replaced by the 3rd respondent so as to allow for the continued functioning of the 3rd respondent.

7. Regarding the court order of 20th December 2018, it is the 2nd respondent's submission that the same had been overtaken by events following the Mediation Settlement Agreement (MSA) that was adopted by the Court on 16th October 2019.

8. The 3rd respondent also opposed the application through a replying affidavit sworn on 24th October 2023. She also emphasizes that the board meeting of 14th June 2022 was properly convened and constituted and that her appointment as director in the 1st respondent was valid. It is her case that her actions undertaken in such capacity are therefore also valid. She states that the 1st respondent has only three (3) directors, being herself, the applicant and the 2nd respondent and the continued failure by the applicant to attend board meetings was detrimental to the functioning of the 1st respondent company.

9. By way of a supplementary affidavit sworn by the applicant on 21st November 2023, the applicant further avers that clause 13(b) of the 1st respondent's Articles required that notice of at least 14 days be given to the applicant ahead of a meeting. It is also the applicant's averment that Regulation 58 of Table A in the first schedule to the Companies Ordinance, Cap 288 of 1948 was also applicable in this regard.

10. These averments are countered by the further affidavit sworn by the 2nd respondent on 30th November 2023. The affidavit confirms that the meeting of 18th June was not a general meeting and therefore that the 14 days' notice is not applicable. It is the 2nd respondent's case that the schedule applicable in this matter is that under Cap 486 (repealed).

11. There is yet a second application which I shall determine first, for good order. The application is dated 18th July 2023 and is filed by the two proposed interested parties, seeking to be enjoined in the application of 28th April 2023. They argue that they are beneficiaries of the estate of the late Chandrakant Gheewala, and that the 1st respondent company forms part of the estate of the deceased. On this basis the proposed interested parties assert that they have an identifiable stake in the proceedings before the Court. They associate themselves with the prayers sought by the applicant.

12. The 2nd and 3rd respondents have vehemently opposed the application for joinder by way of replying affidavits sworn on 12th October 2023 and on 24th October 2023 respectively. The gist of their arguments is that the dispute before the Court relates to internal management of the 1st respondent company which is a company in its own right and has no bearing to the succession cause.

13. Further, that the dispute before the Court which is between directors of the 1st respondent does not concern the intended interested parties who are not directors. The 2nd respondent in fact expresses doubts that the 2nd proposed interested party has full knowledge and comprehends the nature of these proceedings.

14. Pursuant to the directions of this Court issued on 3rd October 2023, the proposed interested parties were allowed to file their responses and submissions to the application of 28th April 2023 which would only be considered if their application to be enjoined in these proceedings was allowed.

15. In compliance with these directions and in response to the application, the 2nd and 3rd proposed interested parties separately vide replying affidavits dated 6th October 2023 support the applicant's application of 28th April. They emphasize that the board meeting of 14th June 2022 was in breach of the status quo orders issued by the probate court. They affirm that the notice of the meeting of 14th June 2022 was not served on the applicant, that the meeting was not quorate and that it was therefore illegal.

16. The 3rd proposed interested party further confirms that she is the beneficial owner of the shares held by her family members as per the MSA. It is her case that any change of directors without her approval and involvement could therefore prejudice her interest in the 1st respondent.

17. The parties filed their respective written submissions and since the submissions are a mirror of the summary of each party's case as already captured, I see no need to regurgitate them but refer to them as reference points in my analysis.

Analysis

18. I have carefully considered the pleadings, submissions and evidence presented by all the parties in support of their respective arguments. A good place to begin is by responding to the submission that the Court should desist from interfering with internal affairs of the Company, a submission that I fully subscribe to. Save to add that this Court's intervention is also necessary from time to time such as where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. (See Re K Boat Service [1998] eKLR).

19. In the instant case the crux of the matter is that the Company's internal affairs are being been conducted in an irregular manner that is prejudicial to the interests of one of the directors and contrary to the Company's Articles and that the 2nd and 3rd respondent may continue to use their relationship on the board to the detriment of the 1st respondent's company and the applicant. I am therefore of the view that in this instance, the Court's intervention is called for.

