

*Addis Ababa
University*

(Since 1950)



**ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF LAW
LL.M PROGRAM - BUSINESS LAW STREAM**

**NULLIFICATION OF COMPANY RESOLUTIONS IN ETHIOPIA:
THE LAW AND THE PRACTICE**

By

MELAKU KASSAYE GEMECHU

ADVISOR: ZEKARIAS KENEA (Associate Professor)

September 2020

Addis Ababa, Ethiopia

ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF LAW
LL.M PROGRAM - BUSINESS LAW STREAM

NULLIFICATION OF COMPANY RESOLUTIONS IN ETHIOPIA:
THE LAW AND THE PRACTICE

By

MELAKU KASSAYE GEMECHU

ADVISOR: ZEKARIAS KENEA (Associate Professor)

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT FOR THE
REQUIREMENTS OF MASTERS OF DEGREE OF LAWS (LL.M)**

**Addis Ababa
September 2020**

DECLARATION

I, Melaku Kassaye, declare that the thesis is my original work and has not been presented for a degree in any other university and that all sources of materials used in the thesis have been duly acknowledged.

Declared by:- Melaku Kassaye

Confirmed by: Zekarias Keneaa (Associate Prof.)

Signature _____

Signature _____

Date _____

Date _____

**ADDIS ABABA UNIVERSITY
FACULTY OF LAW
SCHOOL OF GRADUATE STUDIES**

Approval Sheet

**NULLIFICATION OF COMPANY RESOLUTIONS IN ETHIOPIA:
THE LAW AND THE PRACTICE**

BY

MELAKU KASSAYE GEMECHU

Approved by Board of Examiners

Advisor Zekarias Keneaa (Associate Prof.) Signature _____ Date _____

Examiner _____ Signature _____ Date _____

Examiner _____ Signature _____ Date _____

Table of Contents

Acknowledgment	i
Abstract	ii
Acronym	iii
Dedication!	iv

CHAPTER ONE

GENERAL INTRODUCTION	1
1.1 Background of the Study	1
1.2. Statement of the Problem.....	2
1.3. Research Questions	3
1.4. Objectives of the Study	4
1.5. Significance of the Study.....	4
1.6. Scope of the Study	4
1.7. Methodology	5
1.8. Literature Review.....	6

CHAPTER TWO

THE NOTION AND THEORETICAL UNDERPINNINGS OF NULLIFICATION OF COMPANY RESOLUTIONS	10
2.1. A Brief Account of the Theoretical Concept and Framework for Corporate Governance	10
2.1.1. Agency Theory and the Evolution of Corporate Governance	10
2.1.2 Models of Corporate Governance	12
2.2. The Notion of Corporate Resolutions	16
2.2.1 Organs Entitled to Pass Corporate Resolutions	17
2.2.2. Types of Corporate Resolutions.....	18
2.3. Nullification of Corporate Resolutions	21

2.3.1. The Notion of Nullification of Corporate Resolutions	21
2.3.2. Party/Parties Entitled to Challenge Corporate Resolutions	22
2.3.3. Grounds for Nullification of Corporate Resolution	23
2.3.4. Effects of Nullification of Corporate Resolutions	26

CHAPTER THREE

NULLIFICATION OF COMPANY RESOLUTIONS IN ETHIOPIA: THE LAW AND THE PRACTICE

3.1. Company Resolutions and their Nullifications According to the Ethiopian Commercial Code.....	28
3.1.1. Mandate to pass Company Resolutions	28
3.1.2. Legal Framework for Nullification of Company Resolutions	29
3.1.3. The Right to Contest Corporate Resolutions	35
3.1.4. Effects of Nullification	37
3.2. The Practical Handling of Nullification Petitions by Ethiopian Courts: Analysis of Selected Cases rendered by Federal Courts.	39
3.2.1. Case one: Federal Supreme Court Cassation Bench’s Decision in File No. 52269	39
3.2.2. Case Two: Federal Supreme Court Cassation Bench’s Decision in File No. 90235 ...	42
3.2.3. Case Three: Federal Supreme Court Cassation Bench’s Decision in File No. 13734043	
3.2.4. Case Four: Federal Supreme Court Cassation Bench’s Decision in File No.142716..	44
3.2.5. Case Five: Federal Supreme Court Cassation Bench’s Decision in File No.152636 ..	45
3.2.6. Case Six: Federal Supreme Court Cassation Bench’s Decision in File No.164553	46
3.2.7. Case Seven: Federal Supreme Court Cassation Bench’s Decision in File No.166953	47
3.2.8. Case Eight: Federal Supreme Court Appellate Bench’s Decision in File No.170831..	48
3.2.9. Case Nine: Federal Supreme Court Appellate Bench’s Decision in File No.175530 ..	49

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS.....	52
4.1. Conclusion	52
4.2. Recommendations.....	53

Bibliography 55

Annexes 59

1. Federal Supreme Court Cassation Bench's Decision in File No. 52269 and Federal High Court Decision in File No. 04026
2. Federal Supreme Court Cassation Bench's Decision in File No. 90235
3. Federal Supreme Court Cassation Bench's Decision in File No. 137340
4. Federal Supreme Court Cassation Bench's Decision in File No.142716
5. Federal Supreme Court Cassation Bench's Decision in File No.152636
6. Federal Supreme Court Cassation Bench's Decision in File No.164553
7. Federal Supreme Court Cassation Bench's Decision in File No.166953
8. Federal Supreme Court Appellate Bench's Decision in File No.170831
9. Federal Supreme Court Appellate Bench's Decision in File No.175530

Acknowledgment

First and foremost, I would like to thank the Almighty God for enriching me with all possible patience, prudence and some intelligence too.

Professor Zekarias Kenea, my advisor, has got special place in writing this thesis. Generally, I am heavily indebted and greatly value the intellectual guidance, thought provoking and invaluable comments you provide me throughout my study. In particular, the extra ordinary commitment you showed me in molding this thesis through persistent criticism and scholarly evaluation is always in my mind. I really own you!

My special gratitude goes to my darling, W/ro Kasech Abera. Kasu! You are really an amazing woman! The moral and invaluable support you showed me by solely shouldering the hardship of family responsibilities throughout my study; particularly, in the final stage of writing this thesis deserves many appreciations. May God Bless you all the time!

I would also like to express my heartfelt gratitude to Chief Justice W/ro Meaza Ashenafi and Deputy Chief Justice Ato Solomon Areda, for providing me an invaluable special consideration in writing this thesis.

Finally, many fellows have contributed towards this small work although I alone was the writer. In particular, I would like to express my gratitude to Judge Reta Tolesa, Judge Endeshaw Adane and Judge Habtamu Erkyehun for providing me certain reference materials; Judge Etmet Assefa, Judge Tsehay Menkir, Judge Nuredin Kedir and Judge Estibel Anduaalem for shouldering the hardship of regular daily activities at the work place. You all deserve many thanks and appreciations.

Thank you all!

Melaku Kassaye!

September 2020

Abstract

Corporate resolutions are meant to declare the basic decisions made at the forum of either the shareholders or the Board of Directors. The corporate resolutions made in accordance with the law and the respective corporate's constitutive documents are assumed to be the decision of corporate and shall be binding on all shareholders of the corporations. On the other hand, despite few jurisdiction related differences among countries the recognition for nullification of corporate resolution becomes a growing fashion in modern Company laws. Such recognition is primarily meant to provide the legal mechanisms through which shareholders could oppose disagreeable resolutions. In Ethiopian, matters of nullification of company resolutions are regulated in Article 416 of the 1960 Commercial Code. The notion under this article has become the growing controversy before the court. The scope, the interpretative application, and the practice of Ethiopian courts in resolving disputes involving nullification of company resolutions has not been studied in methodical way. Thus, the concern of this paper is to have a closer look in to what the practical application of the nullification of company resolution under the Commercial Code looks like.

Acronym

Art.	Article
BCC	Belgian Commercial Code
BOD	Board of Directors
OECD	Organization for Economic Cooperation and Development
PLC	Private Limited Company
S.C.	Share Company
TCC	Turkish Commercial Code

Dedication!

I would like to dedicate this small work to my mother, W/ro Tewabech Kitaw, whom I lost in the middle of writing this thesis. Emma! I always remember you!

May the Almighty God give you Eternal Peace!

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study

The 1950s and 1960s marked as the great turn over in modern laws codification history of Ethiopia. These were the time where the country took massive measures in organizing its modern laws in to well written Codes. The 1960 Commercial Code of Ethiopian (herein after the Commercial Code) has been one of the then modern laws that blessed with the excellent organization of many of the modern laws in the country. The Commercial Code, the most comprehensive legislation on the matter and that is still in force, generally recognizes six forms of business organizations: two of which are named as Companies.¹ The form of business organization named as companies² under the Commercial Code are of two types, namely: Share Company (Arts. 304-509) and Private Limited Company (Arts. 510-543).³ Despite the wider distinction among the two forms of companies as regards the nature of formation and management, both provide limited liability for their shareholders. That is to mean that the shareholders are not personally liable for company's debts but rather the company's liability should be met by the company's asset itself. In whatever form, once a company has successfully formed it has separate legal existence from is shareholders. The shareholders do not have direct decision making authority over their company; rather the day to day activity of the company falls on the hands of a few individuals. The so called divorce of shareholders from their company resulted in what some name it "the separation of ownership and control".⁴

This however does not mean that shareholders do not have a say on the managements of their company. The manner by which the shareholders take part in the management of the company is governed by the principles of corporate governance. In fact, there is no universally applicable

¹ Commercial Code of the Empire of Ethiopia ,Negaret Gazeta, extra ordinary Issue, Proclamation No. 3 of 1960, Art.212(1).

² The term used to denote "company" varies across jurisdictions. In some jurisdictions, it is named as "corporation", whereas in others the term "company" itself is used. (For instance, in United State of America and Germany, the term "Corporation is used to denote "Company" whereas in France the term Company itself applicable). Because of this, the two terms are adopted and used interchangeably in this paper.

³ Id, supra note 1

⁴ Adolf A. Berle and Gardiner C. Means, the Modern corporation and Private property, with a new introduction by Murray L.Weidenbaum and Mark Jensen, Transaction Publisher, UK, 1991, P-66

definition of corporate governance. The close examination of literatures on the area reveals that different scholars and regulatory organizations define the term corporate governance differently. Despite the absence of uniform definition, it can generally be understood that the major objective of corporate governance is to balance and protect the different competing interests among diversified stakeholders on a company.⁵

It is the Article of Association and Memorandum of Association that assumed to set the rules by which a company runs and administered. Certain decisions that are beyond the normal day to day running of a business require resolutions which are known as Company Resolutions. Generally, it is these constitutive documents that sets out the basic framework of the company and the general guiding rules governing the right, powers, duties and obligations conferred on the company, its Board of Directors and shareholders. Even if the routine daily activity of the company is on the hands of the its agents, but most decisions beyond the normal day to day activity of a business requires resolution. Company resolution is a formal decision of the company made at meetings of the either at Board of Directors, or at the meetings of shareholders. This decision could be done by company directors or shareholders. Whoever adopts the resolution; such decisions are still susceptible to contention particularly by the shareholders. It is this contention of the company resolution in Ethiopian that constitutes the major concern of this paper.

1.2. Statement of the Problem

The recognition of the right to quest for nullification of company resolution under Article 416/2/ of the Commercial Code is meant to balance two competing interests. On one hand the right to claim for annulment of company resolution is the principal defense mechanism that the minority shareholders in particular entitled to against the abuse of the majority shareholders. On the other hand the properly conducted company resolution is believed to convey the common will of the shareholders aimed to fulfill both their purpose and the company's purpose. In fact, its relevance and importance resides in the necessity for the shareholders and their legal representatives to be aware of and actively assert their rights to oppose disagreeable resolutions. While there is unanimity in accepting that the common will of the shareholders represents the core of the

⁵ Kraakman, Dvies, Hnsman, Hertig, HOpt, Kanda, Rock, *The Anatomy of Corporate Laws: a Comparative and Functional Approach*, Oxford University Press, New York, 2004, P-18.

company, in practice there are frequent situations in which there is substantial disagreement between the shareholders' points of view, frequently leading to adopting resolutions without considering the minority shareholder's input. Since these disagreements must be resolved prior to the company to continue conducting business, it is mandatory for the shareholders to effectively express their point of view in a manner in which the company's interests are protected through the independent filter of the court.

As mentioned in the background study of this thesis the quest for annulment of company resolutions are increasing from time to time. The closer examination of those complaints largely grounded on Article 416/2/ of the Commercial Code. In fact Article 416/2/ of the Commercial Code sets the grounds for the nullification of company resolutions. Yet whether the grounds for the nullification of company resolutions that are heading to courts are within the spirit of the law is the question that needs a closer examination.

As noted above, the 1960 Commercial Code of Ethiopia contains the general rules on the corporate governance in the country. As regards Share Company, the Code recognized Shareholder Meetings as one of the three main organs of management of the share company along with Board of Directors and Auditors.⁶ Shareholders exercise their governance rights through two outlets: namely Ordinary Meetings and Extraordinary Meetings.⁷ On the other hand Article 416 of the Commercial Code sets the way through which company resolution can be set aside. Now a day, the notion under this article has become the growing controversy before the court. It is this growing allegation for nullity of company resolution that draws the attention of this thesis. The scope, the interpretative application, and the practice of Ethiopian courts in resolving disputes involving nullification of company resolutions has not been studied in methodical way. Thus, the concern of this paper is to have a closer look in to what the practical application of the nullity of company resolution under the Commercial Code looks like.

1.3. Research Questions

In light of the foregoing, this study examines the following research question:

⁶ Supra Note 1, Art.347ff.

⁷ Id, Art. Art.388 -416

- Is the practical application of nullification of Company Resolution in Ethiopian consistence with the content and spirit of the relevant law regulating such nullification?

1.4. Objectives of the Study

In line with the above mentioned statement of the problem and research questions, the objective of the study will be:

- To clearly identify the substantive and procedural requirements set out for the quest for nullification of company resolution under the Commercial Code,
- To closely examine whether the practical application of the grounds for setting aside company resolutions are compatible with the aspire the relevant provision of the Commercial Code,
- To recommend what is next to be done so as to reconcile the practice with the law.

1.5. Significance of the Study

The study will focus on the compatibility problems of the claim for nullification of company resolutions in Ethiopia and the recommended solutions. Thus, it may contribute to the ongoing amendment of the Commercial Code of the country on the named specific topic, to create awareness for the legislative body, the Judges and lawyers on the area, serve as a basis and may call the attention of those who want to conduct further research in the field as well as a reference material in the academic sphere.

1.6. Scope of the Study

The study totally devotes to the practical examination of the compatibility of claim for nullification of company resolutions with the law under the 1960 Commercial Code of Ethiopia. To this end the contents of the rules governing the claim for setting aside company resolutions under the Commercial Code would primarily be consulted. Then the contents of the alleged claims for nullification in the Federal Court will be closely examined from substantives as well as procedural perspectives. Geographically the study focuses on the cases brought before the Federal Courts presiding in Addis Ababa.

In terms of representativeness of this study, it should be noted that almost all companies in Ethiopia are required to get registered at the Federal registries in Addis Ababa. Besides, cases falling under the Commercial Code are within the exclusive material jurisdiction of the Federal Courts.⁸ This also implies that cases that are tried before regional courts could under most circumstances be brought to the Federal Courts on appeal. As a result, the study's focus on practices of federal courts may not be seen as a shortcoming in ensuring the representativeness of its findings.

1.7. Methodology

This study adopts a qualitative research method and undertakes predominantly legislative and case analysis. Legislative analysis is employed given that it is essential in particular to answer the first question of this study, namely, what are the grounds for nullification of company resolutions under the Commercial Code of Ethiopia?. A closer analysis of the law is also adopted here in order to clarify the spirit of the law against which their application (court cases) will be examined. In order to thoroughly examine the relevant provisions of the law and deduce its general spirit as regards nullification of company resolution, the research will further collect and examine *travaux préparatoires*, if available, background studies, explanatory notes, and relevant academic literature on the provision of the Commercial Code.

The research also resorts to case analysis in order to comprehensively examine the practical application the rules governing claim for nullification of company resolutions. Hence, it will focus on the study of the reasons, justifications or logical arguments relied upon in the jurisprudence of Ethiopian courts. As explained above under the scope of the study, the research undertakes analysis of judgments of federal courts. In this regard, the research refers to cases that have been adjudicated on appeal and at the Cassation Bench of the Federal Supreme Court, an approach that is chosen due to time constraints, as regards the former, and the legally binding nature of the decision, as regards the latter.

Under limited circumstances, and when relevant to further explain a point of discussion, this research may nonetheless make references to comparable issue under foreign jurisdictions, to be

⁸ Federal Courts Establishment Proclamation No.25/1996, Article 5(6)

determined based on accessibility of legal jurisprudence. Nonetheless, the research does not aim at undertaking a full-fledged comparative analysis.

1.8. Literature Review

The term used to denote “company” varies over jurisdictions. In some jurisdiction, it is named as “corporation”, whereas in others the term “company” itself is used.⁹ Because of this the two terms are adopted and used interchangeably in this paper. Whatever the name may be, it’s the sophisticated tools of pooling capital together to undertaking huge investment businesses particularly in the capitalist world. A corporation, once acquired its legal personality, enjoys certain attributes which differentiate it from other forms of unincorporated business organizations. One of those particular attribute is the separate legal personality and limited liability of its incorporators or investment owners.¹⁰ Because of this separate legal existence of the corporation the shareholders are liable only to the extent of their investments.¹¹ Yet, companies are represented and managed by natural person; be it director or manager. It’s these agents of the company that under take the day to day activity of the company.

Companies, being an artificial person, are governed by what some called it “Company Constitution”.¹² Basically it’s the Memorandum of Association and Article of Association that constitute the constitution of a company.¹³

Studies on nullification of company resolution in the Ethiopian contexts are nonexistent. Yet, a brief glance at some other jurisdictions reveals the fact that the decisions made at company meetings can be disputed before a court of law for nullification. The grounds for nullifications, persons entitled to claim the annulment as well as the procedures to be followed varies from one jurisdiction to the other.

In Turkey for instance, the actions against the general assembly resolutions is regulated by the New Turkish Commercial Code No.6102 (here after called “TCC”).¹⁴ The TCC categorized the

⁹ Ibid, Supra Note 2

¹⁰ Ibid, Supra Note 3

¹¹ Ibid

¹² Clive M.Schmitthoff and James H.Thompson, *Palmer’s Company law* (21 ed., 1968), p.50

¹³ Ibid

action to be brought before the court in to two: namely, action for Annulment and action for Nullity. Further, the TCC makes distinction between the two as regards the grounds, the time within which the action to be taken as well as the persons entitled to bring the action. As regards annulment action, the TCC recognized three grounds for annulment of the general assembly resolution. These are where the resolution is contrary to the TCC, or the articles of association or good faith rule. Where either of these conditions bumps into Shareholders, the Board of Directors or each members of the Board of Directors are entitled to initiate an action for annulment within three months.¹⁵

The TCC regulates the shareholders who can challenge the resolutions in two separate groups: namely shareholders who attended the meeting but cast negative votes; and shareholders regardless of whether or not they attended the meeting.¹⁶ Shareholders who attend a general assembly meeting have the right to challenge the general assembly meeting resolutions on the condition that they cast a negative vote, and had their dissenting opinions stated in the meeting minutes. It is possible either to state dissenting opinions against several decisions as a whole, or separately, for each decision made in a general assembly meeting.

On the other hand shareholders who allege that, the convocation of the meeting has not been duly made, the agenda of the meeting has not been duly announced, persons who do not have the authority to attend the general assembly meeting, or their representatives attended the meeting and cast votes, or they have been unjustly prevented from attending the meeting and casting votes can challenge the general assembly resolutions regardless of whether or not they attended the relevant meeting provided that, in any case, the aforementioned breaches had an influence on the resolution.¹⁷

On the other hand the legal grounds for the nullity of general assembly resolutions have also been established under Article 447 of the Code of the TCC. Accordingly, the law subjected the general assembly resolutions to the nullity and considered it void *ab initio* where it's either

¹⁴ E. MOROĞLU, *Anonim Ortaklıkta Genel Kurul Kararlarının Hükümsüzlüğü*, İstanbul 2009, pg.194(available at <https://www.mondaq.com/turkey/shareholders/262636/>, last accessed June 2020)

¹⁵ TCC Art.445

¹⁶ TCC Art.446

¹⁷ Id, Supra Note 15

contrary to the mandatory rules, public order or morality. When this happened any interested person may bring a declaratory action for the nullity of the general assembly resolution and such action is not subjected to any time limit.¹⁸

In Romania, until the enactment of Law no. 31/1990, companies in general were regulated by the civil Code. The promulgation Law No.31/1990 kicked out the application of the Civil Code on those companies oriented for lucrative purposes.¹⁹ The new law recognized shareholders, company's directors, company's censors and any person justifying an interest for annulment of the general assembly of shareholders meetings as persons legally entitled to claim for annulment.²⁰ The grounds for annulment of the resolution of the general meetings of shareholders may be either Absolute nullity or Relative nullity.²¹ Absolute Nullity is those made for breach of norms securing public order and the general interest whereas relative nullity is made for violations of norms securing the personal interests of the company's shareholders. The latter is mostly related with the will or capacity of shareholders.²² Shareholders may evoke both absolute and relative nullity while other third parties are only entitled to claim for absolute nullity of the resolution which shall not fall under any statute of limitation.²³ But one important feature is that the law prohibits the directors to file a claim for the annulment of a resolution when the object of the resolution is related with revocation of the said directors.²⁴

In Ethiopian the action for setting aside company resolution is regulated by the 1960 Commercial Code.²⁵ The law set forth certain guiding principles as regards the action for nullification of the company resolution under Article 416. As such in principles the resolution adopted in accordance with the law, the memorandum or article of association shall bind all the members, including those who were not present or dissented.²⁶ Yet, the resolution adopted contrary to the law, the memorandum or article of association may be challenged for setting aside within three

¹⁸ TCC Art.447

¹⁹ Roxana Mihaela CATEA, *Practical aspects regarding the claim for the annulment of the resolutions of the general meeting of shareholders, from a substantial and procedural perspective*, Lex ET Scientia International Journal, LESIJ Vol.2, No.XXIV(2017), P.182

²⁰ Id, p.184

²¹ Id, p.185

²² Ibid

²³ Ibid

²⁴ Law No.31/1990, Art.132 par.4(in supra note 18)

²⁵ Commercial Code, Supra Note 1

²⁶ Id, Art. 416(1)

months from the date of the adoption of the resolution or maximum from the entry of the resolution in the commercial register.²⁷

To sum up, despite certain specific particularities across jurisdictions, the right to claim for setting aside company resolutions is the generally recognized legal tradition. In view of this, the study focuses on exhaustively exploring the application of nullifying company resolution in Ethiopian through further discovery of other possible statutory grounds and its practical application in courts.

²⁷ Ibid, Art.416(2)

CHAPTER TWO

THE NOTION AND THEORETICAL UNDERPINNINGS OF NULLIFICATION OF COMPANY RESOLUTIONS

Preliminary Remarks:

Nullification of company resolutions presupposes the existence of company resolution. In turn, the existence of company resolution presupposes the existence of legally defined and mandated corporate organ to pass the resolution. The power to pass company resolution goes in line with the corporate governance structure of a given company. So, when one talks about nullification of company resolutions it is a must, at least, to take a short glance to the concept of corporate governance in general and the possible options thereabout. Hence, the discussions in the following topic along with its sub-topics aim at providing a spark light on the theoretical concepts of corporate governance system in general and the possible frameworks thereof.

2.1. A Brief Account of the Theoretical Concept and Framework for Corporate Governance

2.1.1. Agency Theory and the Evolution of Corporate Governance

Literature evidences that the theoretical underpinnings for the emergence of corporate governance is to tackle the problem of what is called “Agency Theory”.²⁸ The notion of agency theory came in to existence following the concept of separation of ownership and control in the modern company laws.²⁹ As discussed earlier, the concept of separation of ownership and control tells us that once a company has legally been established, the shareholders do not have direct decision making authority over their company; rather the day to day activity of the company falls in the hands of a group of individuals who presumably act in the interest of the owners as well as the company too.

Not surprisingly, this divorce of shareholders from their company throws the owners in to the dilemma that, once they put in their funds, they would not be left holding a worthless piece of

²⁸ Santosh Pande, *The Theoretical Framework for Corporate Governance*, Article in SSRN Electronic Journal · October 2011, P.2 (available at: <http://ssrn.com/abstract=1949615>)

²⁹ Ibid

paper issued by the manager; or so to say, that their funds are not expropriated or wasted on un - attractive projects.³⁰ So, viewed from this context, it's these investors' difficulties that resulted in the emergence of the notion of corporate governance which has been defined by Shleifer et al (1997) as "... how to assure financiers that they get a return on their investment".³¹

Nowadays, the phrase "Corporate Governance" is the most commonly used term particularly in relation to corporation. In fact, as indicated in the background study of this thesis, the term "Corporation" in certain jurisdictions is meant to denote the term "Company" as a result of which the writer opts to adopt and make use of the two terms interchangeably.³² Hence, it should be noted that any discussion made on "corporate governance" under this thesis is meant to refer to "company governance".

The meaning and definition given to the phrase "Corporate Governance" varies across jurisdictions. The variation extends from the narrow definition that it's "a system by which business corporations are directed and controlled"³³ to a more elaborate definition given by the Organization for the Economic Cooperation and Development (OECD); the full text of which reads as follow:

*Corporate governance involves a set of relationships between a company's management, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.*³⁴

³⁰ Ibid

³¹ Id, P.2

³² Refer to the note under Supra Note 2 above.

