



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 16 OF 2016**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**IN HE MATTER OF THE CIVIL PROCEDURE CAP 21**

**AND**

**IN THE MATTER OF THE COMPANIES ACT CAP 486 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO BRING JUDICIAL REVIEW PROCEEDINGS BY WAY OF ORDERS OF CERTIORARI AND MANDAMUS**

**BETWEEN**

**NJOROGE MACHARIA.....1<sup>ST</sup> APPLICANT**

**FRANCIS MBURU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE REGISTRAR OF COMPANIES.....RESPONDENT**

**SOLAI NYAKINYUA CO. LTD.....INTERESTED PARTY**

**EX-PARTE:**

**NJOROGE MACHARIA.....APPLICANT**

**FRANCIS MBURU.....APPLICANT**

**JUDGMENT**

By way of Notice of Motion dated 25<sup>th</sup> May, 2016 the applicants sought the following orders

***“1. That an order of CERTIORARI be issued to move into this honourable court directed to quash the proceedings of the AGM conducted by the respondent on 26<sup>th</sup> March, 2016.***

***2. That an order of MANDAMUS be issued directed at the respondent to compel him to convene a Special General Meeting of Solai Nyakinyua Company Limited and keenly address the member’s grievances***

***3. Costs be provided for”.***

The application was supported by the Affidavit of one **NJOROGE MACHARIA** the 1<sup>st</sup> applicant who is a member and shareholder of **Solai Nyakinyua Company Limited** sworn on 25/5/2016. The application was opposed by way of a Replying Affidavit dated 21/9/2016 sworn by

**GEORGE MUCHERU MWANGI** a director of the Interested Party.

## **BACKGROUND**

The 1<sup>st</sup> and 2<sup>nd</sup> applicants are both members of the Solai Nyakinyua Company Limited (the Interested Party herein), which is a Public company registered under the amended Companies Act, Cap 486, Laws of Kenya. The company was incorporated on 23<sup>rd</sup> April 1976 and its main objectives include making property investments on behalf of its shareholders.

The applicants allege that the company has not held an Annual General Meeting (AGM), filed annual tax returns or published its profit and loss accounts since the year 2003. They claim that unsuccessful attempts to convene the AGM were made in 2010 and 2016 by the directors and shareholders, however it was not until 26<sup>th</sup> March, 2016, following the intervention of the National Land Commission that a general meeting was eventually held. The applicants maintain however that the meeting of 26/3/2016 was invalid because the agenda of the meeting was not discussed. They have therefore sought orders of Certiorari to quash the proceedings of that meeting.

The applicant's argue that due to the failure by the directors of the company to call for an AGM for this period of nine (9) years, the shareholders have not been able to appoint new directors as required by the Memorandum and Articles of Association. During this period the directors have not had to account to the shareholders nor did they run the affairs of the company in a transparent manner. The applicants expressed apprehension that the directors have exposed the company to the possibility of being struck off the register of companies due to non compliance with Section 125, 131 and 148 of the Companies Act.

The applicants are also aggrieved by the fact that the directors have refused to complete the process of transferring land titles to the shareholders and have also refused to release the mother title in order to facilitate the issuance of individual titles to the shareholders. The applicants allege that the directors have been demanding payments from the shareholders in order to finalize these transfers.

In its reply the Interested Party contends that the meeting of 26/3/2016 was properly held and that the Agenda was fully addressed. The Interested Party states that it is currently engaged in the process of processing title deeds for all the shareholders.

Pursuant to directions by the court this matter was disposed of by way of written submissions.

The applicants filed their written submissions on 26/11/2016. They submitted that the meeting held on 26/3/2016 was manifestly unjust, unfair, irregular, unreasonable and wholly unsatisfactory as it did not address the agenda of the day. Further they allege that said meeting was presided over by strangers who included officials of the National Land Commission. No valid resolutions were passed as the shareholders did not participate in the meeting. The applicants submitted that it was proper for the court to compel the directors to convene another AGM.

In their submissions dated 9/12/2016 the Interested Party submitted that an order of certiorari may only issue to quash the decision of an inferior court or public body where that court or public body has acted without authority or has exceeded its jurisdiction, where it has failed to comply with the rules of natural justice, on account of an error on the face of the record, or where a decision is unreasonable. In the present case there was no averment by the applicants that the Interested Party acted contrary to its mandate or the rules of natural justice in convening the meeting of 26/3/2016. The said meeting was shown to have been advertised and conducted procedurally. The mere fact that the applicants were not satisfied with the outcome of the meeting is not a valid reason to quash the proceedings of that meeting.

The Interested Party also faulted the failure of the applicants to annex to their application a copy of the proceedings (minutes) which they sought to have quashed. The court cannot be asked to quash what is not before it as such action would amount to a miscarriage of justice against the shareholders who did attend and participate in that meeting.

Regarding the prayer for Mandamus the Interested Party submitted that such an order would only issue to compel the performance of a public duty by a public body. The party seeking an order of Mandamus must show that there existed a duty imposed by statute and that said duty was not performed.

The Interested Party contends that it complied with the statutory mandate by holding the meeting of 26/3/2016. Therefore the prayer for orders of mandamus to compel it to hold a special general meeting has no basis. The Interested Party submitted that the real intention of the applicants is to run the company without the consent of the shareholders. They submit that these proceedings which have been filed in bad faith have no merit and should be dismissed in its entirety.