To join or not to join; The application of 18th July 2023

20. As previously stated, for good order I will first deal with the application for joinder of the 2nd and 3rd proposed interested parties. Order 1 rule 10(2) of the Civil Procedure Rules empowers the Court:

> " ...At any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

21. The Supreme Court elaborately laid out the threshold for consideration of such applications in Francis Karioki Muruatetu & Another V Republic & 5 Others, Petition No. 15 as consolidated with No. 16 of 2013 (2016) eKLR in the following terms:

> " One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:
>
> i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
>
> ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
>
> iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions.
>
> iv. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."

22. The proposed interested parties have also relied on the Supreme Court's decision in Trusted Society of Human Rights Alliance V Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2013, [2014] eKLR. In this case the Supreme Court further held that:

> " [An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."

23. Finally, in Meme V Republic, [2004] 1 EA 124, the High Court held that a party could be enjoined in a matter for the reasons that:

> " i. joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
>
> ii. joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

iii. joinder to prevent a likely course of proliferated litigation."

24. In analyzing the facts before me against these decisions, I should start by restating the Supreme Court's position that whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties. This is true in this instance where the bone of contention is the appointment of I director by the other directors to the board of the 1st respondent. The proposed interested parties are not directors. They were not invited to the meeting where the 3rd respondent was appointed. They are not shareholders or members of the 1st respondent as yet.

25. Their only claim is that as beneficiaries whose confirmation of grant is still pending before the probate court, they will be prejudiced if they are not given an opportunity to participate in the application. The facts before the Court show that a vacancy was created following the resignation of one of the directors. The other directors were within their power to appoint a director to fill the vacancy. This decision would then be ratified by the Companies' shareholders by a majority vote.

26. This decision would then be ratified by the Companies' shareholders by a majority vote. Being beneficiaries alone is not sufficient reason for joinder of the proposed interested parties. A company is a separate legal entity from its members and runs through a structure and set of rules and regulations. I am reminded by the decision in Shaw & Sons (Salford) Ltd V Shaw, [1935] 2 KB 113, with which I concur, that even a majority shareholder cannot purport to be a company.

27. I have also considered the intended submissions put forward by the proposed interested parties in the application challenging the 3rd respondent and I note that they are an exact replica of the applicant's case. The proposed interested parties present no new dimension to the dispute before the Court. Their presence is therefore not necessary for the complete settlement of the questions involved in the application of 28th April 2023. The long and short of this is that the application for joinder by the proposed interested parties is devoid of merit.

A new director? The application of 28th April 2023

28. The applicant argues that the appointment of the 3rd respondent was in breach of the status quo orders issued by this Court on 20th December 2018. I have looked at the status quo orders issued on 20th December 2018. The said orders were issued consequent to the application of 17th December 2018 for interim injunctive reliefs against the respondents, pending the hearing and determination of that application. The status quo orders in my view did not apply as a blanket indeterminate order, but in direct relation to the actions that had been complained of by the applicants.

29. Indeed, in Thugi River Estate Limited & Another VNational Bank of Kenya Limited & 3 Others, [2015] eKLR the Court also noted that the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts. It is on this basis that the Court further emphasized the need for a court originating status quo orders to explicitly frame the state of affairs to be preserved.

30. It is clear on the face of it that the status quo orders were specifically in relation to the sale or disposal of any assets belonging to the deceased. The appointment of directors in the 1st respondent company was not part of the actions that the applicants sought injunctive relief from. Consequently, it was not part of the actions blocked by the status quo orders. It is therefore my view that this limb of argument by the applicant fails.

31. The 1st respondent company was incorporated on 10th August 1978 under the *Companies Act* Cap 486 (the repealed Act). The *Companies Act*, 2015 is now the applicable legal regime in Kenya having been assented to on 11th September 2015. It repealed Cap 486 by dint of section 1025. The Sixth Schedule to the 2015 Act however provides for Transitional and Saving Provisions. Section 3(1) of this schedule confirms that the coming into effect of the 2015 Act does not affect the continued application of Table A of the First Schedule in the Act.

32. As such, in addition to the Memorandum and Articles of Association of the 1st respondent, table A of the repealed Cap 486 applies as far as relevant and so does the new 2015 Act. The Fourth Schedule of the Companies (General) Regulations, 2015 (the Regulations) proposes model Articles applicable to private companies and is of relevance in this case.