³³ Corporate governance definition: www.corpgov.net (retrieve on 12/8/2013) (Cited in: Dejene Alamirew: *Assessing Corporate Governance of Ethiopian Private Limited Companies With Particular Emphasis of Making Board of Directors Compulsory to Such Companies*, (2014, unpublished, School of Law, Addis Ababa University), Under Note 79

³⁴ OECD Principles of Corporate Governance, 2004 (Cited In: Assefa Aregay, *Corporate Governance Rules In Ethiopia and Germany: A Comparative Analysis*,(2015, Central European University, Hungary), P. 6

As can be understood from the particular elements included under the definition given by the OECD, the issues covered by Corporate Governance encompasses matters that extend from regulating the relationship between a company and its governing bodies to the extent of setting out goals for an organization, direction to be taken to achieve these goals, and roles and responsibilities of functionaries in the organization. Yet, the definition is still criticized for being not broader enough to include such key principles common in corporate governance discourse as the issue of accountability of the managers, transparency and so on.³⁵

It's because of this that some writers concluded that the notion "Corporate Governance" encompasses several issues and that there is no generally accepted definition therefore.³⁶ Nevertheless, literature shows that the variation among the different definition given for Corporate Governance from narrow to the broad ones revolves around the debate on "whether management should run the corporation solely in the interests of shareholders (shareholder perspective) or whether it should take in to account other constituencies (stakeholder perspective)".³⁷ These long lasting debates on the area drive one to look in to the modes and alternative theoretical frame works thereof for corporate governance, which the subsequent sub topic dwells on.

2.1.2 Models of Corporate Governance

The model of corporate governance is largely related to the ownership structure of the economy, which plausibly is an important factor in corporate governance particularly in shaping the agency relationship within firms.³⁸ In fact, the model of corporate governance of a given company has a lot to tell about the economic, historical, cultural and legal characteristics of that particular country.³⁹ As such it can be said that model corporate governance is an attribute of such factors as the ownership and control structures of a company, the legal system and economic model of

³⁵ Ibid

³⁶ Ibid

³⁷ Supra Note 33, P.31

³⁸ Id, P.35

³⁹ Id, P.38

the country and so on.⁴⁰ So, it's these multiple factors that triggered the prevalence of various models of corporate governance system around the globe. Yet, consultation of literature on the area reveals that scholars tend to cluster the various corporate governance models in the world in to two paradigms, without the prejudice of the specific peculiarities of the different jurisdictions. These are the Anglo-Saxon (American) and the European (or German-Japanese) models.⁴¹

The Anglo- American model of Corporate Governance is largely known as the “Shareholder Model” or “Shareholders Capitalisms”.⁴² The model is named so owing to the fact that it contains dispersed shareholders who provide the bulk of the financing to large public firms.⁴³ This model of corporate governance is largely prevalent in such jurisdiction as the United States of America, United Kingdom, Canada, Australia and New Zealand. Companies in these Jurisdictions are mainly directed by management teams that are constrained by Boards of directors. Besides, in such Jurisdictions as in the United State, other organs such as outside directors, private watchdog entities and government authorities are deployed and made use of to closely check the management activities.⁴⁴ It's because of this specific focus on the outsider investors that the model is sometimes labeled as an “outsider system”.⁴⁵

Conceptually, shareholders’ model of corporate governance is associated with the agency theory.⁴⁶ The major concern under shareholders’ model of governance is to maximize

⁴⁰ Id, P.38-40

⁴¹ A. Zattoni, *The Structure of Corporate Groups: The Italian Case*, Corporate Governance - An International Review, Vol. 7, (1999), p. 38-48.

⁴² Neil Fligstein and Jennifer Choo, *Law and Corporate Governance*, California: University of California, (2005), P. 70

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Zelalem Fekadu, *Shareholder or Stakeholder Model of Corporate Governance: Which One Should Ethiopia Choose?* (2016, unpublished, School of Law, Addis Ababa University), P. 29.

⁴⁶ Gerard Charreaux, *Corporate Governance Theories: From Micro Theories to National Systems Theories*, (2004), JEL Classification: G300; P500, p.6. (Cited In: “Alemayehu Yismaw- *Merits and Demerits of Introducing Non-shareholder Directors in the Governance of Ethiopian Share Companies* (2014)”, Note 177

shareholders' wealth through allocative, productive and dynamic efficiency of a corporation.⁴⁷ The theoretical underpinning for this assertion is the inviolability of private ownership of companies which states that companies are the extension of their owners, so much so that corporate governance must reflect shareholders ownership in terms of both means and end. To this end, it must be owned by the shareholders and run in the interests of the same.⁴⁸

Accordingly, the exclusive rights entrusted to the shareholders under this model of governance goes to the extent of determining how and for what purposes the companies' property may be used as well as the right to determine companies' priorities and profits that may be generated.⁴⁹ It's this pursuit of shareholders' interests that a certain writer called Friedman described it as "*there is one and only one social responsibility of business- to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud*".⁵⁰

To sum up, the forgoing discussion depicts that shareholders model of corporate governance puts a strong emphasis on the results achieved by companies and security of their shareholders, plausibly disregarding or at least, paying lesser importance to the long-term business development thereof, which makes the model susceptible to the fierce criticism for lack of strategic development plan.⁵¹

As pointed above, the other model of corporate governance is the so called the German-Japanese model. It's also known as stakeholder model. The share companies in those jurisdictions have large stock shareholders, often comprised of founding families, such as banks, insurance companies or other financial institutions who own the bulk of the shares therein.⁵² The model stood on the notion that companies are social entities that comprise of various constituencies, and

⁴⁷ Maria Maher and Thomas Andersson, *Corporate Governance: Effects on firm Performance and Economic Growth*, (Organization for Economic Co-operation and Development, 1999), p. 6

⁴⁸ Alemayehu Yismaw, *Supra Note 46, Note 180*

⁴⁹ *Id.*, P.33

⁵⁰ *Ibid*

⁵¹ *Supra Note 45, P.30*

⁵² Prof. Dr. Jean J. du Plessis, et al, *German Corporate Governance in International and European Context*, Berlin: (Springer-Verlag Berlin Heidelberg, 2007), p. 119

that the corporate governance system needs to be designed in such a way to integrate the interests of all the stakeholders.⁵³

Accordingly, it primarily focuses on social responsibility of firms and considers the whole society as stakeholders, within which shareholders are taken as one of the sets of stakeholders.⁵⁴ In line with this conception, the proponents of this model assert that all stakeholders' shall be given equal treatment and that any stakeholder group shall not receive preferential treatment over the other.⁵⁵ In addition, the advocators of this model opine that the objective of firms shall not be bound only within the ambit of making of profits to shareholders; but rather, shall be broader enough to encompass the objectives of providing social services and securing job for employees, quality services and products for customers, and welfare to the society.⁵⁶ And the primary role of the managers, according to this model, shall not be pursuing the interests of the shareholders only; but to pursue interests that care for the interests of others involved in the activities of companies.⁵⁷

Finally, it's imperative to note that the Stakeholders model of corporate governance, unlike that of shareholders model, is characterized by the salient feature that it's "two-tier" or "dualistic" Board model. The two tier Board model is particularly familiar in Germany as having the management Board and supervisory Board with separate governance mandate.⁵⁸ Accordingly, the management Board is in charge of the day-to day functions of a corporation whereas the Supervisory Board is charged with providing advices for the management Board.⁵⁹

⁵³ Daniel K. Saint and Aseem Nath Tripathi, *The Shareholder and Stakeholder Theories of Corporate Purpose*, (available at: www.knowledgeworkz.com/samatvam/newsletter/, last accessed on July, 2020).

⁵⁴ Alberto Chilosi and Mirella Damiani, *Stakeholders vs Shareholders in Corporate Governance*, Munich Personal RePEc Archive, (2007), P.2

⁵⁵ Donna Card Charron, *Stockholders and Stakeholder: The Battle for Control of the Corporation*, (Available at: www.researchgate.net/publication/ , Last accessed August 2020)

⁵⁶ E. Merrick Dodd, *For Whom are Corporate Managers trustee?*, Harvard Law Review, Vol. XLV, No.7 (1932)(Accessed from: www.jstor.org/stable/133169)

⁵⁷ Elena F. Perez Carrillo, *Corporate Governance : Shareholders' Interests' and Other Stakeholders' Interests'*, Corporate Ownership and Control, Vol.4, No.4(2007), p.99

⁵⁸ Assefa Aregay, Supra Note 34, P. 11

⁵⁹ Ibid

2.2. The Notion of Corporate Resolutions

It's generally understood that a corporation duly established in accordance with the relevant laws is a legal entity that is separate and distinct from its owners. As such, it enjoys most of the rights and responsibilities that individuals possess.⁶⁰ One of the peculiar and fundamental features of a corporation is its limited liability; or so to say, shareholders may take part in the profits through dividends and stock appropriation without being personally liable for the company's debts.⁶¹ In fact, shareholders do not have direct decision making authority over their company; rather the day to day activities of the company falls in the hands of a group of individuals. One instance where by shareholders express their interest in the corporation and its governance is by purchasing share(s) and gain votes in accordance with the number of shares bought.⁶²

The shareholders exercise these rights largely at the forum set as "Shareholders General Meetings". Typically it's this formal decisions of the company conceded over at this meeting that constitute company resolutions or minutes of meetings. Company resolutions are needed whenever there is a formal decision to be made. And when so doing, corporate entities record their decisions by means of corporate resolutions. The kind of resolution needed as well as certain related matters are largely determined by the Company laws of a given Jurisdiction along with the company's constitutive documents, i.e. Memorandum and Articles of Association. Whatever the kind may be, it should be noted that corporate resolution is a powerful document and an instruments of high significance for good corporate governance on the one hand and the protection of its directors as well as shareholders on the other hand.⁶³ Its significance, in particular, is vivid where the resolution is subsequently challenged.⁶⁴

⁶⁰ Mohammed Rezal salim, *Corporate insolvency: separate legal personality and directors' duties to creditors*, Universiti Teknologi MARA Law Review, Vol. 2, No. 90, 2004, p.1

⁶¹ Ibid

⁶² Soo Young Hong, *Curb Your Enthusiasm: The Rise of Hedge Fund Activist Shareholders and the Duty Of Loyalty*, Fordham Journal of Corporate & Financial Law, Vol. 24, No.1(2019), P.196

⁶³ Available at <https://www.tamimi.com/law-update-articles/corporate-resolution-an-instrument-of-high-significance-to-corporate-entities/>(last accessed August 15, 2020)

⁶⁴ Id

2.2.1 Organs Entitled to Pass Corporate Resolutions

Company resolutions pre-suppose the power to do so. And the power to pass resolutions is something that relates to company governance. Company governance stands on the notion of the traditional separation of ownership and management in corporate law. The legal regime governing corporate governance differs across jurisdictions depending on the kind and nature of corporations. In Germany for instance, the principal bodies of corporate governance in Stock Corporations, which are equivalent to share companies in Ethiopia are the Supervisory Board, the Management Board and the General Shareholders Meeting.⁶⁵ On the other hand, the primary organs of corporate governance in Ethiopia are the shareholders meetings, the Board of Directors and auditors.⁶⁶ The typical feature that distinguishes the German Stock Corporate Governance from its counterpart in Ethiopia is that it follows Two-Tier Board Model; namely, the management Board and the supervisory Board.⁶⁷

The management Board is the body that is bestowed with the management of the day to day activities of the corporation whereas the primary duty of advisory Board is to advise and oversee the Board of managers.⁶⁸ Even if the notion of separation of shareholders and the managements of corporation tells us that the shareholders do not have direct control over their corporation, the shareholders do still play decisive roles in the corporate governance. For instance, in the German Stock Corporation, where certain transaction requires the approval of the shareholders, the advisory Board of Stock Corporation is duty bound to secure the same.⁶⁹ Hence it follows that the shareholders of Stock Corporation have determinant decision making power to approve or disprove the named transaction. Likewise; as to be shown later in detail, shareholders meetings are the most important organ of management in Ethiopia besides Board of Directors and auditors.

Generally speaking, the short glance in to different literature depicts that despite the difference on the nature of participation, voting process as well as other particular instances, in almost all

⁶⁵ Id P.4

⁶⁶ Commercial Code Supra Note 1, Article 347

⁶⁷ Assefa Aregay, Supra Note 34, P.10

⁶⁸ Ibid

⁶⁹ Id, P.20

jurisdictions shareholders take part in the decision making process of their corporations. Yet, the role of shareholders in the management and governance of a company as well as their legal capacity to influence or become involved in matters of company management has been a matter of debate for centuries. The answer to these questions also varies across jurisdictions. For instance, in Australian corporate law, the answer lays on the case authority called *Cuningham principles*.⁷⁰ *Cuningham* was an appeal case decided by the English Court in *Automatic Self-Cleansing Filter Syndicate Co Ltd vs Cuningham* ('*Cuningham*') in 1906.⁷¹ In the case, the court asserted that in the common situation where the constitution of a company vests the power to manage the company in the directors, the shareholders shall not seek to exercise that power, particularly through the mechanism of resolutions passed at the company's general meeting.⁷²

The principle of *Cuningham* has been applied by the courts in the United Kingdom and Australia for more than a century.⁷³ Despite the range of the descriptors and the manner in which the various proscriptions are explained, the closer examination of the court cases decided after *Cuningham* depicts that they tend to restrict shareholders involvement in the management of the company thereby protecting the role of director of the company.⁷⁴

To sum up, from the above brief discussion of the different jurisdiction it can be concluded that corporate resolution can be made via two major corporate bodies; namely, the Board of Directors and the Shareholders.

2.2.2. Types of Corporate Resolutions

As mentioned somewhere in our aforementioned discussions, company resolutions are needed whenever there is a formal decision to be made. In addition, it's also noted that the kind of resolution as well as the governing organ to do the same is determined by the respective company laws of a given jurisdiction and corporate constitutive documents. Largely, corporate

⁷⁰ Stephen Bottomley, *Rethinking the law on Shareholder-Initiated Resolutions at Company General Meetings*, Melbourne University Law Review, Vol.43(2019), P. 93

⁷¹ Ibid

⁷² Ibid

⁷³ Id, P.94

⁷⁴ Id, P.99-100

management remains in the hands of the two governing bodies; namely Board of Directors and the shareholders meetings. Hence, whoever may make, it follows that corporate resolutions are the formal declarations of major decisions made by a corporate entity. The nature of resolution to be passed depends on the governing organ legally empowered to make the resolution. So, when a formal decision is made by the shareholders, it is named as a shareholders resolution, whereas it's known as a Board resolution when passed by the Board of Directors.

But one thing that needs to be vivid is that the types of corporate resolutions are quite distinct from the types of shareholders meetings. The former one primarily relates with the specific requirements needed to approve certain corporate acts whereas the later one is concerned with the manner and frequency within which shareholders may meet.⁷⁵ Literature on the area show that corporate resolutions are majorly of three types. These are ordinary resolutions, extra-ordinary (special) resolutions) and unanimous resolutions.⁷⁶ Ordinary resolutions in the majority of cases are used for routine changes, which needs a simple majority of shareholders or directors who cast a vote in the meeting to agree or disagree on the proposed decision.⁷⁷

On the other hand, Special (extra-ordinary) resolutions are needed for more important decisions or those affecting the constitution of a company. In the majority of cases these require at least 75% of the shareholders or directors to agree on the proposed decision.⁷⁸ One peculiar feature of this resolution is that unlike ordinary resolutions, votes are determined by the number of shares given to each shareholder (as opposed to the number of shareholders).⁷⁹ Finally, unanimous resolutions are those resolutions that require the unanimous (100%) votes of the directors or the shareholders present at the meeting.⁸⁰

⁷⁵ Andreas Cahn and David C.Donald, *Comparative commercial law, text and cases on the laws governing corporation in Germany, the UK and the USA*, Cambridge University press, P.549

⁷⁶ available at www.LEGALVISION.com.au (last accessed on August 17 2020)

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid

The Commercial Code of Ethiopia generally categorizes shareholders meetings in to general and special meetings.⁸¹ The Code further classifies general meeting in to ordinary and extra ordinary meetings which comprises shareholders of all class.⁸² The special meeting recognized by the Commercial Code is meant to denote the meetings of the shareholders of a specific class.⁸³ Nonetheless, no special class shareholders have, to date been recognized in practice in Ethiopia. The two types of meetings are separately regulated under the Commercial Code from Article 417-418 and Article 422-425 respectively. The closer examination of the provisions Articles 417-418 of the Commercial Code reveals that ordinary general shareholders meetings itself is further categorized in to ordinary general annual meetings and other ordinary general meetings may be held if necessary.⁸⁴

Ordinary annual general meeting is that one conducted within four months from the end of each financial year annually, notwithstanding the possibility to extend the four month time to six months by the articles of association.⁸⁵ Yet, there is still the possibility to convene ordinary general meetings within a year other than the annual one. It's this interim ordinary general meeting that's recognized under Article 418(3) of the Commercial Code. The typical example of this interim meeting may be one that could be called by the Board of Directors or officer of the court.⁸⁶

Majority and quorum required in each of the above shareholders' meeting vary with the types of meeting.⁸⁷ From the readings of Article 421 through 425 of the Commercial Code, one can understand that the Code also recognized the above discussed three types of resolutions. Resolutions at ordinary meetings require a simple majority of those who are presented and cast voting, which we called it "ordinary resolution" above.⁸⁸ On the other hand, decisions at Extra-

⁸¹ Commercial Code, Supra Note 1, Article 390

⁸² Ibid, Article 390(2)

⁸³ Ibid, Article 390(3)

⁸⁴ Ibid, Article 418

⁸⁵ Ibid Article 418(1,2)

⁸⁶ Fekadu Petros, የኢትዮጵያ የኩባንያ ህግ, Far East Trading Pvt.Ltd.C, (2008), P.218

⁸⁷ Commercial Code, Supra Note 1, Article 421 and 425

⁸⁸ Ibid Article 421(3)

ordinary meetings require special as well as unanimous resolutions. Special resolutions in Extraordinary meetings are one that requires a two-third majority vote.⁸⁹ Generally, this resolution is required to make all resolutions other than the resolutions to change the nationality of the company or to require shareholders to increase their investment in the company. Conversely, the resolutions to change the nationality of the company or to require shareholders to increase their investment in the company require 100% attendance and unanimous vote of all shares having voting rights.⁹⁰

To sum up, literature evidences that there are generally three accepted types of resolution across jurisdictions. As discussed above, the generally accepted resolution types are also given the same footage, mutatis mutandis, under the Commercial Code of Ethiopia.

2.3. Nullification of Corporate Resolutions

2.3.1. The Notion of Nullification of Corporate Resolutions

In the foregoing discussion it's shown that corporate resolutions are meant to declare the basic decisions made at the forum of either the shareholders or the Board of Directors. The corporate resolutions made in accordance with the law and the respective corporate's constitutive documents are assumed to be the decision of corporate and shall be binding on all shareholders of the corporations.⁹¹ Yet, the resolutions are still susceptible to different challenges from different bodies. The name given and the notion of these challenges vary across jurisdictions. France, Germany and Italy call it Nullification⁹² whereas Romania⁹³ and Belgium⁹⁴ named it Annulment. Turkey on the other hand uses both Nullification and Annulment with distinct

⁸⁹ Ibid Article 425(1)

⁹⁰ Ibid Article 425(2)

⁹¹ Avtar Sing, *Company Law*, (14th ed. Estern Book Company, Lucknow, 2004) P.364

⁹² Pierre Henri Conca, Luca Enriques and Martin Gelter, *Constraining Dominant Shareholders' Self-Dealing: The legal Framework in France, Germany and Italy*, *European Company and Financial Law Review*,(October 2007), P.513-518.

⁹³ Ibid to Supra Note 19

⁹⁴ Alexia Bertrand and Arnaud Coibion, *Shareholder Suits against Directors of a Company, against other shareholders and against the Company itself under the Belgian Law*, *European Company and Finance Law Review*, Vol.6, No.2 and 3,(2009), P.298

grounds and effect thereof.⁹⁵ Whatever the name may be, the significant point behind the claim is to obtain setting aside of decisions adopted by the corporate organ of company, more specifically the general meetings of shareholders and the Board of Directors.

2.3.2. Party/Parties Entitled to Challenge Corporate Resolutions

The legal remedies recognized to challenge the decision of corporate organs of companies, are of course, pointless without specifying the parties entitled to do so as well as the procedures to be adhered to. Literature evidences that, in almost all jurisdictions touched upon in this paper,⁹⁶ recognition for nullification of corporate resolutions has become fashionable. Yet, the persons/organs bestowed with the right to challenge corporate decisions vary across jurisdictions based on the kind of resolution to be contested.

The difference may be treated from substantive as well as procedural aspects. From substantive point of view, some jurisdictions recognized the right to challenge both shareholders' as well as Board of Directors' resolutions whereas others recognized the right only in relation to shareholders' resolutions. For instance, in France, shareholders have been given the right to request the nullification of a company's Board resolutions, where self-dealing transaction was made without obtaining ex ante authorization from the Board of Directors.⁹⁷ Whereas in Italy such right is reserved only for dissenting directors' and Board of auditors'. Individual shareholders are given the right to challenge the validity of the Board resolution only based on infringement the resolution brought on their individual rights.⁹⁸ The Belgian Commercial Code, despite the fact that the Code only covers grounds for the annulment of general meetings, is admitted to make both general meetings and Board of Directors' resolution susceptible to contention.⁹⁹ In Germany, on the other hand, shareholders are not permitted to challenge Board resolutions.¹⁰⁰

⁹⁵ Id to Supra Note 14

⁹⁶ See the discussion made regarding the trends of Turkey, Romania, France, Germany, and Italy above

⁹⁷ Supra Note 92, P.515

⁹⁸ Id, P.515-516

⁹⁹ Supra Note 94, p.298

¹⁰⁰ Ibid

The practice in Turkey shows that shareholders, Board of Directors, each member of Board of Directors and any interested person is entitled to take action against shareholders resolutions.¹⁰¹ In fact, the persons entitled to these challenges vary depending on the nature of the claim.¹⁰² In the same fashion Romania empowered shareholders, company's directors, company's censors and any person justifying an interest in the annulment of the resolution to take court action.¹⁰³ On the other hand, Belgium recognized any interested party; or so to say, any person holding a legitimate and personal interest thereto to request the annulment of resolutions of the shareholders' general meeting as well as other corporate organ resolutions.¹⁰⁴

From procedural point of view, the requirements as well as the procedures to be adhered to also differ across jurisdictions. For instance, Italy requires a minimum ownership threshold for challenges of shareholders' resolutions (at least 5% share for non-listed and 0.1% share for listed companies respectively).¹⁰⁵ Germany, on the other hand resorted to what they call "Clearance Procedure"¹⁰⁶ than putting a minimum ownership threshold for challenges of shareholders' resolutions.¹⁰⁷ In France, however, there are no restrictions for standing to sue either of.¹⁰⁸

2.3.3. Grounds for Nullification of Corporate Resolution

¹⁰¹ Supra Note 14

¹⁰² See the discussion on page 9 of this paper. There it was pointed out that Turkish Commercial Code categorized the right to challenge corporate resolution in to two. Accordingly, the right to quest for annulment of the resolution is reserved only for shareholders, board of directors and each member of board of directors whereas declaratory action for the nullity general assembly resolution can be made by any interested.

¹⁰³ See the discussion under page 10 of this paper. In Romania, General shareholders meeting are subjected to absolute and relative nullity. Shareholders may evoke both absolute and relative nullity while other third parties are only entitled to claim for absolute nullity of the resolutions.

¹⁰⁴ Supra Note 94, P.300

¹⁰⁵ Supra Note 92, P.513-514.

¹⁰⁶ "Clearance Procedure" (*Freigabeverfahren*), is meant to say the mechanisms which allows the court to allow an increase or reduction of capital or an agreement to enter a contractual group to proceed if the suit is patently baseless, or if the alleged violations of the law are less onerous to the firm and its shareholders than the disadvantage of the transaction grounding to a halt.(taken from Supra note 130, P.514)

¹⁰⁷ Ibid

¹⁰⁸ Ibid

Needless to repeat, corporate resolutions constitute basic corporate decisions. The decisions may be either that are directly related to the very existence of the corporation or with the major business activities of the corporation. So, in principle such basic corporate decisions need to be recognized and dully obeyed by the shareholders as well as any party showing interest thereon. But one needs to be realistic that some time there might be an instance where by corporate resolutions in one way or another may not be in line with the shareholders' or other third parties interest. The recognition for nullification of corporate resolutions is, thus, meant to address and balance between these two competing interests; or to put it otherwise, corporate interest on the one hand and shareholders interest on the other.¹⁰⁹

Nevertheless, an unwarranted recognition of the right to claim for nullification of corporate resolution may entail an abuse of right which may possibly end in the collapse of a corporation. To tackle this at the outset, certain coping mechanism needs to be designed. One such mechanism is the pre-recognition and settlement of the grounds on which a given corporate resolution could be contested.

Despite the recognition for nullification of corporate resolution, literature evidences that the recognized grounds vary across jurisdictions. In France, Germany and Italy the grounds that are recognized to result in nullification of shareholders' resolutions are where the resolution violate either the company's bylaws or the law.¹¹⁰ There, violations of the voting behavior set for by the rules or standards of conduct for the shareholders (i.e. duty of loyalty in Germany and abuse of majority rights in France and Italy) are considered to constitute violation of law.¹¹¹

Particularly in France, nullity lawsuits are deemed to be exceptional measures taken to set aside irregularities committed up on incorporation of the company or during its terms.¹¹² The irregularities committed in due course of the business activity of the corporation are deemed to

¹⁰⁹ Bernard Grelon, *Shareholders' lawsuits against the management of a company and its shareholders under French law*, European Company and Financial Law Review, vol.6, No. 2and 3(2009), P. 206

Note here that the question of third party interest is deliberately omitted, as there is no uniform understanding and recognition of third party's right to claim for nullification of corporate resolution across jurisdiction.