## **ANALYSIS**

Two main issues arise for determination in this matter as follows

- (i) Should an order of Certiorari issue to quash the proceedings of the meeting held on 26<sup>th</sup> March, 2016.
- (ii) Should an order of mandamus issue to compel the Interested Party to convene a Special General Meeting to address the issue of the shareholders

I will proceed to consider and analyze each issue individually

### **Prayer seeking an Order of Certiorari**

The applicants sought the issuance of an order of Certiorari based on four main grounds

- That the meeting of 26/3/2016 did not accord with the agenda
- That the resolutions during that meeting were improperly passed
- That the shareholders were not heard
- That the meeting was presided over by strangers.

The last three grounds were only raised in the final submissions filed by the applicants. As such the Interested Party was not informed in advance of these grounds and were not allowed an opportunity to respond to the same. It is trite law that parties are bound by their pleadings and ought not be allowed to depart from what has been pleaded. This rule exists in order to protect a litigant from being ambushed at the submission stage with issues that were not mentioned in the pleadings. It would be greatly prejudicial to the Interested Party if this court were to proceed to render a decision against it on the basis of issues that were not raised in the pleadings and which the Interested Party did not have an opportunity to respond to. For this reason I will not consider the first three grounds and will base my decisions only on the matters which have been raised by the applicants in their pleadings.

The main ground on which the order of Certiorari is being sought is that the matters discussed in the meeting of 26/3/2016 departed from the set agenda. As pointed out by the Interested Party the applicants did not produce a copy of the proceedings to be quashed as required by order 53 rule 7 of the Civil Procedure Rules which provides:-

***“In the case of an application for an order of Certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he had lodged a copy thereof verified by affidavit”.***

The above rule requires that a party seeking an order of Certiorari to quash an order or proceedings must present before the court a copy of the decision being challenged. In ASHRAF SAVANI & ANOTHER Vs CHIEF MAGISTRATE’S COURT KIBERA & 4 OTHERS [2012] eKLR, the court interpreted Order 53 Rule 7 to mean that a copy of the decision being challenged need not be lodged together with the documents filed at the leave stage provided that the same is presented to the court before the hearing of the main motion. In case of failure to comply a satisfactory reason must be given to the court.

The obvious rationale behind Rule 7 is to ensure that a court does not issue an order of certiorari without having had the benefit of seeing the decision it is being asked to quash and also to enable the court satisfy itself that the decision sought to be quashed actually exists. See REPUBLIC Vs NATIONAL WATER CONSERVATION & PIPELINE CORPORATIONS & 11 OTHERS [2015] eKLR. In MWANGI Vs MWANGI S KAIMENYI Ex Parte KENYA INSTITUTE FOR PUBLIC POLICY and RESEARCH ANALYSIS (KIPPRA) [2013]eKLR, the Court of Appeal cautioned that

***“A court of law should not descent into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed”.***

In REPUBLIC Vs NATIONAL HIGHWAY AUTHORITY & 7 OTHERS [2013] eKLR, the court held that 053 r 7 was a mandatory requirement and the failure to comply rendered the application incompetent.

In this case the applicants have not tendered before this court the proceeding of the meeting of 26/3/2016 neither have they advanced any persuasive reason and/or explanation for this failure. Without a chance to peruse those proceedings the court cannot determine whether indeed the issues discussed in the said meeting fell outside the set agenda. The applicant’s allegations concerning the illegality of the meeting remain unsubstantiated. I find that the prayer seeking orders of Certiorari to quash the proceedings of the meeting of 26/3/2016 has no merit and that prayer is hereby disallowed.

#### **Prayer seeking orders of Mandamus**

The applicants sought an order of Mandamus to compel the Interested Party to call for a Special General Meeting to discuss the grievances of the shareholders. Section 280 of the Companies Act, 2015 provides for the circumstances in which the court may order a company to convene a General Meeting. Section 280 provides as follows:-

**280. (1) this section applies if for any reason it is impracticable –**

- (a) to convene a meeting of a company in any manner in which meetings of that company may be convened; or**
- (b) to conduct the meeting in the manner required by the articles of the Company or this Act.**

**(2) the court may, either on its own initiative or on the application:-**

- (a) of a director of the company; or**
- (b) of a member of the company who would be entitled to vote at the meeting,**

***Make an order requiring a meeting to be convened, held and conducted in any manner as the court considers appropriate.***

Thus an order directing a company to convene and hold a general meeting will only issue where the court is satisfied that it is not possible for the company to convene the meeting in accordance with the Act or the Articles of the Company. An order of Mandamus will only be issued as a last resort where there is no other equally effective remedy to achieve the objective. For an order of mandamus to issue it must be shown that there is a specific and determinable duty to act and that the body mandated to so act has refused to act despite requests made to it to do so.

The Companies Act vests in the directors of a company the power to convene and hold general meetings of the company. Section 277(1) of the Act vests in the members the right to require directors to convene a general meeting. Section 277(2) and Section 278(1) (a) and (b) mandate the directors to convene the meeting as soon as it practicable, but they must do so within twenty-eight (28) days after the date of the notice convening the meeting. Section 279 (1) of the Companies Act vests in members the powers to convene the general meeting if the directors fail to do as required by Sections 277 and 278.

The applicants had a duty to demonstrate to this court that they requested the directors to convene a general meeting to discuss the issues they have raised concerning the transfer of the company property to the shareholders and the processing of the titles for the members. If the directors failed to act as per the request of the applicants, they were within their rights to convene a meeting in accordance with Section 278 of the Act. The applicants must exercise this option before seeking the intervention of the court. The applicants have not shown that they tried and failed to convene the meeting in the manner provided for under the Companies Act. In the circumstances orders of Mandamus would not be merited.

Finally based on the foregoing, I find that the Notice of Motion dated 25<sup>th</sup> May, 2016 lacks merit. The same is hereby dismissed in its entirety with costs.

**Dated and delivered in Nakuru this 20<sup>th</sup> day of June, 2017.**

**Maureen A. Odero**

**Judge**