33. The applicant's first ground for seeking to have the meeting of 14th June invalidated is that he did not receive a notice to the said meeting. Article 12 of the Articles of Association of the 1st respondent provides for the mode of service of a notice either personally or by post to the registered address of a member appearing in the register of members.

34. Further, Article 131 of Table A in the repealed Cap 486 makes provision for Notices in the following terms:

> " A notice may be given by the company to any member either personally or by sending it by post to him at his registered address, or (if he has no registered address within Kenya) to him at the address, if any, within Kenya supplied by him to the company for the giving of notice to him. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, pre-paying, and posting a letter containing the notice, and to have been effected in the case of a notice of a meeting at the expiration of 72 hours after the letter containing the same is posted, and in any other case at the time at which the letter would be delivered in the ordinary course of post."

35. On the argument by the applicant that he was not served with the notice at all, I rely on the evidence presented by the respondents. The receipt of the registered mail sent by the 1st respondent to the applicant is evidence that the notice of the meeting was posted as registered mail on 9th June 2022, at 09:23am to PO Box 45175-00100 NAIROBI. This is the address that appears on the company's CR12 as the applicant's address. The applicant has not denied as much. I therefore find that the 1st respondent was served by way of registered post.

36. The 2015 Act as well as the 1st respondent's Articles are silent on the notice period required for the convening of directors' meetings. Article 9(2) of the Model Articles in the 2015 Act only requires that such a notice should indicate the place, time and place of the scheduled meeting.

37. The requirement for an express notice period is quite a variance in comparison to the provisions on general and special meetings which provide for 14- and 21-days clear notice. The reason for this is clearly the latitude given to directors to regulate their proceedings as they deem fit. The interests of the company will however require that steps are taken so as to facilitate collective deliberation and informed decision making of the board and to ensure that directors are able to participate in board meetings. Reasonable notice therefore becomes critical in achieving this.

38. At common law, every director is entitled to a notice of directors' meetings and to be able to attend and speak. Meetings called at very short notice, and held at a time when it is known that certain directors will not be able to attend, have been held to be invalid board meetings and, therefore, decisions taken

even when a quorum is present held not binding to the company. (See for instance Re Homer District Consolidated Gold Mines (1888) 39 Ch D 546).

39. Likewise, in Re Portuguese Consolidated Copper Mines Ltd. (1889) 42 Ch.D. 160 at 167 where inadequate notice was provided to half of the board of directors, Lord Esher held that there was: "no valid meeting, and being an invalid meeting [it] could not adjourn itself."

40. Worthy of mention also is a decision of this Court in Wambeye Kimweli Marakia V Board of Directors, Nzoia Water Services Co. Ltd & 2 Others; Nzoia Water Services Co. Ltd (Interested Party) [2021] eKLR in which the Court (Riechi, J) stated as follows: -

> " The conduct of a board meeting or any meeting for it to be fruitful must have notice of the meeting and the agenda for the meeting. This key principle of governance requires that members should receive adequate notice of the meeting and matters to be deliberated."

41. Adequate or reasonable notice will vary on a case to case basis unless the notice period is expressly stipulated. Applying the evidence presented before the Court to these principles, I have considered the notice in respect of the board of directors meeting of Tuesday 14th June 2022 at 12:00pm. The notice states that the meeting would take place in the board room at the 6th floor of the South Wing at Shelter Afrique House, Mamlaka Road Nairobi.

42. It is clear from the evidence before the Court that the notice would have been deemed as properly effected 72 hours after 9th June 2022 at 9:23am. Since 9th of June 2022 fell on a Thursday, the earliest that the notice would have been deemed as served is close of business Monday 13th June 2022 for a meeting scheduled for Tuesday 14th June 2022. This technically translates to service of the notice several hours ahead of the board meeting.

43. As such, I find no difficulty in holding that while there was service of the notice on the applicant, the same was extremely short to have enabled him to participate in the meeting. The notice was therefore defective as it was inadequate.

44. Before I leave this issue, while I note the frustration expressed by the respondents over the alleged applicant's history of non-attendance of board meetings, this cannot be justification to warrant inadequate notice on the applicant. There are sufficient mechanisms for the directors to deal with the alleged non-attendance in the *Companies Act*. I reiterate the finding of the Court in Young V Ladies' Imperial Club Limited, [1920] 2 KB 523 10 March 1920 that a director must be given notice even if they have previously said they would not be able to attend at that time or would be unable to attend meetings generally.