¹¹⁰ Supra Note 92, P.513

¹¹¹ Ibid

¹¹² Supra Note 109, P.210

be either breach of the mandatory provision of the Commercial Code or breach of an agreement called “Regulated”.¹¹³ The notion “Regulated” under French Commercial Code is a contract signed in between companies with a Board of Directors or companies with the management and supervisory Board.¹¹⁴

Under the Belgian Commercial Code, the general bases for annulment of general meetings’ resolutions are enumerated under Article 64 of the BCC. The full text of which reads as follows:¹¹⁵

1. *If a formal irregularity has influenced the decision;*
2. *In the event of breach of the rules relating to the organization of the meetings or in the event of non-compliance with the agenda of the meeting when the breach is tainted with fraudulent intent;*
3. *In the event of an ultra vires or of a misuse of powers*
4. *If a shareholder votes with shares of which the voting rights have been suspended; and*
5. *In the absence of the required reports of the Board of Directors.*

In Turkey, the grounds for annulment and nullity of general assembly resolutions are different. The general grounds for annulments are where the resolution is contrary to the TCC, or the articles of association or good faith rule.¹¹⁶ On the other hand, the reasons which amount to nullity of the resolutions are where it’s either contrary to the mandatory rules, public order or morality.¹¹⁷ One important aspect of the Turkish as well as Belgian Commercial Code in relation to annulment of general meetings’ resolution is that they both contain what’s called an “influence rule”.¹¹⁸ An influence rule is the notion that the general assembly would not have taken the

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Supra Note 94, .299

¹¹⁶ Supra Note 14, Art.445

¹¹⁷ Supra Note 14, Art.447

¹¹⁸ Turkish Commercial Code(Supra Note 14, Art.445) and Belgian Commercial Code (Supra Note 62, Art.64)

resolution had the subject breach not existed.¹¹⁹ Thus, for shareholders to be able to challenge the resolution they are required to prove that the breach had influence on the outcome of the resolution.

Finally, in Romania, the grounds for annulment of the general meetings' of the shareholder vary depending on the kind of annulment claimed.¹²⁰ The grounds for absolute nullity are breach of norms securing public order and general interests whereas that of relative nullity are breach of norms securing the personal interests of the company's shareholders, which are mostly related to the shareholders' will or capacity.¹²¹

2.3.4. Effects of Nullification of Corporate Resolutions

As the term itself clearly indicate the general effect of setting aside corporate resolution; be it annulment or nullity, is making the respective resolution not to entail any result as if it has not been made. Despite the similarity as regards the general effect thereof, the closer examination of the afore-discussed jurisdictions reveals that there are still specific effects to be treated separately. In Turkey, where an action for annulment is taken on the general assembly's resolution the court, after having received the opinions of the members of Board of Directors, may suspend the execution of the resolution contested.¹²² The final decision rendered as regards the annulment or the nullity of the general assembly resolution is binding on all shareholders and the company.¹²³ Accordingly, once the decision is made the Board of Directors is duty bound to

¹¹⁹ Att. Ecem Cetinyilmaz, *Annulment of General Assembly Resolutions of the Joint Stock Companies and the influence rule*, (2015), (available at <http://www.erdem-erdem.av.tr/publications/law-post/annulment-of-general-assembly-resolutions-of-joint-stock-companies-and-the-influence-rule/>) (last accessed June 2020)

¹²⁰ Supra Note 19, P.185

¹²¹ Ibid

¹²² Gözde Gürünlü, *Turkey: Annulment and Nullity of the General Assembly Resolutions According to the New Turkish Commercial Code No. 6102*, (13 September 2013) (available at https://www.mondaq.com/Author/1050014/Koyuncuo287lu-Kksal-Avukat1305k-Brosu-Gzde-Grnl?article_id=262636) (last accessed June 2020)

¹²³ Ibid

register the court decision with the relevant trade registry office and publish it on the company's website.¹²⁴

In Romania, irrespective of whether the nullity is absolute or relative, the effects of the nullity are all the same; or so to say, invalidation of the resolution. Here too, the decision is binding on all shareholders and the company. As such shareholders must be restored to their position prior to the adoption of the resolution. In addition, the company's management, as well as the company itself shall abstain from enforcing the resolution. Finally, any registrations before the trade registry based on the resolution shall be erased.¹²⁵

In France, Germany and Italy any resolution rendered in violation of the company's bylaws or the law results in nullification of the concerned resolution.¹²⁶ Belgium, in the same fashion, recognized the possible effect thereof to be annulment of the resolution.¹²⁷ One peculiar feature of the Belgian Commercial Code is that it allows the claimant to quest for the suspension of the challenged resolution before instituting claim of annulment in so far as the plaintiff can demonstrate what is called "serious reasons".¹²⁸ Belgian courts have developed case laws that the notion "serious reasons" meant to include an irregularity in the convening notice or in the decision making process where such irregularities have had an influence on the resolution.¹²⁹

¹²⁴ Ibid

¹²⁵ Supra Note 19, P.187

¹²⁶ Supra Note 92, P.513

¹²⁷ Supra Note 94, P.299

¹²⁸ Id, P.300

¹²⁹ Ibid

CHAPTER THREE

NULLIFICATION OF COMPANY RESOLUTIONS IN ETHIOPIA: THE LAW AND THE PRACTICE

The discussions under the preceding chapters familiarized readers with the general notions and related experiences of relatively developed jurisdictions as regards company resolutions and their nullifications. In those countries, it's settled that despite few jurisdiction-related specific differences, the general concept of corporate resolutions as well as the legal framework for nullification of the same can be said is nearly the same. Where the discussion so required, the legal framework governing the two notions in the Ethiopian legal system has been given short glance too. Based on these general foundations, the discussions in the subsequent topics along with sub-topics there under are totally devoted to discussing the legal framework governing the topics under discussion in the Ethiopian Commercial Code in more detail and analyzing the practical applications thereof.

3.1. Company Resolutions and their Nullifications According to the Ethiopian Commercial Code

3.1.1. Mandate to pass Company Resolutions

Corporate resolutions generally denote formal decisions of a company at the various meetings of the respective corporate governing bodies of a given company, particularly at shareholders' meetings. The prevalent general opinion reveals that corporate resolution is directly related to and goes in line with corporate governance structure of a company. It's likely because of this inherent intertwining between the two that the Commercial Code of Ethiopia regulates the matter of company resolutions under the section dealing with corporate governance in general and that of shareholders' meetings in particular.¹³⁰ The Commercial Code recognizes three statutory governance bodies; namely, the General meeting of shareholders, Board of Directors and managers.¹³¹ These three governance organs are empowered with their own respective governance powers and duties in accordance with which each may pass decisions deemed pertinent.

¹³⁰ Commercial Code, Supra Note 1, Book two, Title six, Chapter Four, from Article 347 to 428

¹³¹ Id, Art.347

Nevertheless, all decisions made by the three governing bodies do not constitute company resolutions. Corporate resolution is all about the decisions relating to corporate governance matters that are beyond the normal day to day running of the business. The theories as well as the practical aspects of corporate governance evidence that the main governance matters largely remain in the hands of the two governing bodies; namely Board of Directors and the shareholders'. The Commercial Code of Ethiopia is not an exception to this reality. The closer examination of the sections of the Commercial Code dealing with corporate governance and management reveal that the major corporate governance role is given to shareholders' and the Board of Directors' whereas the managers are entrusted with the mandate to run the day to day activities of a company.

It's these two governing bodies; namely, the shareholders' meetings and the Board of Directors' that are mandated to pass company resolutions in the Commercial Code of Ethiopia. The general matters of Board of Directors' governance roles are dealt with in Book II, Title IV, Chapter IV, Section I, from Article 347 to 367 of the Commercial Code, and specifically the matter of Board of Directors' resolutions is regulated by Article 356 and 358 of the same Code.

3.1.2. Legal Framework for Nullification of Company Resolutions

Basically matters of nullification of company resolutions are regulated in Article 416 of the Commercial Code. Sub Article 1 of this provision lays down the general principle that resolution adopted by a meeting in accordance with the law and company constitutive documents shall bind all members, including those who were not present or dissented. Yet, resolutions adopted contrary to the law or company constitutive documents are susceptible to challenge before the court of law. It's the challenging measure taken to set aside company resolutions and the resultant decision of a court of law to nullify a company resolution that is technically called "Nullification of Company Resolutions".

The legal provision meant to govern nullification of company resolutions under the Commercial Code can be treated from substantive as well as procedural aspects. From substantive point of view, the provision provides the grounds for nullification and the party/parties entitled to institute/submit a petition for nullification. Accordingly, Article 416(2) of the Commercial Code

clearly provides three grounds that may trigger nullification of company resolutions. These are where the resolution; 1/ violates the law, 2/ contrary to the memorandum of association or 3/ contrary to Articles of association of a company. Yet, the extent of such violation, particularly the violation of law is not clearly provided for. Or to put it in a more clear way, whether the violation of the law or the constitutive documents includes the legality of the subject matter of the meetings or limited to the manner and conducts of the meeting is not clearly provided for. Some writers tend to limit the violation only to the manner and conduct of the meetings. For instance, Fekadu Petros, in his book named “የኢትዮጵያ የኩባንያ ሕግ” asserted that the violation described under Article 416(2) of the Commercial Code relates only to the manner of calling and conduct of shareholders’ general meetings.¹³²

In lee way of this, the author raised a question as to whether the majority shareholders in properly called and conducted meetings can deliberately pass a resolution that apparently suppresses the rights of the minority shareholders. As a reflection on the question, the author tends to see the situation in light of the statute of limitation provided under the article for taking an action for nullity. Accordingly, because of the fact that the nature of the right mentioned is something that relate with the inherent shareholder right prescribed under Article 389 of the Commercial Code, it follows that the time provided is not sufficient enough for an action to safeguard such rights and that the matters shall be treated differently.¹³³ It’s based on this founding premise that the author end up with the aforementioned assertion.

Nevertheless, the writer of this thesis has the conviction that the extent of the violation of the law and the constitutive documents prescribed in Article 416(2) of the Commercial Code shall not be limited and related only with the manner and conducts of the meetings. Rather, the violation of the law in particular shall be understood and interpreted in such a way to include the legality of the objects of the resolutions; such as where the objects of the resolution contravene the general policy matters. It’s so, for one reason that the legal framework governing the notion of nullity of company resolution under the Commercial Code is only regulated under Article 416. And that there’s no reason and legal way to hold few nullity actions by virtue of this article while

¹³² Supra Note 86, P.214

¹³³ Ibid, P.214-215

preserving some others to be treated under other legal regimes. Here, the writer opts to touch upon the matter of minority shareholders' right raised by the author named above as a simple example and put it in an interrogation. If the said minority shareholders' are precluded from taking actions of nullity in Article 416, owing to the fact that there's no violations of the law or the constitutive documents as regards the manner of calling and conducting of the meetings that deliberately suppressed their rights, what other legal actions could they take to restore and safeguard the violated rights? In addition, let us say the general meeting passed a resolution that's apparently inconsistent with the general policy matters or that clearly violates provisions of other legal regimes such as the Criminal Code. Then, what other tenable legal measures than questing for the nullity of the resolution could be taken so as to restore the situation?

Basically, closer examinations of different literature as well as related practices in other jurisdictions discussed in the preceding chapters evidence that the recognition of actions for nullity of company resolutions is the principal defense weapon that minority shareholders' are entitled to counter the abuse of majority shareholders. Majority rights may be abused without violation of the rules set for calling and conduct of meetings by simply violating the voting behavior set for by the rules or standards of conduct for the shareholders', which potentially leads to adopting resolutions without considering the minority shareholder's input.

Besides, the practices in relatively developed jurisdictions show that they assumed the probability of adopting resolutions which may contravene the mandatory rules, public order or morality and general policy matters. In such a situation, the jurisdiction entitled any party showing an interest to take an action for nullity, the probable effect of which is setting aside the resolution as void ab intio.

The stand reflected in Commercial Code of Ethiopia is not an exception to this. The entire readings of the provisions of the Code, particularly the section dealing with corporate governance, reveals that it has much to do with the issue of minority shareholders' and accorded some sorts of protections to them. Few of such protections include the cumulative voting or proportional representation provided under Article 352, the principle of one share one voted accorded under Article 407, the pre-emptive rights of the shareholders to buy the newly issued shares in proportion to their shareholding provided under Article 345(4) and 470(1) and the right to take actions against shareholders' general meeting resolutions provided under Article 416(2-

5). The majority shareholders' may adopt resolutions that supersede these principal rights under the cover and pretext of casting majority vote at the meeting. In such a situation, the only mechanisms via which minority shareholders' rights are safeguarded would be by instituting nullification petition before an independent court. The case of a resolution that contravenes mandatory rules, public order and the general policy matters shall be understood in similar fashion and given the same footage.

Of course, the sufficiency or otherwise of three months period provided for nullity action under Article 416(2) of the Commercial Code needs proper consideration. But, such consideration need not preclude the aggrieved shareholder or any party showing an interest from taking nullity action under Article 416(2) of the Commercial Code. Rather, other alternative legal framework needs to be designed and developed through the machinery of legal interpretations. One such alternative is interpreting the provision of Article 416(2) of the Commercial Code in such a way to make a distinction between the time needed for nullity action based on the violation of the rules for calling and conduct of the meetings and that which is based on the violation of the inherent rights one has as a shareholder or the general policy matters.

Accordingly, Article 1677(1) of the Civil Code of Ethiopia¹³⁴ (here after called the "Civil Code") provides that the relevant provisions of the Code dealing with contracts in general shall apply to obligations notwithstanding that they do not arise out of contract. One such general provision of the Code dealing with contract is Article 1845 of the Civil Code which regulates the period of limitations. This Article provides that unless otherwise provided by law, the action for performance of a contract, actions based on the non- performance of a contract and actions for the invalidation of a contract shall be barred if not brought within ten years.

The Commercial Code did not provide for shorter period of time within which an action for nullity of company resolution that supersedes the inherent rights shareholders' can be brought. On the other hand, it looks unjust to ban the exercise of this right within three months period provided under Article 416 of the Commercial Code. So, having regards to the nature and the dimension of the inherent rights of shareholders' and in accordance with the provision of Article

¹³⁴ Civil Code of the Empire of Ethiopia ,Negaret Gazeta, Proclamation No.165, of 1960

1677(1) the Civil Code, the statute of period to bring nullity action under the Commercial Code can be made the ten years general time frame provided under Article 1845 of the Civil Code.

The other substantive aspect of the legal regime governing nullity action under the Commercial Code relates to the party/parties entitled to bring the action. In this regard, there's some sort of discrepancy between the Amharic and the English versions of the Code. The Amharic version clearly provides that any party showing an interest thereon; or so to use the words of the version, “... ማናቸውም ባለጥቅም”, may bring nullity action. Yet, the English version is not clear as to who may bring an action except recognizing the possibility that the resolution may be challenged.

The 1995 Constitution of the Federal Democratic Republic of Ethiopia,¹³⁵ under Article 5(2) stipulates that Amharic shall be the working language of the Federal Government. The matters of Commerce fall under the exclusive legislative jurisdiction of the Federal Government in accordance with Article 55(4) of the Constitution. The existing laws of the country that are not clearly repealed and still in force need to be interpreted and applied in conformity with the Constitution. So, without the prejudice of the subsequent specific discussion on the title, it can be concluded from the wordings of the Amharic version of the Code that any interested party/parties are entitled to bring an action of nullity under the Commercial Code of Ethiopia. And the designation “any party” may include, as the case may be, shareholders, the Board of Directors and each member of the Board, auditors, creditors of the company, and prosecutors (in the interest of the public where the violation relates with mandatory provisions of the law).

On the other hand, the procedural aspect deals with certain requirements and procedures to be fulfilled. In this regard, Article 416(2) only provides for the time frame within which the action for nullity shall be brought. As the discussions under the preceding chapters of this thesis shows the practices in relatively more developed jurisdictions reveal that sort of pre-requirements that need to be met and procedures to be adhered to for taking nullity action.¹³⁶ Some of these include complying with the minimum ownership threshold, where the claimant is a shareholder who

¹³⁵ The Constitution of the Federal democratic Republic of Ethiopia, Proclamation No.1/1995

¹³⁶ Particularly see the discussion under sub-section 2.3.2 of this thesis.

attended the relevant meeting the requirement of casting negative votes and putting dissenting opinions stated in the meeting minutes and the rule of influence.

The Commercial Code does not put any minimum ownership threshold requirements to bring nullity action. Rather, it clearly entitles any party/parties showing an interest thereon, including an owner of one share to bring the action. In light of the theoretical underpinnings of nullity claim, one of which is to safeguard the interests of minority shareholders, the position of the Commercial Code seems to be tenable.

In fact, the Commercial Code did not provide for the requirement of “influence rule” in Article 416. The notion of “Rule of Influence” is dealt with only in Article 409(2) of the Commercial Code which cross refers the effect thereof to Article 416(2) of the same Code. In the former article, it’s provided that a resolution prejudicial to the interest of a company, in which a member having conflict of interest takes part and exercised his/her voting right, shall only be set aside on the ground of failure to comply with the rule of conflict of interests set in the Article where it is found that the resolution would not have been adopted had the vote of the member with conflict of interest not existed.

Literature on the theoretical underpinnings of “Influence Rule” reveal that it’s a tool against excessive litigation, in the sense that it prevents small minority shareholders from challenging corporate resolution due to small irregularities that only concern themselves.¹³⁷

So, taking a lesson from the literature as regards the importance of the “Influence Rule” particularly in maintaining corporate stability and the concept provided under Article 409(2) of the Commercial Code, the writer is convicted that the “Rule of Influence” has to be a procedural pre-requisite in brining nullity action under Article 416(2) of the Commercial Code.

The last and the most important procedural requirement worth dealing with is the voting role the person bringing the action exhibited in the meeting that adopted the contested resolution. In this regard, the Commercial Code has nothing to offer. Article 416(1) of the Commercial Code provides that properly conducted and adopted company resolution binds all the members, regardless of whether they did not attend the meeting or dissented, in the sense that it conveys

¹³⁷ Supra Note 119

the common will of the shareholders aimed to fulfill both their purpose and the company's purpose.

The prime relevance and importance of recognition for the right to bring nullity action against corporate resolution is to provide the legal mechanisms through which shareholders could oppose disagreeable resolutions. If a shareholder attends a meeting and voted in favor of the resolution adopted, there could not be any rationale to let him/her contest his/her own decision. Based on this grounding principle, it's imperative to conclude that shareholder who attended the meeting needs to clearly show his opposition to the resolution by casting negative vote and putting his/her dissenting opinions on the minutes of the meeting, to bring nullity action.

The Commercial Code could not be an exception to the above mentioned ground. Hence, the requirement as regards the voting role the person bringing the action exhibited at the meeting that adopted the contested resolution needs to be set as a procedural requirement for nullity action under Article 416 of the Commercial Code.

3.1.3. The Right to Contest Corporate Resolutions

Under the discussion made above regarding the substantive requirements for an action for nullity, it's generally settled that the Commercial Code entitles any party/parties showing an interest to contest corporate resolution. Besides, the preceding discussion on the mandate to pass corporate resolution ended up with the conclusion that the ultimate power rests in the hands of two governing bodies; i.e., the shareholders' and the Board of Directors'. Hence, the subsequent discussions try to look in to the dimensions of the rights accorded to any party/parties showing interest to bring nullity action in light of nature of the corporate resolution and the organ that passed the resolution.

The question as to who can challenge shareholders' general meetings resolution is not as such a headache. Related practices in other jurisdictions exhibit that in almost all jurisdictions discussed; including Ethiopia, the general meeting's resolutions are made susceptible to challenges from various corners.

What's worth discussing here is the case of Board of Director's Resolutions. As can be gathered from the preceding discussion on the organs entitled to challenge corporate resolutions the practice as regards recognizing organs to contest Board Resolution varies across jurisdictions. Some entitle shareholders to challenge Board resolution in certain specified conditions, whereas others maintain the right as belonging only to dissenting members of the Board.¹³⁸

In this respect, the position of the Commercial Code is not clear. The legal regime governing action for nullity under the Code talks only about "Resolutions" in general term. So, to understand the party/parties entitled to challenge resolution of Board of Directors', one needs to look in to the nature and convenience of the meetings of the Board of Directors' that amounts to adoption of a resolution.

Accordingly, whereas the powers of the Board of Directors' emanate from the law, memorandum of association and resolutions of the general assembly, the manner and conduct of Board meetings is largely regulated by the respective constitutive documents of the companies. But, what should be vivid from the outset is that only members of the Board that can attend for the meetings. So, non-Board member shareholders' may not know the date, time and agenda of the meeting as well as whether the tabled agenda is within the ambit of the power accorded to the Board of Directors'. The likely means through which shareholders' could be aware of the agenda tabled for discussion as well as the resolution adopted is on the forum of shareholders' meetings.

In fact, one of the mandates of shareholders' meetings is hearing the business activities reports of the Board of Directors'. In lee way of this, shareholders' have an inherent right to approve or reject the Board of Directors resolutions. In addition, as discussed earlier individual shareholders are entitled to challenge the general meeting's resolutions which may include the one that approves the resolutions of the Board of Directors'. So, if shareholders' are furnished with such multiple forums to contest the Board resolution, there's no need to entitle them to take action for nullity in the meantime of the company's business activity. One likely reason to be mentioned here may be not to disrupt the smooth business running of the company.

Yet, the respective rights of each member of the Board need to be treated differently. As it's members of the Board of Directors' that closely know the regular business activities of the

¹³⁸ See the discussion under sub-section 2.3.2 above

company, it seems just to entitle them to object to and challenge any Board resolution that he/she believes violated the law or the constitutive documents.

In line with this view, the writer is convinced that the right accorded to challenge general meetings' resolution vests on any party/parties showing an interest thereon, including each member of Board of Directors', while the right to contest Board resolution rests only on the members of the Board who cast negative vote at the Board meetings.

3.1.4. Effects of Nullification

The rules governing the effects of nullification of company resolutions are contained in Article 416(4-6), and in particular in Sub-Articles 5 and 6 of the same provision. As the provision of Article 416(4) of the Code shows, the primary effect that nullity action results in is the suspension of the resolution until the final verdict on petition for nullity is rendered. Actually, suspension of the resolution is not an automatic effect that petition for nullity bring about. Rather, it's a pro-tempore (temporary) order given up on the satisfaction of certain requirements. In the first place, there has to be a request to that effect from the petitioner. Secondly, the petitioner has to produce good reasons to pray for an order of suspension of the execution of the resolution prior to the rendering of the final verdict over the petition. Next, the directors and auditors shall be heard on the claim.

Regarding the final verdict on nullity petition, as the term “Nullification” is self-explanatory, the probable effect thereof will be setting aside the contested resolution; or to put it otherwise, rendering it not to entail any effect as if it was not made. With this respect, the Amharic version used the term “ፈረሽ”, whereas the English version used term “Set aside” to denote the effect of nullification verdict.¹³⁹ The expression used in the English version seems not to that problematic as it's more or less proximate to the theoretical notion thereabout.

Yet, what's worth discussing here would be the expression used in the Amharic version. In fact, the term “ፈረሽ” is contractual term largely used in contract laws. The Civil Code of Ethiopia,

¹³⁹ Commercial Code, Supra Note 1, Art.416(5)

under the section dealing with “Invalidation and Cancellation of Contracts”,¹⁴⁰ equivocally used the term “ፈረሽ” to denote both invalidation and cancellation of contracts. Doctrinal writings on the area reveal that, the notion “Invalidation” and “Cancellation” bear different scenarios and effects particularly in contract law.¹⁴¹ Nevertheless, a closer examination of the concept expressed in the term “ፈረሽ” under contract laws of Ethiopia depicts that it’s likely used to denote “Voidable Contracts”.¹⁴² Generally, the effect of voidable Contract is dependent on the will of the party entitled to request for invalidation of the contract. Until such an action arises, the effects of the contract keep on entailing results. It’s because of this peculiar feature that sometimes the notion is expressed as “Relative Nullity”.¹⁴³

But it should be noted that voidable contract relates with formation defects, which may include, among others defect as to the object of the contract. For a contract to be valid and entail effect, its object, among others shall be lawful and moral.¹⁴⁴ Failure to comply with this object requirement results in making the contract effect less from the beginning; or to use the legal jargon, void *ab initio*.¹⁴⁵ Based on this, it can be concluded that the expression “ፈረሽ” is used to describe both “voidable” and “void ab initio” contracts in the Civil Code.

In relation to this, one thing that needs to be vivid is that even if the term “voidable” and “void ab initio”, are largely known and used in contract laws, their concept and effects is not limited to contract law only; rather, apply to all juridical acts.¹⁴⁶ Accordingly, the expression “ፈረሽ” under Article 416(5) of the Commercial Code shall be understood to include both voidable and void ab initio company resolutions, depending on the nature of the alleged violation that the resolution is tainted with. Where the violation of the law or constitutive documents relates to the convocation

¹⁴⁰ Civil Code, Supra Note 134, Art.1808 to 1818

¹⁴¹ Tilahun Teshome, *Basic Principles of Ethiopian Contract law*, Federal Supreme Court Research and Publication Department, (1996), P.148

¹⁴² Id, P.151

¹⁴³ Ibid

¹⁴⁴ Civil Code, Art.1716

¹⁴⁵ Ibid

¹⁴⁶ Supra Note 141, P.148 and 151

or conduct of the meetings the probable effect of nullity action shall be invalidation of the resolution, having regard to the rule of influence discussed earlier. On the other hand, where the violation relates to mandatory rules of the law, public order or morality the effect shall be verdict of void ab initio, in which case consideration as to the rules of influence may not be necessary.

Article 416(5) provides that the verdict as to the effect of nullity action is binding on all shareholders and the directors are duty bound to take all measures necessary to implement the decision of the court. Nevertheless, the third party rights acquired in good faith while the resolution was effective are recognized and maintained as per the provision of Article 416(6) of the same Code.

3.2. The Practical Handling of Nullification Petitions by Ethiopian Courts: Analysis of Selected Cases rendered by Federal Courts.

Preliminary Remarks:

As already reasoned out under the proposal of this thesis dealing with the scope of the study, the practical analysis will be devoted to selected decided cases by the Federal Courts. To avoid any question that may arise concerning the representativeness of the research, the study specifically deals with cases decided at the regular Appellate and Cassation Benches of the Federal Supreme Court. To this end, in all possible ways, the writer exerted as much effort as possible to access all disposed cases directly related to nullity action in the two benches. However, only seven Cassation Bench, (two of which came from regional High Courts), and two cases submitted to the Federal Supreme Court by way of appeal have been found. The subsequent analysis, therefore, relates to these cases. For proper handling of the topic, the writer opted to make separate treatment of the cases in light of the founding discussions and analytical representations in the preceding chapters.

3.2.1. Case one: Federal Supreme Court Cassation Bench's Decision in File No. 52269

The case between applicants Ato Kedir Haj Husen and Lucy Collage Share Company and respondent Ato Juhar Aliy was decided on Tikimt 17/2003 E.C. The process commenced with the statement of claim the Cassation Respondent instituted at Federal First Instance Court against the Cassation Applicants. Particulars of the claim show that the plaintiff, as a founding member

of the second defendant share company (Lucy Collage Sh.co), had paid up Birr 195,000(one Hundred Ninety-Five Thousand Birr) share capital representing the value of 39 shares. Despite these facts, at an ordinary meeting conducted in his absence on 02/13/1997 E.C. the defendants, with intent to cause harm to him, had deliberately reduced and registered in the minutes of the meeting as if he purchased only 10 shares and the paid-up capital is only Birr 50,000(Fifty Thousand) and passed a resolution to that effect. As relief, he sought for nullification of the resolution, and an order to reinstate him to his actual shareholding and paid-up capital as indicated on the share certificates the defendants issued to him.

The Federal First Instance Court, after receiving the defendants' statement of defense and after hearing both sides', pronounced a verdict that set aside the resolution and reinstate the plaintiff back to the shareholding status he had prior to the resolution.

The Cassation Applicants took the case on appeal to the Federal High Court. One prominent ground for an appeal stated that the preliminary objection they raised concerning the statute of limitation provided under Article 416(2) of the Commercial Code was improperly overruled by the lower court; and that as the plaintiff's action for the nullity of the resolution was brought after the lapse of three months, it should have been rejected.

The High Court on its part, after hearing both parties' appeal arguments, reasoned out that the reduction of the plaintiff's shareholdings, as well as the amount of paid-up capital, has factually been proved. A shareholder's right one has as a member of a share company is an inherent right that shall not be reduced against his/her will by the general shareholders' meeting resolutions or by the Board resolutions. As the plaintiff's claim is an objection to the restriction made on his shareholding rights and the relief sought relates with inherent shareholding rights he has as a shareholder, it should not be said that the claim relates only with the nullification of the resolution. As result, the court overruled the objection and affirmed the lower court's decision.

The Cassation Bench, in the file number stated in caption, reasoned out almost in a similar way as the High Court did and affirmed the High Court's interpretation just asserting that claims concerning inherent shareholding right shall not be covered and barred under Article 416(2) of the Commercial Code.

Comment:

It is obvious that the challenged resolution restricted the inherent shareholding right that the Cassation Respondent had as a shareholder. As the High Court unequivocally stated, the relief sought by the respondent directly relates to this inherent shareholding rights and should not be taken as a simple objection made to set aside the resolution. In the preceding discussion made in relation to the scope of application of the statute of limitation provided under Article 416(2) of the Commercial Code, it's settled that the statute of limitation concerning the action for nullity based on the violation of shareholders' inherent right shall be the general ten years provided under Article 1845 of the Civil Code and that the three months period shall be interpreted in such a way to apply only to actions of nullity brought based on the violation of convocation process or conduct of shareholders' meetings.

Even if both the High Court and the Cassation Bench did not provide as to which statute of limitation should apply on claims of nullity based on the violation of inherent shareholders' right, they asserted that the claim shall not be banned with the three months period provided under Article 416(2) of the Commercial Code. In this respect, the interpretation and application made by the two courts can be said is proper and within the spirit of the law.

Nevertheless, the proper message the Cassation Bench wanted to convey with the expression "*... claims in relation to the inherent shareholding right shall not be covered and barred under Article 416(2) of the Commercial Code*" needs careful attention. In the majority of court cases decided after this decision, the Cassation Bench's decision is cited as precedent that limits the scope of application of Article 416 only on nullity actions that arise from violations of rules governing convocation processes or conduct of meetings. The writer has a conviction that the trend does not seem proper. This is because of the fact that, as can be seen in subsequent case analysis, few cases decided by the Cassation Bench after this case evidence that there's a tendency to encompass additional grounds of nullity under Article 416(2). So, one had better understand as if the expression is meant to limit only the application of the statute of limitations provided under Article 416(2) of the Commercial Code.

3.2.2. Case Two: Federal Supreme Court Cassation Bench's Decision in File No. 90235

The case was decided between Applicants' Ato Kebede Wolde and 8 other persons and Respondent Sunshine Chemical S.C. on Meskereme 29/2007 E.C. This case also relates to the application of the statute of limitation under Article 416(2). The Cassation Applicants', in the statement of claim dated Miyazia 26th 2004 E.C, instituted a claim at Federal First Instance Court requesting for nullification of shareholders' meeting resolution adopted on Tir 27th, 2004 E.C and Yekatit 11th, 2004 E.C. The grounds for nullity action basically relate to the convocation process and conducts of meetings that passed the challenged resolutions. The Cassation Respondent raised a preliminary objection that the claim was not brought within three months after the adoption of the resolutions and that the claim shall be struck out.

The Court of First Instance maintained the objection and struck out the claim on the ground that while the challenged resolution was adopted on Tir 27th, 2004 E.C and Yekatit 11th, 2004 E.C., the claim of nullity was brought after the lapse of the three months period on Miyazia 29th 2004 E.C. The High Court affirmed this decision.

The Cassation Bench, in the file number stated in caption, entertained the case in light of the legal regime governing the manner of calculation of periods provided under the Civil Code. Accordingly, the Bench asserted that even if the First Instance Court noted as if the applicants' action of nullity was brought on Miyazia 29th, 2004 E.C., the registered documents in the lower court's file show that the claim was brought to the court on Miyazia 26th 2004 E.C. in which case it cannot be said that the claim was brought after the lapse of the three months period. As a result, the Cassation Bench reversed the lowers courts judgments and remands the case to the First Instance Court to hear and decide on the merit of the case.

Comment:

The grounds for the action of nullity relate to the convocation and conduct of the meetings that resulted in the adoption of the contested resolutions. The three months statute of limitations provided under Article 416(2) of the Commercial Code clearly regulates actions of nullity brought based on these grounds. Besides, the calculation of the period shall be conducted in a

manner provided under Article 1848 of the Civil Code and reasoned out by the Cassation Bench. Hence, the related practice in this regard shows no disparity from the law.

3.2.3. Case Three: Federal Supreme Court Cassation Bench's Decision in File No. 137340

The case was decided between Applicants' Ato Endalkachew Tesfa and Respondent Tesfa G/selase the Behere Bulga PLC S.C. on Miyazia 03/2009 E.C. The litigation commenced with a statement of claim the Cassation Respondent brought against the Cassation applicant at Federal First Instance Court. The Cassation Applicant, along with his statement of defense, instituted a counterclaim for nullification of the plaintiff's shareholders' meeting resolution that removed him from the general manager post. The grounds for the alleged nullity action stated that the meeting was not called by the appropriate body entitled to do the same under the Article of association; he was not called to the meeting; the resolution was passed without the fulfillment of the requirements set by the Commercial Code as well as the Article of Association to remove the general manager and to amend the Article of Association; a shareholder representing 50% of the total share of the company did not take part in the meeting; persons who took part in the meeting in the name of this shareholder did not have appropriate power of attorney and that the legitimate agent of the said shareholder is only the nullity claimant.

The Federal First Instance Court rejected the Cassation applicant's nullity claim on the ground that the grounds for nullity claims directly relate with the convocation process and conduct of the meeting and that the convocation, as well as the conduct of the shareholders' meeting, did not exhibit any violation of the law and the constitutive documents. The Federal High Court affirmed the decision.

The Cassation Bench, in the file number stated in caption, entertained the case and affirmed the lower courts' decisions.

Comment:

Violation of the rules governing the convocation process and conduct of the meeting is one noticeable ground that amounts to nullification of company resolution. Whether the rules are violated or not is a matter of fact that needs to be proved with the relevant pieces of evidence. Both the trial court and appellate court, with their judicial power to entertain factual matters, are

satisfied that no rules of convocation, as well as the conduct of the meeting, were violated. As the Cassation Bench is mandated to entertain only basic error of laws, it took the factually proven facts and affirmed the lower courts' decision. Hence, the writer does not notice any practical divergence from the laws.

3.2.4. Case Four: Federal Supreme Court Cassation Bench's Decision in File No.142716

The case was between Applicant Hirmata Minch Real Estate S. Company's 25 shareholders' and Respondents' the Company's Board of Directors'. The case commenced with the nullity claim Cassation Applicants' instituted against Cassation Respondents' at Oromia National Regional State Jimma Zone High Court. The claim requested for nullification of the resolution of the 12th shareholders' meeting of the company. Particulars of the claim state various grounds for the nullity of the resolution. Two of which, worth analyzed here are 1/ the shareholder meeting, in violation of the constitutive documents and without sufficiently proving that the defendants' really saved the company from unnecessary expenses worth 38,778, 370.00, adopted the resolution that entitled the defendants to earn 12% of the saved expenses in the form of award. 2/ the shareholder meeting unlawfully removed the 5th plaintiff from the company's membership.

The High Court, after hearing both sides' arguments pronounced a verdict that set aside only part of the resolution that removed the 5th plaintiff from the company's membership. In rejecting the first ground of nullity stated above for analysis, the Court reasoned out that the payment accorded to the defendants in the form of an award is a kind of remuneration that defendants' are legally entitled to receive as per Article 351(1) of the Commercial Code. When such entitlement is adopted by shareholders' meeting, it shall not be brought to the court in accordance with Article 416 of the Commercial Code. The Oromia Supreme Court dismissed Cassation Applicants' appeal without calling the respondents.

The Federal Supreme Court Cassation Bench, in the file number stated in caption, entertained the case and affirmed the lower courts' decisions by four to one majority vote. In so doing, the majority vote reasoned out in two ways. One is that the existence of any violation of the law or company constitutive documents in relation to the convocation and conducts of the meeting is neither claimed nor proved by the applicants. Second, whether the resolution of the shareholders'

meeting is against the interest of the company or that of shareholders' has neither been claimed nor proved by the applicants.

Comment:

The Cassation Bench analysis recognized additional grounds for action of nullification of company resolutions. That is "where the resolution of the shareholders' meeting is against the interest of the company or shareholders". This evidences that the grounds of nullity under Article 416(2) of the Commercial Code are not limited to those related to the convocation and conducts of the meeting, which is also the analytical conclusion of this study. So, the way the grounds of nullity action contained under Article 416(2) of the Commercial Code are understood as well as the relative practical application in this case shows no paradox of the law and the practice.

3.2.5. Case Five: Federal Supreme Court Cassation Bench's Decision in File No.152636

The case is decided between Applicant Atenet Trading Sh.C. and Respondents the Company's thirteen Shareholders'. The case was initiated via the statement of claim, dated Meskerem 24th 2006 E.C., Cassation Respondents' instituted against Cassation applicant at Hawassa City High Court for nullification of the shareholders' meeting resolution adopted on Sene 08/2005 E.C. and in 1999 regarding the manner of distribution of the company's Commercial shops among its shareholders; and if this could not possible for the dissolution of the Company.

The High Court set aside the resolution adopted on Sene 08/2005 E.C. Yet, this was reversed by the Federal Supreme Court Cassation Bench and the case was remanded to Hawassa Court to be heard and decided again along with facts that need to be clarified. Accordingly, the High Court entertained the case and set aside both resolutions on the ground that the manner of distribution of commercial shops adopted by both resolutions disregard the interests of majority shareholders'; and that they are designed in such a way to create unfair share distribution differences among the shareholders', which in effect is unjust and against the objectives of the Commercial Code. The decision was affirmed by the appellate as well as the Cassation Bench of the Regional Supreme Court.

The Federal Supreme Court Cassation Bench, in the file number stated in caption, entertained the case and affirmed the lower courts' decisions.

Comment:

The noticeable ground because of which Regional Courts nullify shareholders' meetings resolutions states that the resolutions disregard interests of majority shareholders and that they are unjust. The Cassation Bench unequivocally used the same reasoning and affirmed the lower courts' decisions. This decision too, adds additional grounds of nullity to the one provided for by Article 416(2) of the Commercial Code. So, the decision can be said is one step forward in recognizing and applying the spirit of the law.

3.2.6. Case Six: Federal Supreme Court Cassation Bench's Decision in File No.164553

The case was decided between applicants Civil Work Consultant Engineers' PLC and two other Persons (Manager and Deputy Manager of the PLC) and Respondents Ato Ermiyas Abate and two other persons. The case was initiated with a statement of claim Cassation Respondents' instituted against Cassation Applicants and one other person at the Federal First Instance Court. The claim requests for nullification of shareholders' meeting resolution adopted on Tahisas 27/2007 E.C. regarding the remuneration of the second and third Cassation Applicants'(Manager and Deputy Manager of the PLC respectively) and business area of the company. The ground for the action of nullity stated that the manager and deputy manager of the PLC, being the party having conflict of interest and in violation of the rules governing conflict of interest cast vote and decided on their matters.

The court set aside the resolution passed on remuneration on the ground that the manager and deputy manager being members having a conflict of interest took part and exercised their voting rights. The Federal High Court rejected the appeal brought by both parties and affirmed the lower court's decision.

The Federal Cassation Bench, on the file number mentioned in caption, entertained the case and affirmed the lower court's decisions. In so doing, the bench raised the issue of influence rule and entertained in light of the minimum shareholders' vote set by the Commercial Code and constitutive documents to adopt the resolution. And in conclusion, it criticized the adoption of the resolution on the ground that it violated not only the rules governing conflict of interests but also those rules governing the minimum shareholders' vote required to adopt the resolution.

Comment:

Violation of the rules governing conflict of interest is one ground that amounts to the nullity of company resolution. Yet, the influence the alleged violation has on the adoption of the resolution needs to be carefully examined. The Cassation Bench raised this in its reasoning. Hence, the related practice in this regard can be said is within the realm of the law.

3.2.7. Case Seven: Federal Supreme Court Cassation Bench's Decision in File No.166953

The case was between Applicants Ato Said Adem and Ato Teshome Aweke vs Addis Abeba Commercial Center Merkato Share Company. The case began with a statement of claim Cassation Applicants filed against Cassation Respondent at the Federal First Instance Court. The claim requested for nullification of extra-ordinary shareholders' meetings resolution adopted on Ginbot 08/2007 E.C. Particulars of the claim stated the grounds for nullity as follow: the previously adopted shareholders' meeting resolution accorded priority right to lease one additional commercial shop from the company's commercial complex building to each shareholder. As per this resolution, the majority of shareholders made use of their rights. However, an extra-ordinary shareholders' meeting was called and in violation of the existing shareholders' resolution, the law, and the constitutive documents, passed a resolution revoking their priority rights.

The Federal First Instance Court rejected the nullity claim on the ground that the conduct of the meeting did not exhibit any violation of the law as well as the constitutive documents.

The Federal High Court reversed the lower court's decision and set aside the resolution. In so doing, the Court reasoned out that the latter resolution disregarded the right to equality and equitable utilization of the building among shareholders. The Federal Supreme Court's Appellate Bench in its turn reversed the High Court's decision and affirmed the Federal First Instance Court's decision.

The Federal Supreme Court Cassation Bench, in the file number stated in caption, entertained the case and affirmed the Supreme Court's decision. In so doing, the Bench added that the priority right adopted by the shareholders' meeting's resolution was accorded to majority shareholders only and not to all shareholders including the applicants'. In the absence of this, the applicants'

claim as if the resolution of extraordinary meeting waved their priority right is baseless. Whether the resolution violates the law or the constitutive documents was not factually proved in the lower Courts. Hence, there is no reason to nullify the resolution.

Comment:

The Cassation Bench asserted that the priority right accorded to shareholders' in the shareholders' meeting resolution did not include the applicants. Because of which they can't claim nullity of the resolution on the ground that it revoked their rights. The writer wants to stress on the message that the contrary reading of the assertion conveys and put it in an interrogation. What if the fact stated by the Cassation Bench had been proved? Would it amount to a ground for nullity action as per article 416(2) of the Commercial Code? If not, why the Cassation Bench concerned with the legality of the objects of the resolution instead of just entertaining the case only in light of the convocation and conduct of the meeting?

Based on the question raised above, the writer is convinced that the assertion of the Cassation Bench implies that the legality of the object of the meeting could be one ground for nullity action. In this respect, the practice in the Federal Supreme Court Cassation Bench can be said is within the demesnes of the law analytically reached on in the preceding discussions.

3.2.8. Case Eight: Federal Supreme Court Appellate Bench's Decision in File No.170831

The case was decided between Appellants' Ato Jemal Bediru and three other persons (Shareholders' of Nehekir Real Estate Mall Sh.C) and Respondents Ato Umer Biru and three other Persons (Members of Board of Director of the Company). The case began with a statement of claim the appellants instituted against the respondents at the Federal First Instance Court. The claim requested for nullification of Board resolution adopted on Miyazia 20/2009 E.C. on the ground that it was adopted in violation of the law and the constitutive documents. The particular grounds of nullity stated, among others; 1/ the plaintiffs were not notified of and called upon to attend the meeting. 2/ Matters of increasing shareholders' capital investments in the company as well as the issuance of shares to the public were made agenda items and resolutions passed on them in their absence. 3/ the spouse of the Chairperson of the Board without buying shares and paying the share price thereof has been registered as a shareholder.

The Federal First Instance Court, after hearing both sides' arguments, nullified the resolution based on all the alleged grounds for nullity stated in the Statement of Claim. The Federal High Court reversed this decision on the ground that the Board's Resolution was passed within the power conferred on the Board of Directors' by the Article of Association of the company.

The Federal Supreme Court Appellate Bench, in the file number stated in the caption, modified the lower courts' decisions and nullified only part of the resolution that recognized the spouse of the Chairperson of the Board as a shareholder and affirmed the rest. In so doing the court reasoned out: 1/ As the action for nullity was brought against Board resolution and as appellants are not members of the Board of Directors' they can't claim nullity of the resolution on the ground of convocation process. 2/ The Board's resolution is only an executive resolution passed to execute the previously adopted shareholders' meeting resolution decided in relation to increasing capital investment of the company and issuance of shares to the public. The court criticized the High Court's assertion (the assertion that the business conduct of deciding on matters of increasing capital investment of the company and issuance of shares to the public fall within the power accorded to the Board of Directors by the article of association) for violating the mandatory provision of Article 425(2(b)) of the Commercial Code that vest the same power in the meeting of shareholders.

Comments:

As can be vividly understood from the case, action for nullity of the Board's resolution was brought by shareholders. The Supreme Court recognized this allegation and partially nullified the Board's resolution. Yet, in the preceding discussion made as regards who may challenge Board resolution, the writer has analytically drawn the conclusion that the right to contest Board resolution shall only be reserved to members of the Board who voted against at Board's meetings. So, the Supreme Court's decision seems to be against this conclusion.

3.2.9. Case Nine: Federal Supreme Court Appellate Bench's Decision in File No.175530

The case was decided between Appellant Ato Yohanes Samuel vs Respondents' Gesha Village Coffee Estate and two other persons. The case began with the filing of a statement of claim, dated Tikimt 13/2010 E.C., the applicant instituted against the respondents at the Federal High

Court. The claim requested for nullification of the resolution adopted at the shareholders meeting on Yekatit 21/2008 E.C. One of the grounds for the claim of nullity stated that the shareholders' meeting adopted the resolution for the allocation of shares to an outsider in violation of his pre-emptive right to allotment of cash share issued by way of an increase of capital in proportion to his shareholding.

The defendants raised a preliminary objection that the claim shall be barred by the statute of limitations as it was not brought within three months of the adoption of the resolution per Article 416(2) of the Commercial Code.

The Federal High Court, after hearing both sides' arguments on the issue of preliminary objection, rejected the claim on the ground that it was not brought within three months of the adoption of the contested resolution. The applicant took an appeal to the Supreme Court. One ground of the appeal stated that his claim relates to the inherent pre-emptive right he has as a shareholder. The Federal Supreme Court Cassation Bench in F.No.52269 gave a binding legal interpretation to the effect that claim relating to inherent shareholding rights shall not be barred by the statute of limitation contained in Article 416(2) of the Commercial Code. So, in light of the binding interpretation his claim should not have been rejected.

The Federal Supreme Court Appellate Bench, in the file number noted above, entertained the case and affirmed the High Court's decision. In so doing, the court reasoned out that the said Cassation Bench's precedent relates to the actually established shareholding right one has as a shareholder while the applicant's claim relates with undue priority right to buy the newly issued shares. The Federal Supreme Court Cassation decision shall be precedent on the subsequent cases only where there exist the same fact and same question of law as between the two cases in accordance with Proclamation 454/2005, Article 2(1). Because of this, the said Cassation Bench decision is not relevant to the applicant's claim.

Comment:

The binding interpretation given in Cassation F.No.52269 relates to the inherent rights one has as a shareholder. One such inherent shareholder's right includes the pre-emptive right of subscription of a new cash share in proportion to the number of share one held as per the provision of Article 389(2), 345(4), and 470(1) of the Commercial Code. The applicant's claim is

directly related to the violation of this pre-emptive right accorded to him by the law. If that is the case, in accordance with the analytical conclusion reached on above and the binding interpretation given by the Cassation Bench, the statute of limitation contained in Article 416(2) of the Commercial Code should not have been applied to the applicant's claim. In this regard, the way the two courts' understood and entertained the case can be said is beyond the realm of the law.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

The legal regime governing the rules of nullification of company resolutions are contained in Article 416 of the Commercial Code. These rules can best be treated from substantive as well as procedural requirements set for actions for nullity. From the substantive point of view, the provision laid down the grounds for nullification and the party/parties entitled to institute claim for nullification. One noticeable ground of nullity provided is where the resolution is contrary to the law, Memorandum of association or Articles of association.

The general understanding as to the extent of the violation of the law and the constitutive documents tends to limit the violation only on matters of the convocation and the conduct of the meeting. Yet, it should not be limited to that, rather the violation of the law in particular shall be understood and interpreted in such a way to include the legality of the objects of the resolutions; such as where the objects of the resolution contravene mandatory rules, public order or morality and the general policy matters. As regards the substantive requirements as to who may challenge company resolution, the Commercial Code unequivocally entitles any party/parties showing an interest to contest corporate resolution. The expression “any part” may include, as the case may be shareholders, the Board of Directors and each member of the Board, auditors, creditors of the company, and prosecutors. Nevertheless, the right to contest Board resolution shall only be accorded to the members of the Board who cast negative vote on the Board’s meetings.

From the procedural requirements, the Commercial Code clearly provides only the time frame within which the action for nullity could be taken. Yet, it shall be understood and interpreted to include the requirements of influence rule and the voting role the claimant exhibited in the meeting that adopted the contested resolution. That is to say, where the claimant is that attended the meeting he/she needs to clearly show his/her opposition to the resolution by casting negative votes and putting his/her dissenting opinions on the minutes of the meeting.

As regards the practical handling of nullity cases, the analysis of certain selected Federal court cases show that the practice in understanding the scope of application of grounds of nullification

of company resolutions in general can be said is within the analytical demesnes of the law. Yet in few decided court cases, the practice as regards who may challenge the Board resolution as well as the scope of application of the rules governing the statute of limitation under Article 416(2) of the Commercial Code depict series divergence from the analytical spirit of the law. With this respect, court case eight and nine analyzed above can be cited as indicators.

4.2. Recommendations

In light of the stated grounding conclusions, the writer would like to recommend the following few points.

- The grounds for nullification of Company Resolution contained in Article 416(2) of the Commercial Code shall have to be understood and interpreted in such way that includes the legality of the objects of the challenged resolution;
- Having regard to the multiple conveyance alternatives the shareholders' have to contest and reject the resolution of Board of Directors' and not to disrupt the smooth business running of a company in the meantime, the right to challenge Board resolution shall only be reserved for members of the Board who casted negative on the Board meeting,
- Having regard to the importance the "Influence Rule" has, particularly on maintaining corporate stability and the concept provided under Article 409(2) of the Commercial Code, the "Rule of Influence" needs to be set as a procedural pre-requisite in taking nullity action by virtue of Article 416(2) of the Commercial Code. In addition to this, where the claimant of nullity action is one that attended a meeting which passed the contested resolution, the right to challenge the resolution shall be maintained for those who voted against the resolution and had their voting "No" registered in the minutes of the meeting.
- The rule governing statute of limitation contained in Article 416(2) of the Commercial Code shall be understood and interpreted in such way to govern only nullity action taken as a result of violation of the law or constitutive documents as regards the convocation and conducts of the meeting.
- Where the claim of nullification of Company resolution arises from the violation of the law or the constitutive documents other than those relating to the convocation and

conducts of the meeting, general period of limitation provided for in Article 1845 of the Civil Code shall be applied to bring nullity action under the Commercial Code.