45. The applicant has also taken issue with the agenda accompanying the notice of the said meeting. I note that there were 4 agenda items for discussion. These are; auditors update; restructuring of the company; court order dated 20th December 2018 regarding the freezing of bank accounts; and AOB. Notably, there was no agenda on resignation or appointment of directors. Effectively, the agenda gave no indication that anything substantive apart from the 3 agenda items was going to be discussed.

46. One needs to appreciate the provisions of Article 25 of the Model Articles in the 2015 Regulations. It provides that the resignation of a director ought to be preceded by a notice to the other directors. This is for good reason, so as to allow the remaining directors to ponder over a replacement for the said director. It also implies that the resignation and appointment of a director is one that requires substantive deliberation.

47. Besides such a notice not having been provided to the Court, it is also my view that the resignation and appointment of directors ought to have been included as a substantive item and discussed as such on the agenda as opposed to being raised as Any Other Business as reflected in the minutes.

48. In saying so, I again concur with the Learned Judge in Pridgeon Masake Barasa V Ministry of Agriculture, Livestock, Fisheries & Co-operatives Bungoma County & Another; Kitinda Dairy Farmers Co-operative Society Ltd & 13 others (Interested parties) [2019] eKLR that:

> " The purpose of an agenda in a meeting (in this case a meeting of the board of directors) is to inform [directors] of the matters set for discussion so that they may not only prepare to give meaningful deliberation but also be informed of the likely action that may be taken."

49. Similarly, I also share the view of Riechi, J in Wambeye Kimweli Marakia v Board of Directors, Nzoia Water Services Co. Ltd & 2 others; Nzoia Water Services Co. Ltd (Interested Party) [2021] eKLR that:

> " Any election of officials, interim or otherwise is a serious issue and notice should be issued to prepare members and even allow those who intend to be elected to volunteer themselves. It cannot in my view be hidden under 'Way Forward".

50. I am cognizant that while the Learned Judge was not referring to a board meeting, the tenets of accountability, transparency and good governance in board management would require similar or higher standards.

51. From this analysis, the fate of the meeting of 14th June 2022 is that it was an invalid meeting and the appointment of the 3rd respondent was therefore null and void irrespective of whether it was a quorate meeting or not. The applicant cited the decision in Habiba Mohamed Al-Amin & 2 Others V Standard Chartered Kenya Ltd & Others, [2020] eKLR, where the Court held that when a meeting does not attain the meeting threshold, anything done is a nullity.

52. Finally, amongst the applicant's prayers is a declaration that any subsequent acts by the 3rd respondent as a director of the 1st respondent are null and void. I am cognisant of section 133(1)(a) of the Act which provides that:

> " The acts of a director are valid even if it is later discovered that—
>
> a. the appointment of the director was defective; or .."

53. The effect of section 133(1)(a) is that where a person has been appointed as a director of a company but the appointment is subsequently found to be defective, their appointment and therefore actions done by them, is deemed to be valid until the date when they stop being directors.

54. The provision is meant to protect innocent parties who may be adversely affected if the actions of directors were invalidated due to such defects. It serves to ensure that third parties dealing with a company have the confidence to rely on the actions of its directors, even if there are defects in their appointment by virtue of the ostensible authority that the director holds himself out as having. The provision should therefore not be misunderstood to condone the appointment of persons who are not eligible to be directors.

55. For the reasons that I have explained, I am left with no option but to hold that the actions of the 3rd respondent in as far as they relate to the period that she was purportedly a director, are valid.

Determination

56. The long and short of this is that the application dated 18th July 2023 is dismissed. The application dated 28th April 2023 is allowed in the following terms:

    i. A declaration is hereby issued that the resolution of the Board of Directors passed on 14th June 2022 is a nullity.

    ii. A declaration is hereby issued that the appointment of Mrs. Prafulla Eleshkumar Gheewela as a director of the 1st respondent is fraudulent, irregular and illegal.

    iii. An order is hereby issued restraining Mrs. Prafulla from conducting any business for and on behalf of the 1st respondent in the capacity of a director.

    iv. Considering the relationship of the parties herein, I make no orders as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2024.

F. MUGAMBI

JUDGE