- The forthcoming Commercial Code should take in to consideration the controversy surrounding the application of the provision of Article 416(2) of the Commercial Code and the Article has to be amended accordingly.

Bibliography

A. Books

1. Andreas Cahn and David C.Donald, *Comparative commercial law, text and cases on the laws governing corporation in Germany, the UK and the USA*, (Cambridge University press 2010)
2. Arun Kumar Sen, and Jitendra Kumar Mitra, *Commercial Law including Company Law*, (The World Press Private Limited, Kolkota (2002).
3. Avtar Sing, *Company Law*, (14th ed. Estern Book Company, (Lucknow, 2004)
4. Berle A, and Means G, *The Modern Corporation And Private Property* (Transaction Publishers 1991)
5. Clive M.Schmitthoff and James H.Thompson, *Palmer's Company law* (21ed., 1968)
6. Fekadu Petros, የኢትዮጵያ የኩባንያ ህግ, (Far East Trading Pvt.Ltd.C, 2008)
7. Kraakman, Dvies, Hnsman, Hertig, HOpt, Kanda, Rock, *The Anatomy of Corporate Laws: a Comparative and Functional Approach*, (Oxford University Press, New York, 2004)
8. P.P.S. Gogna, *A Text of Company Law*, S.CHAND & COMPANY LTD.(5th ed.2004)
9. Prof. Dr. Jean J. du Plessis, et al, *German Corporate Governance in International and European Context*, Berlin: (Springer-Verlag Berlin Heidelberg, 2007)
10. S.S.Gulshan and G.K. Kapoor, *Business and Corporate Laws*, (New age International Publisher 2002)
11. Tilahun Teshome, *Basic Principles of Ethiopian Contract law*, (Federal Supreme Court Research and Publication Department, 1996)

B. Journal Articles

1. Alberto Chilosì and Mirella Damiani, *Stakeholders vs Shareholders in Corporate Governance*, Munich Personal RePEc Archive, (2007)
2. Alexia Bertrand and Arnaud Coibion, *Shareholder Suits against Directors of a Company, against other shareholders and against the Company itself under the Belgian Law*, European Company and Finance Law Review, Vol.6, No.2 and 3,(2009)

3. Assefa Aregay, *Corporate Governance Rules In Ethiopia and Germany: A Comparative Analysis*,(2015, Central European University, Hungary)
4. A. Zattoni, *The Structure of Corporate Groups: The Italian Case*, Corporate Governance - An International Review, Vol. 7, (1999)
5. Att. Ecem Cetinyilmaz, *Annulment of General Assembly Resolutions of the Joint Stock Companies and the influence rule*, (2015), (available at <http://www.erdem-erdem.av.tr/publications/law-post/annulment-of-general-assembly-resolutions-of-joint-stock-companies-and-the-influence-rule/>) (last accessed June 2020)
6. Bernard Grelon, *Shareholders' lawsuits against the management of a company and its shareholders under French law*, European Company and Financial Law Review, vol.6, No. 2and 3(2009)
7. Daniel K. Saint and Aseem Nath Tripathi, *The Shareholder and Stakeholder Theories of Corporate Purpose*, (available at: www.knowledgeworkz.com/samatvam/newsletter/, last accessed on July, 2020).
8. Donna Card Charron, *Stockholders and Stakeholder: The Battle for Control of the Corporation*,(Available at: www.researchgate.net/publication/ , Last accessed August 2020)
9. Elena F. Perez Carrillo, *Corporate Governance : Shareholders' Interests' and Other Stakeholders' Interests'*, Corporate Ownership and Control, Vol.4, No.4(2007)
10. E. Merrick Dodd, *For Whom are Corporate Managers trustee?*, Harvard Law Review, Vol. XLV, No.7 (1932)
11. E. MOROĞLU, *Anonim Ortaklıkta Genel Kurul Kararlarının Hükümsüzlüğü*, İstanbul 2009, pg.194(available at <https://www.mondaq.com/turkey/shareholders/262636/>, last accessed June 2020)
12. Gözde Gürünlü, *Turkey: Annulment and Nullity of the General Assembly Resolutions According to the New Turkish Commercial Code No. 6102*, (13 September 2013) (available at https://www.mondaq.com/Author/1050014/Koyuncuo287lu-Kksal-Avukat1305k-Brosu-Gzde-Grnl?article_id=262636 (last accessed June 2020)
13. Maria Maher and Thomas Andersson, *Corporate Governance: Effects on firm Performance and Economic Growth*, (Organization for Economic Co-operation and Development, 1999)

14. Mohammed Rezal salim, *Corporate insolvency: separate legal personality and directors' duties to creditors*, *Universiti Teknologi MARA Law Review*, Vol. 2, No. 90, 2004
15. Neil Fligstein and Jennifer Choo, *Law and Corporate Governance*, California: University of California, (2005)
16. Pierre Henri Conca, Luca Enriques and Martin Gelter, *Constraining Dominant Shareholders' Self-Dealing: The legal Framework in France, Germany and Italy*, *European Company and Financial Law Review*, (October 2007)
17. Roxana Mihaela CATEA, *Practical aspects regarding the claim for the annulment of the resolutions of the general meeting of shareholders, from a substantial and procedural perspective*, *Lex ET Scientia International Journal*, LESIJ Vol.2, No.XXIV(2017)
18. Santosh Pande, *The Theoretical Framework for Corporate Governance*, Article in *SSRN Electronic Journal* · October 2011
19. Soo Young Hong, *Curb Your Enthusiasm: The Rise of Hedge Fund Activist Shareholders and the Duty Of Loyalty*, *Fordham Journal of Corporate & Financial Law*, Vol. 24, No.1(2019)
20. Stephen Bottomley, *Rethinking the law on Shareholder-Initiated Resolutions at Company General Meetings*, *Melbourne University Law Review*, Vol.43(2019)

C. Unpublished Thesis

1. Alemayehu Yismaw- *Merits and Demerits of Introducing Non-shareholder Directors in the Governance of Ethiopian Share Companies* (2014)
2. Dejene Alamirew: *Assessing Corporate Governance of Ethiopian Private Limited Companies With Particular Emphasis of Making Board of Directors Compulsory to Such Companies*, (2014, unpublished, School of Law, Addis Ababa University)
3. Zelalem Fekadu, *Shareholder or Stakeholder Model of Corporate Governance: Which One Should Ethiopia Choose?* (2016, unpublished, School of Law, Addis Ababa University),

D. Domestic Legislations

1. Federal Courts Establishment Proclamation No.25/1996,
2. The Civil Code of the Empire of Ethiopia, 1960, Proclamation No 165, Neg. Gaz. (*Extraordinary Gazette*) Year 19, No 2
3. The Commercial Code of the Empire of Ethiopia, 1960, Proclamation No 166, Neg. Gaz. (*Extraordinary Gazette*) Year 19, No 3
4. The Constitution of the Federal democratic Republic of Ethiopia, Proclamation No.1/1995

E. Internet Sources

1. <https://www.tamimi.com/law-update-articles/corporate-resolution-an-instrument-of-high-significance-to-corporate-entities/>
2. www.LEGALVISION.com.au
3. <https://www.mondaq.com/turkey/shareholders/262636>
4. www.knowledgeworkz.com/samatvam/newsletter/
5. www.researchgate.net/publication/
6. www.jstor.org/stable/133169
7. at <http://www.erdem-erdem.av.tr/publications/law-post/annulment-of-general-assembly-resolutions-of-joint-stock-companies-and-the-influence-rule/>
8. https://www.mondaq.com/Author/1050014/Koyuncuo287lu-Kksal-Avukat1305k-Brosu-Gzde-Grnl?article_id=262636

Annexes

1. Federal Supreme Court Cassation Bench's Decision in File No. 52269 and Federal High Court Decision in File No. 04026
2. Federal Supreme Court Cassation Bench's Decision in File No. 90235
3. Federal Supreme Court Cassation Bench's Decision in File No. 137340
4. Federal Supreme Court Cassation Bench's Decision in File No.142716
5. Federal Supreme Court Cassation Bench's Decision in File No.152636
6. Federal Supreme Court Cassation Bench's Decision in File No.164553
7. Federal Supreme Court Cassation Bench's Decision in File No.166953
8. Federal Supreme Court Appellate Bench's Decision in File No.170831
9. Federal Supreme Court Appellate Bench's Decision in File No.175530

Annex - one

የሰበር መ.ቁ. 52269

ጥቅምት 17 ቀን 2003 ዓ.ም

ዳኞች:- ተገኔ ጌታነህ

ሐጎስ ወልዱ

ብርሃኑ አመነው

አልማው ወሌ

ዓሊ መሐመድ

አመልካች:- 1. አቶ ከድር ሀጅ ሁሴን አልቀረቡም

2. ሊስ ኮሌጅ አክሲዮን ማህበር አልቀረቡም

ተጠሪ:- አቶ ጁሀር አልይ አልቀረቡም

መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል::

ፍርድ

ጉዳዩ የቀረበው አመልካች የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤትና የከፍተኛው ፍርድ ቤት የሰጡት ውሳኔ መሠረታዊ የሕግ ስህተት ያለበት በመሆኑ በሰበር ታይቶ ይታረምልኝ በማለት ስላመለከቱ ነው:: ክርክሩ የአክሲዮን ድርሻ የሚመለከት ነው:: ተጠሪ 148,000 /አንድ መቶ አርባ ስምንት ሺህ ብር/ ዋጋ ያለው አክሲዮን ባለቤት እንዳልሆነኩ የወሰነበት ውሳኔ ተሰርዞ የአክሲዮን ባለቤት መሆኔ ይወሰንልኝ በማለት ክስ አቅርቧል:: አመልካች ይህንን ገንዘብ ተጠሪ በአይነት ወይም በገንዘብ ገቢ አላደረገም በማለት ተከራክረዋል:: የሥር ፍርድ ቤት ተጠሪ ብር 100,000, የከፈሉ መሆኑ በመመሥረቻ ጽሑፍ የተገለፀ ሲሆን 95,000 የከፈሉ ስለመሆኑ ደግሞ ሊሲኩሌጅ አክሲዮን ማህበር የሰጣቸው

ፌዴራል ጠቅላይ ፍርድ ቤት
 ጠቅላይ ገዢ
 13/03/03
 አቶ ጁሀር አልይ

ማስረጃ ቀርቧል። ይህንን ድርሻ በቃለ ጉባዔ እንዳልተከፈለ ለመቀየር መሞከራቸው ሕጋዊ ውጤት የለውም በማለት ውሳኔ ሰጥቷል።

አመልካቾች ይግባኝ ለከፍተኛው ፍርድ ቤት አቅርበዋል። የከፍተኛው ፍርድ ቤት የግራ ቀኙን ክርክር ከሰማ በኋላ ከፍተኛው ፍርድ ቤት ተጠሪ የአክሲዮን ማህበሩ ሲቋቋም ከጠቅላላ ካፒታል ብር 100,000 ከዚያ በኋላ 95,000 መክፈላቸው ተረጋግጧል። ይህንን መብት ለማሳሻል የተሰጠው ውሳኔ የሕግ መሠረት የለውም በማለት የሥር ፍርድ ቤት የሰጠውን ውሳኔ አጽንቶታል።

አመልካቾች ተጠሪ ክስ ያቀረበው ውሳኔ ከተላለፈ በኋላ አንድ ዓመት አሳልፎ ነው። እኛ ያነሣውን የይርጋ መቃወሚያ አላገባብ ውድቅ ተደርጎብናል። ስለዚህ የበታች ፍርድ ቤቶች የሰጡት ውሳኔ መሠረታዊ የሕግ ስህተት ያለበት ስለሆነ እንዲሻርሉን በማለት አመልክተዋል። ተጠሪ በበኩሉ የአክሲዮን ማህበር ቃለ ጉባዔ ጉዳዩን በአጀንዳነት ይዞ ያስተላለፈው ውሳኔ የለም። የእኔ አክሲዮን ድርሻ ዝቅ አድርጎ በቃለ ጉባዔው መመዝገብ የሚያስከትለው ሕጋዊ ውጤት የለውም የበታች ፍርድ ቤቶች ውሳኔ መሠረታዊ የሕግ ስህተት የለበትም በማለት መልስ ሰጥቷል። የአመልካቾችን የይርጋ መቃወሚያ በተመለከተም የራሱን የመከራከሪያ ነጥብ አቅርቧል። አመልካቾች የመልስ መልስ አቅርበዋል።

ከስር የክርክሩ አመጣጥና በሰበር የቀረበው የግራ ቀኙ ክርክር ከላይ የተገለፀው ሲሆን እኛም መዝገቡን መርምረናል። መዝገቡን እንደመረመርነው አመልካቾች ለመመሥረቻ ጽሑፍና በአክሲዮን ሼር ሰርቲፊኬት የተገኘውን መብት በማስመልከት ዝቅ ለማድረግ የአክሲዮን ማህበሩ ጠቅላላ ጉባዔ የተሰጠው

ፊርማ ጠቅላይ ፍርድ ቤት
ጥበቃ ገደብ
13/10/2013
አባል

ውሳኔ በአንድ ዓመት ይርጋ ይገደባል በማለት ያቀረቡትን ክርክር የበታች ፍርድ ቤቶች ያለፉት በመዝገቡ ዋና የመከራከሪያ ጭብጥ የሆነውን ነጥብ አጠቃላይ ባህሪና የንግድ ሕግ ቁጥር 359/1/ ድንጋጌ ይዘት መንፈስና ዓለማ በማገናዘብ መሆኑን ለመረዳት ችለናል።

ተጠሪ በዚህ መዝገብ ያቀረቡት ክስ የባለአክሲዮኖች ጉባዔ የሰጠው ቃል ጉባዔ እንዲሻሻልን ወይም ቀሪ እንዲሆን ሳይሆን በመሠረታዊነት የአክሲዮን ማህበሩ መሥራችነታቸውና ለአክሲዮን ማህበሩ በተረጋገጠ ማስረጃ ክፍያ የፈጸሙባቸው የአክሲዮን ድርሻ የሚጎዳ ተግባር ለአክሲዮን ማህበሩ እየተፈጸመ ስለሆነ ይህንን መብታቸውን ለማስከበር ነው። በዚህ መንገድ የሚቀርብ ክስ በንግድ ሕግ ቁጥር 416/2/ የሚሸፈንና ቀሪ የሚሆን አይደለም በማለት የከፍተኛው ፍርድ ቤት የሰጠው የሕግ ትርጉምና ውሳኔ ተገቢ ሆኖ ስላገኘነው በፍ/ሥ/ሥ/ሕግ ቁጥር 348/1/ መሠረት አጽንተኝዋል።

ው ሳ ኔ

1. የመጀመሪያ ደረጃ ፍርድ ቤትና የከፍተኛ ፍርድ ቤት የሰጠው ውሳኔ ፀንቷል።
2. በዚህ ፍርድ ቤት የተሰጠው የእግድ ትእዛዝ ተነስቷል።
3. በዚህ ፍርድ ቤት የወጣውን ወጭና ኪሣራ ግራ ቀኙ ለየራሳቸው ይቻላል።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

ተ.ወ

ፌዴራል ጠቅላይ ፍርድ ቤት
ገዢ ገዳማ
13/03/23
ተገቢ ሆኖ ስላገኘነው



በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ
 የፌዴራል ዘፍተኛ ፍርድ ቤት
 THE FEDERAL DEMOCRATIC REPUBLIC
 OF ETHIOPIA
 FEDERAL HIGH COURT

ቁጥር _____
 No. _____

ተገኘበት ቀን _____ ዓ. ፓ.

Date 200 _____

አዲስ አበባ/Addis Ababa

ወ ሳ ኔ

1. የፌዴራል መደበኛ የረጅ ፍ/ቤት ዘመ.ቁ. 18801፡ በ15/9/2000 ዓ.ም የሰጠው ፍርድ ቤቱ/ም/ም/ሐ/ቁ. 348(1) መሠረት በካቲት፡፡
2. መሰሉ ሰጠ ወይን-ከገራ ዘርዘር ያቅርቡ፡፡
3. በዚህ መሠረት የተሰጠ ሰገዳ ተገኝቷል፡፡
 መዘዘዩ ተዘገቷል፡፡ ይመሰስ፡፡



X

ቀን 19 11

ፍብክ
 Fax: 25 02 07

ፖ ማ ቱ
 P. O. Box 3467

Annex - 2.

የሰበር መዝገብ ቁጥር 90235

መስከረም 29 ቀን 2007 ዓ.ም.

ዳኞች:- አልማው ወሌ

ሠልጣን አባተማም

መኮንን ገ/ሕይወት

ሙስጠፋ አህመድ

ተኸሊት ይመሰል

አመልካቾች:-

1. አቶ ከበደ ወልዴ አስረስ
2. አቶ ሐነፀ ማሞ ኃይለኛው
3. አቶ መኮንን አማራ ወ/ሚካኤል
4. አቶ ይበልጣል ወልዴ አስረስ
5. አቶ ምስራቅ ታደሰ ኃ/ማርያም
6. አቶ ካሳሁን እምሩ ተሰማ
7. አቶ አብደላ አሊ በ.ንአሊ
8. አቶ ላውጋስት ፀጋ አለምነህ
9. አቶ አሰፋ መኮንን ወ/ዓዲቅ

} 8ኛ ተጠሪ ቀረበ

ተጠሪ:- ስንሻይን ኬሚካል አክሲዮን ማህበር - የቀረበ የለም

መዝገቡ ተመርምሮ የሚከተለው ፍርድ ተሰጥቶአል።

ፍርድ

ጉዳዩ የአክሲዮን ማህበር ቃለ ጉባኤዎችን ለማሻር እና ማህበሩን በፍርድ ኃይል ለማስፈረስ ከቀረበ ክስ ጋር ተያይዞ የተነሳ ክርክርን የሚመለከት ሲሆን የተጀመረውም እንደቅደም ተከተላቸው ከ1ኛ እስከ 8ኛ እና 10ኛ ከሳሾች የነበሩት የአሁኖቹ አመልካቾች በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት በአሁኑ ተጠሪ ላይ ባቀረቡት ክስ ነው።

በ26/08/2004 ዓ.ም. ተዘጋጅቶ የቀረበው ክስ ይዘትም ባጭሩ:-ተከላሽ ማህበር በ15 ባለአክሲዮኖች የተቋቋመ ማህበር ሆኖ እያለ የተዘጋጀ እና የተፈረመ የካፒታል ዕድገት ማሻሻያ ቃለ ጉባኤ ሳይኖር ማህበሩ በምስረታ ላይ ነኝ በማለት አክሲዮኖችን መስራች

1

ፊርማ ማህበር ፍርድ ቤት
 ትክክል ገልጻል
 ፊርማ ቀን 20/08/13
 ሠግዳ

ላልሆኑ አባላት መሸጡ ተገቢነት የሌለው መሆኑን፣ ለስብሰባው ሰነድ ቀናት ሲቀሩ ለባለአክሲዮኖች በስልክ ጥሪ በማድረግ፣ የስብሰባውን አጀንዳ ሳይገልጽ እና በዕለቱ የተነበቡትን ጽሁፎችም ለተጠሩት ባለአክሲዮኖች ሳያደርስ በ27/05/2004 ዓ.ም. የቦርድ አባላትን መምረጡ እና በ11/06/2004 ዓ.ም. ደግሞ አዲተርን መምረጡ ሕጋዊነት የሌለው አሰራር መሆኑን በዝርዝር የሚገልጽ ሆኖ

1. በ27/05/2004 ዓ.ም. እና በ11/06/2004 ዓ.ም. የተደረጉት ስብሰባዎች እና በስብሰባው የተላለፉት ውሳኔዎች ሕጋዊ አይደሉም ተብለው እንዲሻሩ፤
2. የማህበሩ ገቢ እና ወጪ በባለሙያ ተጣርቶ ለነባር እና ለአዳዲስ ባለአክሲዮኖች እንዲገለጽ፤
3. ማህበሩ ኖሮ ከሚሰጠው ጠቀሜታ ይልቅ ጉዳቱ እየጎላ የመጣ በመሆኑ እንዲፈርስ እና አባላት ያዋጡት ገንዘብ ተመላሽ እንዲደረግ፤

ይወሰን ዘንድ ዳኝነት የተጠየቀበት ነው።

ተከላሽ በበኩሉ በ11/09/2004 ዓ.ም. በተጻፈ ማመልከቻ የመቃወሚያ እና የፍሬ ነገር ክርክርን ያካተተ መልስ ያቀረበ ሲሆን የመቃወሚያ ነጥቦቹም በ27/05/2004 ዓ.ም. እና በ11/06/2004 ዓ.ም. የተደረጉት ስብሰባዎች እና በስብሰባው የተላለፉት ውሳኔዎች ሕጋዊ አይደሉም ተብለው እንዲሻሩ የቀረበው ክስ በንግድ ሕግ ቁጥር 416(2) መሰረት በይርጋ የታገደ ነው የሚል እና ከከሳሾቹ መካከል ከፊሎቹ በ27/05/2004 ዓ.ም. በተደረገው ስብሰባ ተገኝተው እና ተስማምተው ውሳኔ ያስተላለፉ በመሆኑ ክስ ለማቅረብ የሚያስችል መብት የላቸውም የሚል ነው። በፍሬ ጉዳዩ ረገድ በሰጠው መልስም በ27/05/2004 ዓ.ም. እና በ11/06/2004 ዓ.ም. የተደረጉት ስብሰባዎች የተከናወኑትም ሆነ ውሳኔዎቹ የተላለፉት በሕጉ አግባብ በመሆኑ፣ የአክሲዮን ሽያጭ ጊዜ እንዲራዘም በ13/01/2003 ዓ.ም. በተደረገና በተመዘገበ የመስራቾች የተሟላ ቃለ ጉባኤ ተወስኖ ተግባራዊ የተደረገ መሆኑን እና ማህበሩ ስራውን እያከናወነ የሚገኘውም ሕጉን ተከትሎ በመሆኑ ክሱ ውድቅ ሊደረግ ይገባል በማለት ተከራክሮአል።

ፍርድ ቤቱም አግባብነት አላቸው ያላቸውን ጭብጦች በመያዝ ጉዳዩን ከመረመረ በኋላ አንድ አክሲዮን ማህበር ስብሰባ ያደረገው እና ውሳኔ ያስተላለፈው ሕግን፣ የመመስረቻ ጽሁፉን እና የመተዳደሪያ ደንቡን ባልተከተለ ሁኔታ በሆነ ጊዜ ከሕግ ውጪ የተደረገው ስብሰባ እና የተላለፈው ውሳኔ እንዲሻሻር መጠየቅ የሚቻለው ውሳኔው ከተላለፈበት ቀን ጀምሮ በሰነድ ወር ጊዜ ውስጥ፤ ውሳኔው በንግድ መዝገብ ተመዝግቦ ከሆነም ከተመዘገበበት

ረጅም ጊዜ ለገቢ ጥያቄ ላይ
ገቢ ጥያቄ ላይ
ገቢ ጥያቄ ላይ
ገቢ ጥያቄ ላይ
ገቢ ጥያቄ ላይ

ቀን ጀምሮ በሶስት ወር ጊዜ ውስጥ ስለመሆኑ በንግድ ሕግ ቁጥር 416(2) የተመለከተ መሆኑን፣ ክሱን ያቀረቡት በ29/08/2004 ዓ.ም. በመሆኑ በ27/05/2004 ዓ.ም. እና በ11/06/2004 ዓ.ም. እንዲሁም በ13/01/2003 ዓ.ም. በተደረጉት ስብሰባዎች የተላለፉት ውሳኔዎች እንዲሻሻላቸው ያቀረቡት ጥያቄ በይርጋ የታገደ በመሆኑ በፍትህ-ሰነድ ስነ ስርዓት ሕግ ቁጥር 244(2)(ሠ) እና 245(2) መሰረት ተቀባይነት የሌለው መሆኑን እና ማህበሩ እንዲፈርስ የቀረበው ጥያቄም በበቂ ምክንያት ላይ የተመሰረተ አለመሆኑን ገልጾ ክሱን ውድቅ በማድረግ ውሳኔ ሰጥቶአል።

አመልካቾች አቤቱታቸውን ለዚህ ችሎት ያቀረቡት የፌዴራል ከፍተኛ ፍርድ ቤት ይግባኙን ዘግቶ በማሰናበቱ ሲሆን የሰበር አቤቱታው ተመርምሮ በዚህ ጉዳይ በ27/05/2004 ዓ.ም. እና በ11/06/2004 ዓ.ም. የተደረጉ ስብሰባዎችና የተላለፉት ውሳኔዎች ይሻሻሉን በማለት አመልካቾች ያቀረቡት ክስ በይርጋ ይታገዳል የመባሉን አግባብነት እና ሌሎች ነጥቦችን ተጠሪው ባለበት ለማጣራት ይቻል ዘንድ ጉዳዩ ለሰበር ክርክር እንዲቀርብ በመደረጉ ግራ ቀኝ የጽሁፍ ክርክር ተለዋውጠዋል። የጉዳዩ አመጣጥ እና የክርክሩ ይዘት ከላይ የተመለከተው ሲሆን እኛም በክርክሩ አልባት ማግኘት የሚገባቸው ነጥቦች፡-

1. ማህበሩ ሲፈርስ ይገባል በማለት አመልካቾች ያቀረቡትን የዳኝነት ጥያቄ ባለመቀበል በስር ፍርድ ቤቶች የተሰጠው ውሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመበት ነው ለማለት ይቻላል ወይስ አይቻልም?
2. በ27/05/2004 ዓ.ም. እና በ11/06/2004 ዓ.ም. የተደረጉ ስብሰባዎችና የተላለፉት ውሳኔዎች ይሻሻሉን በማለት አመልካቾች ያቀረቡት ክስ በይርጋ ይታገዳል በማለት የተሰጠው ውሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመበት ነው ወይስ አይደለም?

የሚሉ መሆናቸውን በመገንዘብ እና ክርክሩ የተስተናገደበትን የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት መዝገብ በማስቀረብ ጭምር ጉዳዩን ከእነዚህ ጭብጦች አንጻር መርምረናል።


በዚህም መሰረት የመጀመሪያውን ነጥብ በተመለከተ አመልካቾች ባቀረቡት ክስ ማህበሩ እንዲፈርስ እና አባላት ያዋጡት ገንዘብ ተመላሽ እንዲደረግ የጠየቁት ማህበሩ ኖሮ ከሚሰጠው ጠቀሜታ ይልቅ ጉዳቱ እየላለ የመጣ መሆኑን በመግለጽ እና ይህንኑ ያሳያሉ ያሏቸውን ምክንያቶች በመዘርዘር ነው። ማህበሩ እንዲፈርስ ላቀረቡት ጥያቄ በምክንያትነት የጠቀሱትም የአክሲዮን ሽያጭ አላበቃም፣ ማህበሩ ስራውን አልጀመረም፣ የተሰበሰበው ገንዘብ በማለቁ ማህበሩ የቢሮ ኪራይ መክፈል ተስኖት ቢሮው ታሸንፎ፣ ለአባላቱም አስፈላጊውን መረጃ አይሰጥም፣ አዲተርም የለውም የሚሉ መሆናቸውን የመዝገቡ ግልባጭ ያመለክታል።

3

ፈረዳ ጠቅላይ ፍርድ ቤት
 ገንዘብ ግልባጭ
 ሰርዓት *[Signature]* 20/10/13
 11591

የስር ፍርድ ቤቶች በዚህ ረገድ አመልካቾች ያቀረቡትን የዳኝነት ጥያቄ ሳይቀበሉ የቀሩት እነዚህ በአመልካቾቹ የተጠቀሱት ችግሮች መኖራቸው በረጋገጥ እንኳ በሌላ የሕግ አግባብ አልባት ሊያገኙ የሚችሉ ከመሆኑ ውጪ በንግድ ሕግ በቁጥር 218(2) በተመለከተው ድንጋጌ መሰረት ማህበሩ እንዲፈርስ ውሳኔ ለመስጠት የሚያስችሉ በቂ እና ትክክለኛ ምክንያቶች ተደርገው ሊወሰዱ የሚችሉ አይደሉም በማለት መሆኑን ተገንዝበናል። ከዚህም መገንዘብ የሚቻለው የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት አመልካቾቹ ማህበሩ እንዲፈርስ ለማስወሰን የሚያስችሉ ናቸው በማለት ያቀረቧቸውን ነጥቦች ከሕግ ጋር አገናዝቦ በመመዘን ውድቅ ያደረገው በሕግ በተሰጠው ስልጣን መሰረት መሆኑን ሲሆን ፍርድ ቤቱ በዚህ ረገድ የሰጠው ውሳኔ ደግሞ በይግባኝ ሰሚው ክፍተኛ ፍርድ ቤትም ተቀባይነት አግኝቶአል። በመሆኑም ፍሬ ነገርን በማጣራት እና ማስረጃን በመመዘን ረገድ በሕግ ስልጣን በተሰጣቸው የስር ፍርድ ቤቶች የተሰጠው ውሳኔ የመሰረታዊ የህግ ስህተት ጥያቄን የሚያስነሳ ባለመሆኑ በዚህ ረገድ የተሰጠው ውሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት ነው ለማለት የሚቻል ሆኖ አልተገኘም።

ሁለተኛውን ነጥብ በተመለከተ እንዲሻሩ ክስ የቀረበባቸው ስብሰባዎች እና ቃለጉባኤዎች የተደረጉት እና የተያዙት በ27/05/2004 ዓ.ም. እና በ11/06/2004 ዓ.ም. መሆኑ ያላከራከረ ሲሆን የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ክሱን ውድቅ ያደረገው በ27/05/2004 ዓ.ም. የተደረገው ስብሰባ እና የተያዘው ቃለጉባኤ እንዲሻሩ ክሱ የቀረበው በ29/08/2004 ዓ.ም. በመሆኑ ሶስት ወር ካለፈው በኋላ የቀረበው የዳኝነት ጥያቄ በንግድ ሕግ ቁጥር 416(2) መሰረት በይርጋ የሚታገድ ነው በማለት ነው። ይሁን እንጂ የይርጋው የመጀመሪያ ቀን ከይርጋው ዘመን ሂሳብ ውስጥ ገብቶ የማይታሰብ ስለመሆኑ፣ የይርጋው ቀን የሚሞላው ለይርጋው የተወሰነ የመጨረሻ ቀን ካለፈ በኋላ ስለመሆኑ እና ምናልባት ይህ ቀን በሕግ የታወቀ የበዓል ቀን የሆነ እንደሆነ ይርጋው የሚሞላው ከበዓሉ ተከታይ በሆነው በዓል ባልሆነው ቀን ስለመሆኑ የይርጋ ጊዜ አቆጣጠርን በሚደነግገው በፍትሐብሔር ሕግ ቁጥር 1848 በዝርዝር ተደንግ ይገኛል። በዚህ ረገድ በንግድ ሕግ በተለየ ሁኔታ የተቀመጠ ድንጋጌ እስከሌለ ድረስ ይህ የይርጋ ጊዜ አቆጣጠር መርህ በንግድ ሕግ በተመለከቱት የይርጋ ጊዜያት ላይ ጭምር ተፈጻሚነት ያለው መሆኑ አከራካሪ አይሆንም። በዚህ ድንጋጌ መሰረት ጥር 27 ቀን 2004 ዓ.ም. በይርጋው ቀን ውስጥ ገብቶ የማይቆጠር ሲሆን ከቀጣዩ ማለትም ከ28/05/2004 ዓ.ም. ጀምሮ በንግድ ሕግ ቁጥር 416(2) ድንጋጌ የተመለከተው የሶስት ወር ጊዜ ሲቆጠር የመጨረሻው የክስ ማቅረቢያ ቀን የሚሆነው 28/08/2004 ዓ.ም. ነው። ይህ ቀን ደግሞ እሁድ ዕለት የሚውል በመሆኑ የይርጋው

4
ፌዴራል ጠቅላይ ፍርድ ቤት
ገዝባ ገልግጭ
ፊርማ  ቀን 20/01/13
ሠናዳ

ቁጥር 416(2) የተደነገገው የሶስት ወር የይርጋ ጊዜ ሳይሞላ በመሆኑ ክስ በይርጋ የታገደ ነው ሊባል የሚችል አይደለም። በሌላ በኩል በ13/01/2003 ዓ.ም. የተደረገው ስብሰባ እና የተላለፈው ውሳኔ እንዲሻርላቸው አመልካቾቹ ለስር ፍርድ ቤት ያቀረቡት የዳኝነት ጥያቄ ስለመኖሩ የመዝገቡ ግልባጭ የማያመለክት በመሆኑ ምክንያት በዚህ ረገድ አመልካቾቹ ያቀረቡት ክርክር በዚህ መዝገብ ሊስተናገድ ሚችልበት ስነ ስርዓታዊ አግባብ አልተገኘም።

ሲጠቃለል አቤቱታ የቀረበበት የስር ፍርድ ቤቶች ውሳኔ በከፊል መሰረታዊ የሕግ ስህተት የተፈጸመበት ሆኖ በመገኘቱ የሚከተለው ውሳኔ ተሰጥቶአል።

ው ሳ ኔ

1. በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት በመዝገብ ቁጥር 194225 በ18/03/2005 ዓ.ም. ተሰጥቶ በፌዴራል ክፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 131811 በ26/06/2005 ዓ.ም. በትዕዛዝ የጸናው ውሳኔ በፍትሐብሔር ስነ ስርዓት ሕግ ቁጥር 348(1) መሰረት ተሻሽሎአል።
2. በተራ ቁጥር 1 ከተጠቀሰው ውሳኔ ውስጥ ተጠሪ ማህበር እንዲፈርስ አመልካቾቹ ያቀረቡት ጥያቄ በበቂ እና አሳማኝ ምክንያቶች ላይ የተመሰረተ ባለመሆኑ ሕጋዊ ተቀባይነት የለውም በሚል የተሰጠው የውሳኔ ክፍል በፍትሐብሔር ስነ ስርዓት ሕግ ቁጥር 348(1) መሰረት ፀንቶአል።
3. በተራ ቁጥር 1 ከተጠቀሰው ውሳኔ ውስጥ በ27/05/2004 ዓ.ም. እና በ11/06/2004 ዓ.ም. የተደረጉ ስብሰባዎችና የተላለፉት ውሳኔዎች ይሻሩልን በማለት አመልካቾች ያቀረቡት ክስ በንግድ ሕግ ቁጥር 416(2) መሰረት በሶስት ወር ይርጋ የሚታገድ ነው በማለት የተሰጠው የውሳኔ ክፍል በፍትሐብሔር ስነ ስርዓት ሕግ ቁጥር 348(1) መሰረት ተሸሮአል።
4. በ27/05/2004 ዓ.ም. እና በ11/06/2004 ዓ.ም. የተደረጉ ስብሰባዎችና የተላለፉት ውሳኔዎች ይሻሩልን በማለት አመልካቾች ክስ ያቀረቡት በንግድ ሕግ ቁጥር 416(2) የተመለከተው የሶስት ወር የይርጋ ጊዜ ከማለፍ በፊት በመሆኑ በዚህ ረገድ የቀረበው ክስ በይርጋ የሚታገድ አይደለም በማለት ወሰነናል።
5. በ27/05/2004 ዓ.ም. እና በ11/06/2004 ዓ.ም. የተደረጉ ስብሰባዎችና የተላለፉት ውሳኔዎች ይሻሩልን በማለት አመልካቾች ያቀረቡትን ክስ በተመለከተ ግራ ቀኙ በፍሬ ጉዳዩ ረገድ ያቀረቡትን ክርክር መርምሮ ተገቢውን ውሳኔ ይሰጥበት ዘንድ

6 | ሪፖርት ላይ ፍርድ ቤት
ትክክል ገልጻል
 ሲ.ር.ማ ያ ቀን 20/01/13
ሠናዳ

Annex - 3

የሰበር መ/ቁ 137340

ሚያዝያ 03 ቀን 2009

ዳኞች:- 1.አልማው ወሌ

2.ሙስጠፋ አህመድ

3. አብርሃ መሰለ

4. ጳውሎስ ኦርሺሶ

5. ሠናይት አድነው

አመልካች:- አቶ እንዳልካቸው ተስፋ ገ/ሥላሴ - ቀረቡ

ተጠሪዎች :- ተስፋ ገ/ሥላሴ ዘብሔረ ቡልጋ ኃ/የተ/የግል ማህበር - አዲሱ ስራ አስኪያጅ አቶ ጥበብ ተስፋ እና ጠበቃ አበባ መንግስቱ - ቀረቡ

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል።

ፍ ር ድ

በዚህ የሰበር ክርክር መነሻ የሆነው ጉዳይ በአሁኑ የሰበር ተጠሪ ከሳሻነት የተጀመረው በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ሲሆን የአሁኑ አመልካች ተከላሽ እና የተከላሽ ከሳሽ ነበሩ። የተጠሪ ክስ መሰረታዊ ይዘትም:- የአሁኑ አመልካች በተጠሪ ማህበር መተዳደሪያ ደንብ መሰረት መጋቢት 26 ቀን 1992 ዓ/ም የማህበሩ ስራ አስኪያጅ ሆነው ተሾመው ሲያገለግሉ ከቆዩ በኋላ ታህሳስ 01 ቀን 2008 ዓ/ም በተደረገ የማህበሩ ጠቅላላ ጉባኤ ክስራ አስኪያጅነታቸው ተነስተው በምትካቸው አቶ ጥበብና ተስፋ ገ/ሥላሴ መሾማቸውን፤ አመልካቹ ክስራ አስኪያጅነታቸው በጠቅላላ ጉባኤ ከተሻሩ በኋላ በእጃቸው የሚገኙትን የድርጅቱን ሰነዶችንና ቢሮ እንዲያስረክቡ ቢጠየቁም ለማስረክብ ፈቃደኛ ካለመሆናቸውም በላይ ስራ አስኪያጅ ነኝ በሚል ችግር እየፈጠሩ በመሆኑ ስራ መስራትም ሆነ ንግድ ፈቃድን ማሳደስ ያለመቻሉንና ክስራ አስኪያጅነታቸው ከተነሱ በኋላም የድርጅቱን ገቢ እየወሰዱ መሆኑን ጠቅሶ ሂሳብ አጣሪ ተመድቦ ሂሳቡ እንዲጣራ፣ የድርጅቱን ቢሮ እና በውስጡ የሚገኙ ማናቸውንም ንብረቶች እንዲያስረክቡ፣ የድርጅቱን የንግድ ፈቃድ፣ የንግድ ምዝገባ ምስክር ወረቀት፣ የተጨማሪ እሴት ታክስ ምስክር ወረቀት፣ የድርጅቱን ማህተም፣ ድርጅቱ ከ3ኛ ወገኖች ጋር ያደረጋቸውን ልውውጦችንና የውለታ ሰነዶችን እንዲያስረክቡ እንዲወሰን ዳኝነት መጠየቁን የሚያሳይ ነው።

የአሁኑ አመልካች ለክሱ በሰጡት መልስም የመጀመሪያ ደረጃ መቃወሚያና የፍሬ ነገር ክርክር አቅርበዋል። አመልካች በመጀመሪያ ደረጃ መቃወሚያነት ያነሱት ክርክርም ታህሳስ 01 ቀን 2008 ዓ/ም የተደረገውና አመልካችን ከማህበሩ ስራ አስኪያጅነት ሽሮአል የተባለው ቃለ ጉባኤ ህጋዊ ባለመሆኑ አዲስ ተሾመዋል በተባሉት ስራ አስኪያጅ አረጋጋጭነት ክስ ሊቀርብ የማይገባ መሆኑን፤ በአዲስ አበባ ፍርድ ቤት በማህበሩ ግማሽ ባለድርሻ በሆኑት በወ/ሮ አለሚቱ ንጉሴ በተሰጠ በሞግዚትነትና በአስተዳዳሪነቱ ውሳኔ ላይ ክርክር ላይ በመሆናቸው ይኼው ጉዳይ እልባት እስከሚያገኝ ድረስ ክሱ ላልተወሰነ ጊዜ በቀጠሮ እንዲቆይላቸው መጠየቃቸውን የሚያሳዩ ሲሆን በፍሬ ነገሩ ያቀረቡት ክርክር ደግሞ አመልካቹ ክስራ አስኪያጅነት በተሻሩበት ጠቅላላ ጉባኤ ላይ ያልተገኙ አባላት በመተዳደሪያ ደንቡ አግባብ ጥሪ ያልተደረገላቸው መሆኑን፤ በጠቅላላው ጉባኤ መነሻነት አመልካች መሻራቸውም ሆነ አዲስ የተሾሙት ስራ አስኪያጅ ህጋዊ ያለመሆኑን ጠቅሰው ክሱ ውድቅ ሊሆን ይገባል ሲሉ ተከራክረዋል። የአመልካች የተከላሽ ከሳሽነት ክስ ይዘትም:- ታህሳስ 01 ቀን 2008 ዓ/ም በተደረገው ቃለ ጉባኤ በማህበሩ መተዳደሪያ ደንብ አንቀጽ 7.2 ስልጣን በተሰጣቸው አካላት የሰበሰባ ጥሪ ያለመደረጉን፣ አመልካችም በስብሰባው እንዲገኙ ያለመደረጉን፣ ውሳኔው በመተዳደሪያ ደንቡና በንግድ ሕጉ ስራ አስኪያጅ ለመሻርም ሆነ መተዳደሪያ ደንቡን ለማሻሻል መሟላት ያለባቸው ሁኔታዎች ሳይሟሉ የተሰጠ

ፌዴራል ዲክላራሽን ፍርድ ቤት
ትክክል ገልጻል
ጥም 2009/01/13
ሰህ ገብረ

መሆኑን፣ የድርጅቱ 50% ባለድርሻ የሆኑት ወ/ሮ አለሚቱ ንጉሴ በሰብሰባው ያለመሳተፋቸውን፣ እርሳቸውን ወክለናል ያሉት የሰብሰባው ተሳታፊዎች ህጋዊ ያለመሆናቸውን እና የወ/ሮ አለሚቱ ንጉሴ ህጋዊ እንደራሴ አመልካች መሆናቸውን ዘርዝረው ታህሳስ 01 ቀን 2008 ዓ/ም በተደረገው ስብሰባ የተላለፈው ውሳኔ እንዲሰረዝ ይወሰን ዘንድ ዳኝነት መጠየቃቸውን የሚያሳይ ነው።

ለአመልካች የተከሰቱ ክስ ተጠሪ ማህበር በሰጠው መልስም፡- በጠቅላላ ጉባኤ የተሰጠ ውሳኔ ይሻርልኝ የሚል ጥያቄ የሕግ መሰረት የሌለው መሆኑን፣ አቶ ጥበቡ ተስፋ ገ/ሥላሴ በማህበሩ አብላጫ ድምጽ በስራ አስኪያጅነት መሾማቸውን፣ ቃለ ጉባኤውም በሰነዶች ማረጋገጫና ምዝገባ ጽ/ቤት መመዘገቡን፣ በቃለ ጉባኤውም ወ/ሮ ቆንጂት ተስፋ እና ወ/ሮ ጥሩወርቅ ተስፋ ወ/ሮ አለሚቱ ንጉሴን ወክለው መፈረማቸውን፣ በመ/ቁጥር 134642 በወ/ሮ አለሚቱ ላይ የክልልነት ውሳኔ ተሰጥቶ በዚህ ውሳኔ መሰረት ወ/ሮ ቆንጂትና ወ/ሮ ጥሩወርቅ የወ/ሮ አለሚቱ ሞግዚትና አስተዳዳሪ እንዲሆኑ መሾማቸውን፣ በማህበሩ መተዳደሪያ ደንብ አንቀጥ 7.2 መሰረትም የማህበሩ ግማሽ ካፒታል የሚወክሉ አባላት በደብዳቤ ለሰብሰባ ሊጠሩ እንደሚገባ የተደነገገ ቢሆንም ስብሰባው የተካሄደው ከማህበሩ ካፒታል ከ75% በላይ በይዘት ማህበሮች መሆኑን፣ ለአመልካቹ የሰብሰባ ጥሪው በሚገባ የደረሰባቸው መሆኑን፣ አመልካች የወ/ሮ አለሚቱ ንጉሴ ወኪልነታቸውም በፍርድ ቤት በተሾሙት ሞግዚቶችና አስተዳዳሪዎች የተሻረ መሆኑን፣ በክልልነትና በሞግዚትነት አስተዳደር ውሳኔ ላይ ቅሬታ የቀረበ ቢሆንም ውሳኔው እስካልተሻረ ድረስ በውሳኔው ላይ ቅሬታው ስለቀረበ ብቻ ውሳኔውን መሰረት አድርጎ መስራትን የሚከለክል ሕግ የሌለ መሆኑን፣ ቃለ ጉባኤውንም በሰነዶች ማረጋገጫና ምዝገባ ጽ/ቤት ቀርበው ያስመዘገቡና በሰነዱ ላይ የፈረሙ አባላት በውሳኔው ላይ አልተስማሙም የሚባልበት አግባብ የሌለ መሆኑን ዘርዘሮ የተከሰቱ ክስ ውድቅ እንዲሆን ዳኝነት ጠይቋል።


ጉዳዩን በመጀመሪያ ደረጃ የተመለከተው የስር ፍርድ ቤትም የአሁኑ አመልካች ያቀረቧቸውን የመጀመሪያ ደረጃ መቃወሚያ ነጥቦችን ውድቅ አድርጎ ፍሬ ነገሩን በመመርመር አመልካች ለሰብሰባው ጥሪ ተደርጎላቸው ያለመቅረባቸው በማስረጃ መረጋገጡን፣ ወ/ሮ አለሚቱ ንጉሴ በፍርድ ቤት በተሰጠው የክልልነት ውሳኔ የሞግዚትነትና አስተዳዳሪነት ስልጣን በተሰጣቸው መሰረት ስልጣኑን በፍርድ ቤት ውሳኔ ባገኙት ግለሰቦች ለአመልካቹ ከወ/ሮ አለሚቱ የተሰጣቸውን ውክልና ሽረው በሰብሰባው ላይ መሳተፋቸው መረጋገጡን፣ እነዚህ ግለሰቦች ያገኙት የፍርድ ቤት ውሳኔ እስካልተለወጠ ድረስ ውሳኔው ላይ ይግባኝ በመቅረቡ ብቻ ግለሰቦቹ የሰሩት ተግባር ተቀባይነት የለውም ሊባል የሚችልበት የሕግ አግባብ የሌለ መሆኑን፣ አከራካሪው ስብሰባም በማህበሩ ከ75% ድርሻ በላይ በይዘት አባላት የተጠራና በቃለ ጉባኤው የተሳተፉ አባላት በራሳቸው ወይም በወኪሎቻቸው አማካኝነት የፈረሙ መሆናቸው መረጋገጡን፣ የማህበሩ አባላት ¾ኛ የሚሆኑት ከተሟሉ ደግሞ ስብሰባን በመጥራት ስራ አስኪያጅ ለመሻርም ሆነ የመተዳደሪያ ደንብ የመለወጥ ወይም ማናቸውንም የማህበሩን የሚመለከት ውሳኔ ማስተላለፍ እንደሚችሉ በማህበሩ የመተዳደሪያ ደንብ አንቀጥ 7 እና በን/ሕ/ቁጥር 527 (1)፣ 536 (2) እና 537 ድንጋጌዎች ስር ከሰፈረው መገንዘብ የሚቻል መሆኑን በምክንያትነት ይዞ አመልካቹ ታህሳስ 01 ቀን 2008 ዓ/ም በተደረገ ስብሰባ የተያዘው ቃለ-ጉባኤ የተላለፈውን ውሳኔ እንዲሰረዝ ያቀረቡትን ክስ ውድቅ ያደረገው ሲሆን የአሁኑ ተጠሪ ማህበር የጠየቀውን ዳኝነት ግን በአሁኑ አመልካችም ተገቢው ማስተባበያ ክርክር ያልቀረበበት መሆኑን ጠቅሶና ተቀባይነት ያለው መሆኑን ገልጾ ተቀብሎታል።

የአሁኑ አመልካች በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ፍርድ ቅር በመሰኘት ይግባኙን ለፌዴራል ከፍተኛ ፍርድ ቤት ያቀረቡ ቢሆንም ፍርድ ቤቱ ይግባኙን በፍ/ሥ/ሥ/ህ/ቁጥር 337 መሰረት ስለሰረዘባቸው የሰበር አቤቱታቸውን ለዚህ ችሎት አቅርበዋል። በአቤቱታቸው በዋናነት ያቀረቡአቸው የቅሬታ ነጥብም ሲጠቃለል፡- ታህሳስ 01 ቀን 2008 ዓ/ም የተደረገው ስብሰባ ከማህበሩ መተዳደሪያ ደንብና ከህጉ ውጪ የተደረገ መሆኑን ዘርዝረው ቃለ ጉባኤም እንዲሰረዝ ይወሰን ዘንድ ዳኝነት መጠየቃቸውን የሚያሳይ ነው። አቤቱታው ተመርምሮም በዚህ ችሎት እንዲታይ የተደረገ ሲሆን ተጠሪ ቀርቦ ግራ ቀኙ በፅሁፍ እንዲከራከሩ ተደርጎአል።

ፌዴራል ክፍለ-ግዛድ ፍርድ ቤት
ዝብዓል ገልግጭ
ዲ.ሮ.ማ. ገሰ ቀን 20.01.13
ሰ ህ ገሰ

አመራር በሚያካሂዱበት ወቅት ከአንድ ወኪል የሚጠበቀውን ጥንቃቄ በማድረግ እንዲሁም በታታሪነትና በቅንነት መሰራት ይጠበቅባቸዋል። አመልካች በዚህ ረገድ አጥብቀው የሚከራከሩት ታህሳስ 01 ቀን 2008 ዓ/ም የተደረገው ስብሰባው ከማህበሩ ደንብና ከንግድ ሕጉ ውጪ የተጠራ በመሆኑ በዚህ ቀን የተላለፈው ውሳኔ ሕጋዊ አይደለም በሚል ነው። አመልካች ይህንኑ ክርክራቸውን ለማጠናከር የሚጠቅሱት የማህበሩን ደንብ አንቀፅ 7. 2 ድንጋጌ ሲሆን በዚህ ድንጋጌው ስብሰባው መጠራት ያለበት በዋና ስራ አስኪያጁ ወይም በማህበሩ አዲተር ነው በሚል ነው፤ በን/ሕ/ቁጥር 532(2) ስር የተመለከታውን ቅድም ተከተልም ያሟላ አይደለም በሚል ነው። የማህበሩ መተዳደሪያ ደንብ አንቀፅ 7.2 ሙሉ ይዘትም በንግድ ሕጉ የተደነገገው እንደተጠበቀ ሆኖ ስራ አስኪያጅ ወይም አዲተር ወይም የማህበሩ ግማሽ ካፒታልን የሚወክሉ አባላቶች ስብሰባ መጥራት የሚችሉ መሆኑ የሚያሳይ መሆኑን የክርክሩ ሂደት የሚያስገነዝብ ሲሆን የዚህ ድንጋጌ አቀራረጽ ሲታይ የሥብሰባው አጠራር አማራጭ መንገዶችን ያስቀመጠ እንጂ ቅድም ተከተሉን መሰረት አድርጎ መከናወን ያለበት መሆኑን የሚያመላክት አይደለም። ከሁሉም በላይ የስብሰባው ጥሪ ለደረግ የቻለው አመልካች በስራ አስኪያጅነታቸው ስብሰባው እንዲጠራ እና ቦታ እንዲያመቻቹ ተጠይቀው አልጠራም በማለታቸው ምክንያት በማህበሩ ከ75% በላይ ድምጽ ባላቸው ማህበረተኞች በሕዳር 25 ቀን 2008 ዓ/ም በተጻፈ ደብዳቤ ጥሪ መደረጉን የክርክሩ ሂደት የሚያሳይ መሆኑንና አመልካችም ማስተባበያ ክርክር ያላቀረቡበት ስለመሆኑ ተገንዝበናል። ከዚህ አንጻር ሲታይ ስብሰባ የመጥራት ኃላፊነት የተሰጠው ስራ አስኪያጅ ሃላፊነቱን ሳይወጣ መቅረቱ ከተረጋገጠ በሕጉ በማህበሩ መተዳደሪያ ደንብ በተቀመጠው አማራጭና በሕጉ መሰረት የሰብሰባ ጥሪ አድርጎ ተገቢውን ውሳኔ ማሳለፍ የሚነቀፍበት የሕግ አግባብ የለም። በመሆኑም አመልካች የስብሰባው አጠራር የማህበሩን ደንብ አንቀጽ 7.2 ድንጋጌን ባልጠበቀ ሁኔታ የተከናወነ ነው የሚሉት በክርክሩ ሂደት የተረጋገጡትን ፍሬ ነገሮችንና በን/ሕ/ቁጥር 532 (2) ድንጋጌ ስር ያለውን ይዘትና መንፈስ ባላገናዘበ መልኩ ሁኖ አግኝተናል። አመልካች በሕጉ አግባብ ጥሪ የተደረገላቸው መሆኑና ምልዓተ ጉባኤውም በአግባቡ ተሟልቶ ሰብሰባው መካሄዱን ፍሬ ነጉን የማጣራት ስልጣን ያለው የሥር ፍርድ ቤት ያረጋገጣቸው ጉዳዮች ሲሆኑ በዚህ ረገድ ተመሳሳይ ስልጣን ያለው ይግባኝ ሰሚ ፍርድ ቤትም ተመሳሳይ ድምዳሜ ያደረሰበት ጉዳይ በመሆኑ አመልካች የስብሰባው ጥሪው አልተደረገልንም በማለት የሚያቀርቡት የፍሬ ነገር ክርክር ለዚህ ችሎት በኢ.ፌ.ዲ.ሪፕብሊክ ሕገ መንግስት አንቀፅ 80(3(ሀ)) እና አዋጅ ቁጥር 25/88 አንቀጽ 10 ከተሰጠው ስልጣን አንጻር ተቀባይነት የሚሰጠው ሁኖ አልተገኘም። ሌላው አመልካች አጥብቀው የሚከራከሩት ነጥብ የወ/ሮ አለሚቱ ንጉሴ ሞግዚትና አስተዳደሪ ናቸው የተባሉት ሰዎች በስብሰባው ላይ የመካፈላቸውና የመፈረማቸው ጉዳይ በክልልነት፣ በሞግዚትና በአስተዳደሪነት ስልጣናቸው ላይ በፍርድ ቤት ክርክር ያልተቋጨ ክርክር ያለ በመሆኑ ህጋዊ ውጤት የሚሰጠው አይደለም በሚል ነው። ሆኖም እነዚህ ግለሰቦች በስብሰባው ላይ የተካፈሉትና በቃለ ጉባኤው ላይ ፈርመው ቃለ ጉባኤውም በሚመለከተው አካል እንዲመዘገብ የተደረገው ስልጣን ባለው ፍርድ ቤት በተሠጠው ውሳኔ በመሆኑ ይህ ውሳኔ ጸንቶ ባለበት ጊዜ በመሆኑ በጉዳዩ ላይ በይግባኝ ወይም በሰበር ደረጃ ክርክር መኖሩ ግለሰቦቹ በፍርድ ባገኙት ስልጣን መሰረት ያከናወኑትን ተግባር ሕጋዊ ውጤት የሚያሳጧበት የሕግ አግባብ የሌለ ሁኖ አግኝተናል። በመሆኑም ታህሳስ 01 ቀን 2008 ዓ/ም የተደረገው ስብሰባ በሕጉ አግባብ የተጠራና ¾ ኛ በላይ የሆነውን የማህበሩን ካፒታል በየዙ አባላት የተከወነ መሆኑ የተረጋገጠ በመሆኑ ሕጋዊ የማይሆንበት ምክንያት አልተገኘም።

ስብሰባው በሕጉ አግባብ የተከናወነ ነው ወደሚለው ድምዳሜ ከተደረሰ ቀጥሎ መታየት ያለበት ጉዳይ ጠቅላላ ጉባኤው አመልካችን ከስራ አስኪያጅነታቸው ለማንሳት የወሰደው እርምጃ ሕጋዊ መሆን ያለመሆኑ ጉዳይ ነው። ከላይ እንደተገለጸው ስራ አስኪያጅ የማህበሩ አመራር በመሆኑ በማህበሩ የተጣለበትን ግዴታ መወጣት የግድ ይላል። በተያዘው ጉዳይ የስር ፍርድ ቤት አመልካች ሃላፊነታቸውን አለመወጣታቸውን በግልጽ በውሳኔው ላይ ባያሰፍርም የማህበሩ ጠቅላላ ጉባኤ ታህሳስ 01 ቀን 2008 ዓ/ም ስብሰባውን የጠራው ግን ይህንኑ ምክንያት በማድረግ ስለመሆኑ የክርክሩ ሂደት ያሳያል። አመልካች ከማህበሩ ጠቅላላ ጉባኤ በተቃራኒው የሚንቀሳቀሱ መሆኑ እና ሌሎች ጥፋቶች የተጠቀሱ ሲሆን የማህበሩን ጠቅላላ ጉባኤ የሚሰጠውን ውሳኔ የማይቀበል ስራ አስኪያጅ ማህበሩን

ፌዴራል ዲሞክራሲያዊ ፍርድ ቤት
ትክክል ግልባጭ
 ፡:ርማ Just +3 20.01.13
 n n 

Annex - ~~Three~~ ^{Four}

የሰ/መ/ቁጥር 142716

ቀን 28/10/2010 ዓ/ም

ዳኞች :- አልማው ወሌ

ሙስጠፋ አህመድ

አብርሃ መሰለ

ፈይሳ ወርቁ

ጳውሎስ ኦርሺሶ


አመልካች:- የሂርማታ ምንጭ ሪል እስቴት አክሲዮን ማህበር አባላት 1.ደረጀ ደቻሳ 2. አይሻ አብደላ 3. ናስር መሀመድ 4. ትዕግስት ተካ 5. አክሊሉ ተካ 6. ሁሴን አበራ 7. መሀመድ ላሉ 8. ደንድር አንጃቦ 9. ሀይዳር መሀመድ 10. ደግፌ ታቦር 11. እርጎ ባህሩ 12. ፈድሉ ከሊል 13. ሸዋዬ ስዩም 14. መሀመድ ከሊል 15. ከድር ከሊፋ 16. ሀይደር ከሊፋ 17. ዳንዴል ደፍጌ 18. ከተማ በተላ 19. ንብሬስ ተማም 20. ሰብሬ ሳላ 21. ሰኢድ ያሲን 22. አሰራር ከሊል 23. ደጋ ኢብራሂም 24. ኑረዲን አብደላ 25. ሙደሲር ሽፋ

ተጠሪ:- የሂርማታ ምንጭ ሪል እስቴት አክሲዮን ማህበር አስተዳዳሪዎች 1. ደምሴ ቱራ 2. ተስፋዬ በቀለ 3. አዲሱ ማሩ 4. ጉግሳ ዘውዴ 5. ታሪኩ አፈወርቅ 6. ጌቱ አብርሃም 7. ይድነቃቸው ተሰማ 8. ምስኪያ መሀመድ 9. ናትናኤል ሀይሉ 10. ደረጀ ገ/ስላሴ 11. ከድር ካሊድ

መዝገቡ ተመርምሮ የሚከተለው ፍርድ ተሰጥቷል፡፡

ፍርድ

ለዚህ ሰበር መዝገብ ክርክር መነሻ የሆነው ጉዳይ የቀረበው አመልካች ግንቦት 30 ቀን 2009 ዓ.ም በተፃፈ አቤቱታ በኦሮሚያ ብ/ክ/መ. የጅማ ዞን ከፍተኛ ፍ/ቤት በመ/ቁጥር 38332 የካቲት 6 ቀን 2009 ዓ/ም የሰጠው ውሳኔ እና የኦሮሚያ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ/ቁጥር 210766 ሚያዝያ 8 ቀን

ፈይሳ ጠቅላይ ፍርድ ቤት
ታክሳ ፻፩፻፳፱
ፊርማ  ቀን 05/10/10
WLM (ግ)

2009 ዓ/ም በዋለው ችሎት የሰጠው ውሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት በመሆኑ በሰበር ታይቶ እንዲታረምልን በማለት ቅሬታቸውን በማቅረባቸው ነው። ቅሬታቸውም አቤት የተባለበትን ውሳኔ፣ አመልካች የሚቃወሙባቸውን ምክንያቶች የሚዘረዝርና በሰበር ሰሚው ችሎት በኩል ሊታይልን ይገባል የሚሉትን ዳኝነት የሚጠይቅ ሲሆን፣ የስር ፍ/ቤቶች ተጠሪዎች የ38,778,370 ብር 12% ክፍያ 4,653,404 ብር አስወስነው ሼራቸውን አሳድገው የቅድሚያ መብት ተጠቅመው 8 ሰቅ ወስደዋል። በንግድ ህግ ቁጥር 353 መሰረት ለአስተዳዳሪዎች ክፍያ የሚወሰነው ማህበሩ ያገኘው የተጣራ ትርፍ ካለ፣ ይህም በመተዳደሪያ ደንቡ ከተቀመጠና ትርፉ ለአባላት ከተከፋፈለ በኋላ ነው። ማህበሩ በንግድ ህግ ቁጥር 452 መሰረት የተጣራ ትርፍ ማግኘቱ ተጣርቶ የቀረበ ውጤት ሳይኖር ስራውን ከጀመረ ገና 6 ወሩ ሆኖ እያለ እና ወደ ፊት የሚከፈል 16,546,121.16 ብር የብድር እዳ እያለበት በመተዳደሪያ ደንቡ የተደነገገ ነገር ሳይኖር 38,778,370 ብር ትርፍ አግኝቷል በሚል 12% እንዲወሰንላቸው ማድረጋቸው ከህግ ውጪ ሆኖ እያለ የስር ፍ/ቤት ህጋዊ ነው ሲል መወሰኑ ስህተት ነው። 7ኛ ተጠሪ የማህበሩ ቦርድ አባልና የቴክኒክ ኮሚቴ ኃላፊ ሆኖ እያለ ለማህበሩ ሴራሚክ፣ ፓኔል እና አልሙኒየም ሽጦለት እያለ የጨረታ ሂደቱን ባልጠበቀ ሽያጩ ተፈጽሞ እያለ በንግድ ህግ ቁጥር 356 (3) መሰረት ጠቅላላ ጉባኤው ሳያውቅ የተከናወነ መሆኑ ተረጋግጦ እያለ ግዢው ህጋዊ ነው ሲል መወሰኑ ስህተት በመሆኑ ይታረምልን የሚል ነው።

በስር ፍ/ቤት የነበረው ክርክር የጀመረው ከአሮሚያ ብ/ክ/መ. ጅማ ዞን ከፍተኛ ፍ/ቤት ሲሆን ከሳሾች የአሁን አመልካቾች ባቀረቡት ክስ ተከላሾች (የአሁን ተጠሪዎች) ሂርማታ ምንጭ ሪል እስቴት አክሲዮን ማህበር በ7 ሰዎች በብር 4,305,000 በ28/7/2000 ዓ/ም ተቋቁሞ ህጋዊ ሰውነት በማግኘት ሥራ ጀምሯል። በአሁኑ ጊዜ 17 አክሲዮን በመሸጥ እና ከአባላት በተገኘ መዋጮ ካፒታሉን ወደ ብር 36,000,000 አሳድጎ ህብር ህንጻ በመገንባት ስራ ጀምሯል። ማህበሩ 38,000,000 ብር ትርፍ አግኝቷል በሚል ከትርፉ ላይ 12% ለማህበሩ አስተዳዳሪዎች (ለተከላሾች) ሊሰጥ ይገባል በማለት ተከላሾቹ በ12ኛው ጠቅላላ ጉባኤ በማስወሰን ከማህበሩ መመስረቻ ጽሁፍ እና መተዳደሪያ ደንብ ውጪ 8 ሱቆች ያለ ጨረታ ወስደዋል። ተከላሾች የማይገባ ጥቅም ለማግኘት ከ7ኛ ተከላሽ ጥራት የሌለውን እቃ ያለጨረታ በመግዛት ግንባታ ፈጽመዋል። በ2000 ዓ/ም በተዘጋጀው ፕሮፖዛል ህንጻውን ለመገንባት ብር 16,000,000 ያስፈልጋል ተብሎ የነበረ ቢሆንም በብር 31,389,954.16 መገንባቱን ሪፖርት አድርገዋል። ከአባላቱ የተሰበሰበው ብር 36,000,000 ሆኖ እያለ ከንግድ ባንክ ብር 13,200,662.91 ተበድረው ማህበሩን ለእዳ ዳርገውታል። ተከላሾቹ የማህበሩን አክሲዮን ከ400 ወደ 500 ሲያሳድጉ የሚፈለግበትን ክፍያ በሙሉ የከፈለ አባል ከባንክ ብድር

ፈጠራ ጠቅላይ ፍርድ ቤት
 ተከክል ገልባጭ
 ረገግ 05/11/10
 W.L.D.C.T

የሚደረግ ነው። አሁን የሚያቀርቡት ጥያቄ ተቀባይነት የለውም። ከሳሾች በማስረጃ ያልተደገፈ ክስ ያቀረቡና ተቀባይነት የሌለው ክስ በመሆኑ ውድቅ ይሁንልን በሚል መልስ ሰጥተዋል።

የስር የጅም ዞን ክፍተኛ ፍ/ቤት በመ/ቁጥር 38332 የካቲት 6 ቀን 2009 ዓ/ም በሰጠው ውሳኔ 1ኛ በውጪ ኦዲተር ኦዲት ይደረግልን ሲሉ ከሳሾች ያቀረቡት ጥያቄ በተመለከተ በንግድ ህግ አንቀጽ 368 መሰረት አክሲዮን ማህበር የራሱን ኦዲተር መሾም ይችላል። እነዚህ ኦዲተሮች የሰሩት ስራ ችግር ካለበት በንግድ ህግ ቁ. 381 መሰረት ለንግድ ሚኒስቴር ማመልከት ይቻላል። በመሆኑም ከሳሾች በደፈናው ማህበሩ በውጪ ኦዲተር ኦዲት እንዲደረግላቸው የጠየቁት የህግ ድጋፍ የለውም ማህበሩ በራሱ ኦዲት አስደርጓል። ይህ የኦዲት ውጤት ችግር ካለበት ለንግድ ሚ/ር ማመልከት አለባቸው እንጂ ለፍ/ቤት የቀረበበት ሁኔታ ተገቢ ባለመሆኑ አልተቀበልነውም። 2ኛ የማህበሩ ህብር ህንጻ የተገነባው ጥራት የሌለው ዕቃ ከ7ኛ ተከላሽ ተገዝቶ ነው የሚለውን በተመለከተ ተገዛ የተባለው ጥራት የሌለው እቃ ምን እንደሆነ ክስ አይገልጽም። ከክርክሩ የተረዳነው ሴራሚክ፣ አልሙኒየም እና ፓኔል ሲሆን የጥቅም ግጭት እንዳይኖር በንግድ ህግ ቁጥር 356(1) መሰረት እንዲህ አይነት ግዥ ሲፈጸም በአስተዳዳሪዎች መጽደቅ ያለበትና ኦዲት ተደርጎ ጉድለት ካለበት የሚሰረዝ እንጂ የተፈጸመው በማህበሩ አስተዳዳሪዎች ተወስኖ በ23/11/2006 ዓ/ም የተገዛ መሆኑ ታውቃል። በዚህም ሁኔታ የማታለል ድርጊት መኖሩ ሳይረጋገጥ እንዲሁ የቀረበ ተቃውሞ ተቀባይነት የለውም። 3ኛ ማህበሩ ከንግድ ባንክ የተበደረውን ብር 13,200,662.91 ብድር በተመለከተ ማህበሩ ከፒታሉን ማሳደግ የሚችለው በብድርና ሼር በመሸጥ ነው። ማህበሩ ብድሩን የተበደረው በ11ኛው ጠቅላላ ጉባኤ ተወስኖ ነው። በመሆኑም በከሳሾች የቀረበው ክስ ተቀባይነት ያለው አይደለም። 4ኛ ማህበሩ ለአባላት ከብድሩ ጋር ተያይዞ የገባላቸው ቃል ካለ ተጠይቆ በ1/5/2009 ዓ/ም በሰጠው ማብራሪያ መሰረት ለ3ኛ፣ 6ኛ፣ 7ኛ፣ 12ኛ፣ 14ኛ፣ 16ኛ፣ 19ኛ፣ 22ኛ እና 23ኛ ከሳሾችና ሌሎችም በ9/10/05 በተደረገው ስምምነት የወለድ ክፍያ በተለይ ታስቦ ከማህበሩ ለመተካት በመሆኑ በገባው ቃል መስረት እንዲፈጸምላቸው። 5ኛ 12ኛው ጠቅላላ ጉባኤ ውሳኔ ተከላሾች አስተዳዳሪዎች 12% ከብር 38,778,370.00 ወስደዋል የተባለውን በተመለከተ የ12ኛው ጠቅላላ ጉባኤ ውሳኔ እንዳየነው የማህበሩ ትርፍ ሳይሆን አስተዳዳሪዎች ከዚህ ቀደም ለሰሩት ስራ ሽልማት ሲሆን በንግድ ህግ ቁጥር 416 መሰረት በጠቅላላ ጉባኤ የተወሰነ ውሳኔ ከሆነ ለፍ/ቤት ክስ ሊቀርብ እንደማይችል የተደነገገ ሲሆን ተከላሾች በንግድ ህግ አንቀጽ 353 (1) መሰረት ለሥራቸው ዋጋ በሽልማት መልክ እንዲወስዱ ውሳኔው የሚያሳይ ሲሆን ይህ ከህግ ውጪ የሚያሰኝ አይደለም። ክፍያው በዛ ከተባለ እንኳ ፍ/ቤት የሚጨምረው ጉደይ አይደለም። 6ኛ. 7 ሱቆች ከህግ ውጪ ወስደዋል የሚለውን በተመለከተ

ፈጠራ ጠቅላይ ፍርድ ቤት
ተከበረ ግለሰብ
ፊርማ [Signature] ቀን 05/11/10
ሠሪ/ር/ጋ

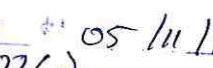
የማህበሩ የውስጠ ደንብ አንቀጽ 6 ክፍተኛ ሼር መያዝና ከመስራቾች መሀከል አንዱ መሆን ምድር ቤት ካለው ሱቅ በቅድሚያ የመከራየት መብት ይሰጣል። ተከላሾች በጠቅላላ ጉባኤው ባገኙት ክፍያ ሼራቸውን ማሳደጋቸው የጠቅላላው ጉባኤ ውሳኔ ህገወጥ ባለመሆኑ የከላሾች ጥያቄ ተቀባይነት ያለው አይደለም። 7ኛ. ከከላሾች ውስጥ 5ኛ ከላሽ ከማህበሩ መሰረዙን በተመለከተ ከንግድ ህግ እንቀጽ 389(1) መሰረት የማህበሩ አባል በፍላጎት ካልሆነ በስተቀር ከአባልነት መሰረዝ እንደሌለበት ተደንግጎ ስለሚገኝ 5ኛ ከላሽ ከማህበሩ አባልነት የተሰረዘው ከህግ ውጪ በመሆኑ የማህበሩ ውሳኔ ተሰርዟል ሲል ወስኗል። ከላሾች የአሁን አመልካቾች ለኦሮሚያ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት የይግባኝ ቅሬታ አቅርበው በመ/ቁጥር 210766 ሚያዝያ 19 ቀን 2009 ዓ/ም በዋለው ችሎት የሰጠው ትእዛዝ በፍ/ብ/ሥ/ሥ/ህግ ቁጥር 337 መሰረት አያስቀርብም ሲል ይግባኙን ሰርዞታል።

የአሁን አመልካችም ይህን ውሳኔ በመቃወም ቀርበዋል። መዝገቡም ተመርምሮ በስር ፍ/ቤት በዚህ ጉዳይ የአክሲዮን ማህበሩ ትርፍ አግኝቷል ተብሎ የጠቅላላ ጉባኤው ለተጠሪዎች በሽልማት መልክ 12% ከትርፍ ላይ እንዲያገኙ የተወሰነ ቢሆንም ከዚያ በኋላ በተደረገ ማጣራት የአክሲዮን ማህበሩ ትርፍ ያላገኘ ስለመሆኑ ተገልጿል። ተጠሪዎች የአክሲዮን ማህበሩን ከወጪ ማዳናቸው ባልተረጋገጠበት ሁኔታ ክላቸው ውድቅ የመደረጉን አግባብነት ለመመርመር ሲባል ቀርቧል። መልስና የመልስ መልስም ተሰጥቶታል። ተጠሪዎች ነሐሴ 12 ቀን 2009 ዓ/ም በተጻፈ መልስ የስር ፍ/ቤት ውሳኔ መሰረታዊ የህግ ስህተት ያልተፈጸመበት መሆኑን በማንሳት ይጽናልን ስሉ ተከራክረዋል። አመልካቾችም ጥቅምት 6 ቀን 2010 ዓ/ም በተጻፈ የመልስ መልስ አቤቱታቸውን በማጠናከር ተከራክረዋል።

የጉዳዩ አመጣጥ ከላይ የተመለከተውን ሲመስል፣ እኛም የቀረበውን አቤቱታ፣ መልስ እና የመልስ መልሱን እንዲሁም የስር ፍርድ ቤት ውሳኔዎችን እና ከጉዳዩ ጋር አግባብነት ያላቸውን የሕግ ድንጋጌዎችን መሠረት በማድረግ በጉዳዩ ላይ የተሰጠው ውሳኔ መሰረታዊ የሆነ የህግ ስህተት መኖር አለመኖሩን ከተያዘው ጭብጥ አንጻር ከስር ፍ/ቤት በማስመጣት ጭምር መርምረናል። እንደመረመርነውም በግራ ቀኝ በተደረገው ክርክር ሂረግ ምንጭ ሪል እስቴት አክሲዮን ማህበር ህብር ህንጻ ገንብቶ ስራ ጀምሯል። ማህበሩ በመመስረቻ ጽሁፉና በመተዳደሪያ ደንቡ መሰረት የስራ ክንዋኔውን በየዓመቱ ኦዲት እያስደረገ ለጠቅላላ ጉባኤ ሪፖርት ስያደርግ የቆየ መሆኑ ታውቋል። የአሁን አመልካቾች ማህበሩ በየዓመቱ ኦዲት ተደርጎ ለጠቅላላ ጉባኤ ሪፖርት አልቀረበም የሚል ቅሬታ የላቸውም። የኦዲቱም ሪፖርት በሀሰት የቀረበ ነው የሚል ክርክር የላቸውም። አሁን ለዚህ ሰበር ሰሚው ችሎት ክርክር ለሆነው ጉዳይ በ12ኛው ጠቅላላ ጉባኤ የብር

ፊርማ ጠቅላይ ፍርድ ቤት
ትክክል ዓለገጥ
ፊርማ የሚገኝ የግድ 05/10/10
WLO

38,778,370.00 12% ብር የአሁን ተጠሪዎች በማህበሩ አስተዳዳሪነት ሲያገለግሉ ለህብር ህንጻ ግንባታ ላደረጉት አስተዋጾ ተብሎ እንዲከፈላቸው መወሰኑ ተገቢ አይደለም የሚል ነው። በስር ፍ/ቤት በተደረገው ማጣራት ማህበሩ ኦዲት ተደርጎ ለጠቅላላው ጉባኤ ሪፖርት ተደርጎ ተከሳሾች የአሁን ተጠሪዎች የማህበሩ አስተዳዳሪ ሆነው የህብር ህንጻ ግንባታ ሲያስፈጽሙ በሰጡት አገልግሎት እና ባደረጉት ጥረት ማህበሩ ለግንባታው ሊያወጣ ይችል የነበረውን ተጨማሪ ወጪ ብር 38,778,370.00 ያዳኑ ወይም ያስቀሩ መሆኑን ጠቅላላ ጉባኤው አምኖበት በሽልማት መልክ በማህበሩ መመስረቻ ጽሁፉ እና በመተዳደሪያ ደንብ ወይም በንግድ ህጉ አንቀጽ 353(1) በተደነገገው መሰረት ካዳኑት የወጪ መጠን ላይ 12% የአገልግሎት ክፍያ የወሰነላቸውና የአሁን አመልካቾችም በጠቅላላ ጉባኤው ላይ ተገኝተው እና በውሳኔው ተስማምተው ቃለ ጉባኤውን በፊርማቸው ያረጋገጡ መሆኑን ቀርቦ ከተያያዘው ዋናው መዝገብ ተገንዝበናል። አመልካቾቹ ውሳኔውን ባስተላለፈው 12ኛው ጠቅላላ ጉባኤ አልተጠራንም፣ በስብሰባው ላይ አልበርንም፣ በቃለጉባኤው ላይ አልፈረምንም በሚል ከስር ጀምሮ ያቀረቡት ክርክርም ሆነ ማስረጃ ስለመኖሩ የመዝገቡ ግልባጭም ሆመ የሰበር ክርክራቸው የሚጠቁሙት ነገር የለም። ጠቅላላ ጉባኤው የሽልማት ውሳኔውን ያስተላለፈው ተጠሪዎቹ ብር 38,778,370.00 ያዳኑ ወይም ያስቀሩ ስለመሆኑ ሳይረጋገጥ ነው በሚል በአመልካች በኩል የቀረበው ክርክርም አመልካቾቹ እራሳቸው የተስማሙበትን እና በፊርማቸው ያረጋገጡትን የማህበሩን ጠቅላላ ጉባኤ ውሳኔ መሰረት ያደረገ ባለመሆኑ ተቀባይነት ያለው አይደለም። የመዝገቡ ግልባጭ እንደሚያረጋግጠው የሽልማቱ ምንጭም ማህበሩ ከንግድ እንቅስቃሴው ያገኘው ትርፍ ሳይሆን በህንጻው ግንባታ ምክንያት በማህበሩ ላይ ሊደርስ ይችል የነበረ እና ነገር ግን በተጠሪዎቹ ልፋት እና ጥረት ከወጪ የዳኑ የማህበሩ ገንዘብ ነው። በመሆኑም በዚህ ሁኔታ የተሰጠ ውሳኔ የአሁን ተጠሪዎች ከሥልጣናቸው ወጪ መስራቻቸው ወይም ኃላፊነታቸውን አለመወጣታቸው ባልተረጋገጠበት ሁኔታ እና የጠቅላላ ጉባኤ ውሳኔ ማህበሩን ወይም አባላቱን የሚጎዳ ውሳኔ ወስኗል ሊባል የሚችል በቂ ምክንያት ባልቀረበበት የጠቅላላ ጉባኤ ውሳኔ ሊሻር ይገባል ሲሉ ያቀረቡት ቅሬታ ተገቢነት ያለው አይደለም። የስር ፍ/ቤትም በዚህ መሰረት የአሁን አመልካቾች የማህበሩ 12ኛ የጠቅላላው ጉባኤ ውሳኔ እንዲሻርላቸው ያቀረቡት ክስ በበቂና ሕጋዊ ምክንያት ላይ የተመሰረተ አለመሆኑን መሰረት አድርጎ የጠቅላላው ጉባኤ ውሳኔ እንደማይሻር የሰጠው ውሳኔ በቀረበው ማስረጃ አጣርቶ እና በህጉ መሰረት የሰጠው ውሳኔ በመሆኑ መሠረታዊ የህግ ስህተት የተፈጸመበት ሆኖ አልተገኘም።

ፈጠራ ጠቅላይ ፍርድ ቤት
ትክክል ገልጻል
ፊርማ  ተፈጻሚ 05/11/10
WLP/22/2

ው ሳ ኔ

1. የጅማ ዞን ከፍተኛ ፍ/ቤት በመ/ቁጥር 38332 የካቲት 6 ቀን 2009 ዓ/ም የሰጠው ውሳኔ እና የአሮሚያ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ/ቁጥር 210766 ሚያዝያ 8 ቀን 2009 ዓ/ም በዋለው ችሎት የሰጠው ውሳኔ በፍ/ብ/ሥ/ሥ/ህግ ቁጥር 348(1) መሰረት በአብላጫ ድምጽ ጸንቷል።
2. ወጪና ኪሣራ ግራ ቀኝ የየራሳቸውን ይቻሉ።
3. ከጅማ ዞን ከፍተኛ ፍ/ቤት የመጣው የመ/ቁጥር 38332 በመጣው ሁኔታ ይመለስ ብለናል።
4. የዚህ ውሳኔ ትክክለኛ ግልባጭ ለስር ፍ/ቤት ይድረሳቸው ብለናል።
መዝገቡ ተዘግቶ ወደ መ/ቤት ተመልሷል።

የማይነበብ የአራት ዳኞች ፊርማ አለበት

ፈጠራ ጠቅላይ ፍርድ ቤት
ታሰባ ገጠላ
ሪፖርት ቁጥር 05/11/10
ሠገደ

የሚወሰነው ኪፍያው 10% መብለጥ የለበትም እስከ 10% የሚወሰነው ከማህበሩ የተጣራ ትርፍ እንጂ ከ38,778,370.00 ተጨማሪ ወጪ ብር አይደለም። ይህ ውሳኔ አባላቱንና ማህበሩን የሚጎዳ ከህግ ወጪ የተሰጠ ውሳኔ መሆኑን ያመለክታል 3. የንግድ ህጉ አንቀጽ 353(1) መሰረት ለአስተዳዳሪዎች በጠቅላላ ጉባኤ ውሳኔ ሊከፈላቸው የሚችለው የአገልግሎት ኪፍያ እንጂ ሽልማት አይደለም። ሽልማትና የአገልግሎት ኪፍያ ይለያያል። ሽልማት የእያንዳንዱን አባል ፍላጎት ውሳኔ የሚጠይቅ እንጂ በድምጽ ብልጫ የሚወሰን አይደለም። የሽላሚዎቹ የግል ፍላጎት እንጂ የአስተዳዳሪዎች መብትም አይደለም። በሽልማት መልክ የተወሰነ ኪፍያ ሌላ ጊዜ አስተዳዳሪዎቹን የአገልግሎት ክፍያን አንደመብት ከመጠየቅ የሚያግድ ባለመሆኑም ከህግ ወጪ የተሰጠ ውሳኔ በመሆኑ ሊሻር የሚገባው ውሳኔ ነው አላለሁ።

ሠ/አ

ፊደል ጠቅላይ ፍርድ ቤት
 ትክክል ያልገኘ
 ፊርማ ~~ወ/ሥ~~ 05/11/10
 ሠ/ሠ

የማይነበብ የአንድ ዳኛ ፊርማ አለበት

ቀን 12/6/2011 ዓ/ም

በመ/ቁጥር 108043 ላይ የሰጠውን መመሪያና ትእዛዝ በመተው ጭብጦቹ በአንድ ተጠቅልለው ታይተዋል በሚል የሰጠው ውሳኔ ተገቢ አይደለም። የአሁን ተጠሪዎች በክላሻው የጠየቁት ዳኝነት ማህበሩ ሰኔ 8 ቀን 2005 ዓ/ም የማህበሩ ጠቅላላ ጉባኤ የሰጠውን ውሳኔ እንዲሻር፣ የደረሰብን ጉዳት እንዲጣራ ሱቆቹ ወደ ማህበሩ እንዲመለሱ የሚል ሲሆን የስር ፍ/ቤቶች ተመልሰው የቀድሞውን ውሳኔ ማፅናታቸው ካለአግባብ ነው። በፍ/ብ/ሀግ ቁጥር 1731 ድንጋጌ መሰረት ውሎች በተዋዋዮቹ መሀከል ህግ ሲሆኑ በኋላ ጥቅሜ ተጎዳ በማለት ውል ይፍረስልኝ ማለት የሚቻል አይደለም። እንዲሁም በፍ/ብ/ሀግ ቁጥር 1763 እና 1764 ዳኞች ሪትዕን ምክንያት በማድረግ ውል ማሻሻል ወይም መለወጥ እንደማይችሉ ደንግጎ እያለ ታልፎ የተሰጠብኝ ውሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት በመሆኑ ይታምልኝ የሚል ነው።

በስር ፍ/ቤት የነበረው ክርክር የጀመረው በደ/ብ/ብ/ሕ/መ. ሀዋሳ ከተማ ከፍተኛ ፍ/ቤት ሲሆን ከላሻች የአሁን ተጠሪዎች ሲሆኑ ተከላሽ የአሁን አመልካች ነው። ጉዳዩ ቀደም ሲል ከላሻች በ24/1/2006 ዓ/ም ባቀረቡት ክስ ተከላሽ የመጀመሪያ ደረጃ ተቃዋሚና በፍሬ ነገሩ ላይ መልስ ሰጥቶ ከተከራከሩ በኋላ የሀዋሳ ከተማ ከፍተኛ ፍ/ቤት ጥር 2 ቀን 2009 ዓ/ም በዋለው ችሎት ማህበሩ እንዲፈርስ ሲል ውሳኔ ሰጥቶ ተከላሽ ለክልሉ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት የይግባኝ ቅሬታ አቅርቦ ጠቅላይ ፍ/ቤቱ በመ/ቁጥር 60963 የካቲት 224 ቀን 2009 ዓ/ም በዋለው ችሎት አከራክሮ እንዲወስን ለሀዋሳ ከተማ ከፍተኛ ፍ/ቤት መልሶለታል። ከፍተኛው ፍ/ቤት አከራክሮ የተከላሽ ማኅበር ጠቅላላ ጉባኤ በ8/10/2005 ዓ/ም የሰጠው ውሳኔ ተሰርዞ በእጣ የተደረገው ክፍፍል ቀርቶ በጨረታ አወዳድሮ ለአባላት ቅድሚያ በመስጠት እንዲያከራይ በማለት ውሳኔ ሰጥቷል። በዚህ ውሳኔ ተከላሽ ለክልሉ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎትና ሰበር ሰሚ ችሎት በቅደም ተከተል የይግባኝ ቅሬታና አቤቱታ አቅርቦ የጸናበት ሲሆን ለፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት አቤቱታ አቅርቦ የፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁጥር 108043 ላይ የከላሽ ጥያቄና ተከላሽ ማህበር በ18/6/2005 ዓ/ም የሰጠው ውሳኔ፣ ጥያቄያቸው የ1999 ዓ/ም የሱቆች ክፍፍል የመለወጥ ፍላጎት መኖር አለመኖሩን፣ የ2005 ዓ/ም የማህበሩን ውሳኔ ለማፍረስ የ1999 ዓ/ም ውሳኔ ወደ ኋላ ተመልሶ የሚሸርበት አግባብ፣ የ2005 ዓ/ም ውሳኔ የሚሻር መሆን አለመሆኑን ጭብጥ በመያዝ አከራክሮ እንዲወስን ለሀዋሳ ከተማ ከፍተኛ ፍ/ቤት በመለሰለት መሰረት የሀዋሳ ከተማ ከፍተኛ ፍ/ቤት በመ/ቁጥር 14589 ላይ አከራክሮ ግንቦት 23 ቀን 2009 ዓ/ም በዋለው ችሎት የሰጠው ውሳኔ የከላሻች ጥያቄ በ1999 ዓ/ም የተደረገው የሱቅ ክፍፍል ሰፊ የሆነ የጥቅም ልዩነት የፈጠረ በመሆኑ ሱቆቹ ወደ ማህበሩ ቋት ተመልሰው አዲስ ክፍፍል እንዲደረግ ካልሆነ ማህበሩ ይፍረስ የሚል ሲሆን ተከላሽ ደግሞ

ከተማ ከፍተኛ ፍ/ቤት
ቀን 19/11/13
ክ/ቤ

ቀን 12/6/2011 ዓ/ም

የከላሻች ጥያቄ በተገቢው ሰዓት ያልቀረበ መሆኑን ገልጸው ነገር ግን ጥያቄያቸውን ተቀብሎ የጥቅም ልዩነት የተፈጠረ መሆኑን አጣርቶ በ1999 ዓ/ም ክፍፍል የማይለወጥና ጥቅማቸው የተጎዳውን አባላት እንደሱቁ አይነት የካሳ ክፍያ በአንድ ጊዜ እንዲከፈል የወሰኑ መሆኑን የሚገልጽ ነው። የማህበሩ የ1999 ዓ/ም ውሳኔም ሆነ የ2005 ዓ/ም ውሳኔ ስንመለከት የብዙሃኑን መብት በእኩል የማያከብር ፍትሃዊ ያልሆነ ከመሆኑም በላይ የንግድ ህጉን አላማም የሚጻረር ነው። የማህበሩ ዓላማ አባላቱ ከኪራይ ሱቅ ወጥተው የግል ሱቅ እንዲኖራቸው ታስቦ ነው። ይሁንና ይህ ዓላማ አባላቱ የግል ሱቅ ይዘው ማህበሩ የፈረሰ ሳይሆን በንግድ ህግ መሰረት አትነት ትሬድንግ አ/ማ ተመስርቶ አሁንም ያለ ማህበር ነው። ተከላሻ አትነት ትሬድንግ አ/ማ በ41 አባላት በንግድ ህግ መሰረት የተመሰረተ ሲሆን የገበያ ማእከሉን በባለቤትነት መያዝ ያለበት ማህበሩ አንጂ አባላቱ መከፋፈል አልነበረባቸውም። ማህበሩ ሱቆቹን ቅድሚያ ለአባላቶቹ ሰጥቶ በጨረታ አከራይቶ አባላቱም ባላቸው የአክሲዮን ድርሻ እኩል ተጠቃሚ ያደረጋቸው መሆን ይገባ ነበረ። የማህበሩ ጠቅላላ ጉባኤ ውሳኔ ግን ከላይ የተገለጸውን የህግ መሰረቶችን የሚጻረርና ኢፍትሃዊ በመሆኑ ሊሻር የሚገባው ነው። በመሆኑም የማህበሩ ሱቆች ወደ ማህበሩ ተመልሰው የአባላትን ቅድሚያ የመከራየት መብት በመጠበቅ በጨረታ እንዲከራይ ማድረግ ይገባል በማለት ቀደም ሲል የተሰጠው ውሳኔ የሚለወጥበት የህግ መሰረት የለም ሲል ወስኗል። ተከላሻ ለደ/ብ/ብ/ሕ/መ. ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት የይግባኝ ቅሬታ አቅርቦ በመ/ቁጥር 70856 ላይ አከራክሮ መስከረም 16 ቀን 2010 ዓ/ም በዋለው ችሎት በሰጠው ውሳኔ የሀዋሳ ከተማ ከፍተኛ ፍ/ቤት ውሳኔን በማጽናት ወስኗል። ተከላሻ የአሁን አመልካች ለደ/ብ/ብ/ሕ/መ. ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት አቤቱታ አቅርቦ በመ/ቁጥር 71374 ላይ አከራክሮ ጥር 7 ቀን 2010 ዓ/ም በዋለው ችሎት በሰጠው ውሳኔ የደ/ብ/ብ/ሕ/መ. ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት ውሳኔንና የሀዋሳ ከተማ ከፍተኛ ፍ/ቤት ውሳኔን በማጽናት ውሳኔ ሰጥቷል።

የአሁን አመልካችም ይህን ውሳኔ በመቃወም ቀርቧል። መዝገቡም ተመርምሮ የስር ፍ/ቤቶች በፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁጥር 108043 ላይ የተሰጣቸውን መመሪያ መሰረት አድርገው አከራክረው የወሰኑ መሆን አለመሆኑን አግባብነት ለመመርመር ሲባል ቀርቧል። መልስና የመልስ መልስም ተሰጥቶበታል። ተጠሪዎች መጋቢት 7 ቀን 2010 ዓ/ም በተጻፈ መልስ የስር ፍ/ቤት የሰጠው ውሳኔ መሰረታዊ የህግ ስህተት እንዳልተፈጸመበት በማንሳት ይጽናልኝ ሲሉ ተከራክረዋል። አመልካችም መጋቢት 24 ቀን 2010 ዓ/ም በተጻፈ የመልስ መልስ አቤቱታውን በማጠናከር ተከራክሯል።

ሪፖርት ላይ ስርዓት ላይ ስርዓት
 ሪፖርት ላይ ስርዓት ላይ ስርዓት
 19/6/13
 ጠ/16

ቀን 12/6/2011 ዓ/ም

የጉዳዩ አመጣጥ ከላይ የተመለከተውን ሲመስል፣ እኛም የቀረበውን አቤቱታ፣ መልስ እና የመልስ መልሱን እንዲሁም የስር ፍርድ ቤት ውሳኔዎችን እና ከጉዳዩ ጋር አግባብነት ያላቸውን የሕግ ድንጋጌዎችን መሠረት በማድረግ በጉዳዩ ላይ የተሰጠው ውሳኔ መሰረታዊ የሆነ የህግ ስህተት መኖር አለመኖሩን በተያዘው ጭብጥ አንጻር መርምረናል። እንደመረመርነውም የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁጥር 108043 ላይ ህዳር 12 ቀን 2009 ዓ/ም በዋለው ችሎት የሰጠው ውሳኔ ተራ ቁጥር 2 ላይ የተጠሪዎች የዳኝነት ጥያቄና የካቲት 18 ቀን 2005 ዓ/ም ለማህበሩ ያቀረቡት ጥያቄ ምንነት፣ ማህበሩ ተጠሪዎች የካቲት ወር 2005 ዓ/ም ያቀረቡትን ጥያቄ የተቀበለበትና ለማስተካከልም ያሰበው በምን አግባብ እንደሆነ፣ በተለይም የ1999 ዓ/ም የሱቆቹን ክፍፍል የመለወጥ ፍላጎት መኖር አለመኖሩን፣ ይህ ፍላጎት አልነበረም የሚባል ከሆነ ሰኔ 8 ቀን 2005 ዓ/ም የማህበሩ ጉባኤ ውሳኔ ለማስፈረስ በተጠሪዎች በኩል በቀረበው ጥያቄ መነሻነት ወደ ኋላ ተመልሶ የ1999 ዓ/ም ውሳኔ ጭምር የሚሸርበት አግባብ መኖር አለመኖሩን፣ ማህበሩ ሰኔ 8 ቀን 2005 ዓ/ም የወሰነው ውሳኔ የሚሻር መሆን አለመሆኑን ጭምር ተጣርቶ እንዲወሰን የሚል ነው። በስር ፍ/ቤት በተደረገውም ክርክር የከሳሾች የአሁን ተጠሪዎች ጥያቄ በ1999 ዓ/ም የተደረገው የሱቅ ክፍፍል ሰፊ የሆነ የጥቅም ልዩነት የፈጠረ በመሆኑ ሱቆቹ ወደ ማህበሩ ቋት ተመልሰው አዲስ ክፍፍል እንዲደረግ ካልሆነ ማህበሩ ይፍረስ የሚል ሲሆን ጥያቄያቸው በ1999 ዓ/ም የተደረገው የሱቅ ክፍፍል ላይ የቀረበና የሰኔ 8 ቀን 2005 ዓ/ም የማህበሩ ጠቅላላ ጉባኤ ውሳኔም ከዚህ ጥያቄያቸው ተነስቶ የተሰጠ ውሳኔ ነው። በ1999 ዓ/ም የተደረገው የሱቅ ክፍፍል ሰፊ የሆነ የጥቅም ልዩነት የፈጠረ ስለመሆኑም ማህበሩ የአሁን አመልካች የአሁን ተጠሪዎችን ጥያቄ ተቀብሎ የጥቅም ልዩነት የተፈጠረ መሆኑን አጣርቶ በ1999 ዓ/ም ክፍፍል መሰረት ጥቅማቸው የተጎዳውን አባላት እንደሱቁ አይነት የካሳ ክፍያ በአንድ ጊዜ እንዲከፈላቸው የወሰነ መሆኑን የአሁን አመልካች ባቀረበው ክርክር መረዳት የሚቻል ሲሆን የሚያስተባብሉትም ጉዳይ አይደለም። በዚህ መሰረት የስር ፍ/ቤቶች የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁጥር 108043 ጭብጥ ይዞ እንዲጣራ በመለሰው መሰረት የማህበሩ የ1999 ዓ/ም የተደረገው የሱቅ ክፍፍልም ሆነ የ2005 ዓ/ም በማህበሩ የተሰጠው ውሳኔ የብዙሃኑን መብት በእኩል የማያከብር ፍትሃዊ ያልሆነ መሆኑን እና የንግድ ህጉንም የሚጻረር መሆኑን ግራ ቀኙ ባቀረቡት ማስረጃ አጣርቶ ውሳኔ ሰጥቷል። የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁጥር 72189 ላይ በበላይ ፍ/ቤት ትእዛዝ አንድን በነጥብ ወደ ስር ፍ/ቤት የተመለሰ ጉዳይ አይቶ እልባት እንዲሰጥበት የተላለፈለት የስር ፍ/ቤት የተመለሰውን ጉዳይ የበላይ ፍ/ቤት የሰጠውን ፍርድ መሰረት በማድረግ በአግባቡ ውሳኔ ለመስጠት ተገቢውን ጥረት ማድረግ ያለበት

በ 19/11/11
 18/16

ቀን 12/6/2011 ዓ/ም

ስለመሆኑ አስገዳጅ የህግ ትርጉም ሰጥቶበት ይገኛል። በዚህ መሰረት የስር ፍ/ቤቶች ግራ ቀኙ ባቀረቡት ማስረጃ መሰረት አጣርቶ በህጉ መሰረት የሰጡት ውሳኔ መሠረታዊ የህግ ስህተት የተፈጸመበት ሆኖ አልተገኘም።

ው ሳ ኔ

1. የደ/ብ/ብ/ሕ/መ. ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁጥር 71374 ጥር 7 ቀን 2010 ዓ/ም በዋለው ችሎት የሰጠው ውሳኔ፣ የደ/ብ/ብ/ሕ/መ. ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ/ቁጥር 70856 መስከረም 16 ቀን 2010 ዓ/ም በዋለው ችሎት ውሳኔ እና የሀዋሳ ከተማ ከፍተኛ ፍ/ቤት በመ/ቁጥር 14589 ግንቦት 23 ቀን 2009 ዓ/ም በዋለው ችሎት የሰጠው ውሳኔ በፍ/ብ/ሥ/ሥ/ህግ ቁጥር 348(1) መሰረት ጸንቷል።
2. በዚህ መዝገብ ክርክር ወጪና ኪሣራ ግራ ቀኙ የየራሳቸውን ይቻሉ።
3. የካቲት 13 ቀን 2010 ዓ/ም በዋለው ችሎት የሀዋሳ ከተማ ከፍተኛ ፍ/ቤት የመ/ቁጥር 16214 ላይ የተሰጠው የእግድ ትእዛዝ ተነስቷል። ይጻፍ።
4. የዚህ ውሳኔ ትክክለኛ ግልባጭ ለስር ፍ/ቤት ይድረሳቸው ብለናል።
5. መዝገቡ ተዘግቶ ወደ መ/ቤት ተመልሷል።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት።

ብ/ግ

የሰ/መ/ቁጥር 152636
 ቀን 12/6/2011 ዓ/ም
 ፊርማ Do የገ 19/1/13
 ጠ/ቤ

Annex-6

የሰ.መ.ቁ.164554 ³

ጥቅምት 25 ቀን 2012 ዓ.ም

- ዳኞች :-
1. ተፈሪ ገብሩ (ዶ/ር)
 2. ቀነዓ ቁጣታ
 3. ደጀኔ አያንሳ
 4. ኑረዲን ከድር
 5. ብርቅነሽ እሱባለወ

አመልካቾች: ...1. ሲቪል ወርክስ አማካሪ መሐንዲሶች ኃ/የተ/የግ/ማህበር } ጠበቆች ማሪያ ካህሳይ
 2. አቶ ብዙነህ ከበበ } እና ዜና ደባሱ
 3. አቶ ዘሪሁን አበራ } ቀርቦዋል

ተጠሪዎች: ...1. አቶ ኤርምያስ አባተ } ጠበቃ ሰላም ገ/ሚካኤል ቀርቦዋል::
 2. አቶ ማንደፍሬ ተስፋዬ }
 3. አቶ አለማየሁ ማሞ }

ይህ መዝገብ ተመርምሮ የሚከተለው ፍርድ ተሰጥቷል::

ፍርድ

ይህ የማህበር ሥራ አስኪያጆች የደመወዝ ጭማሪ ጋር የተያያዘ ክርክር የተጀመረው በፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ሲሆን የአሁን አመልካቾች ተከላሾች፣ የአሁን ተጠሪዎች ከላሾች እና በዚህ ችሎት የክርክሩ ተካፋይ ያልሆኑት አቶ ካሳሁን ዘርጋወ 4ኛ ተከላሽ ሁኖ ሲከራከሩ ነበር:: ጉዳዩ ለዚህ ችሎት ሊቀርብ የቻለው የአሁን አመልካቾች የፌዴራል ከፍተኛ ፍ/ቤት በመ.ቁ.174168 ሐምሌ 20 ቀን 2010 ዓ.ም የሰጠው ወሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት ስለሆነ እንዲታረምልን በማለት በማመልከታቸው ነው::

የጉዳዩ አመጣጥ ሲታይ የሥር ከላሾች (የአሁን ተጠሪዎች) ባቀረቡት ክስ ከላሾች እና ከ2ኛ-4ኛ ተከላሽ በሕጉ አግባብ 1ኛ ተከላሽ ማህበር የቋቋምን ሲሆን፣ 2ኛ ተከላሽ የማህበሩ ዋና ሥራ አስኪያጅ እና 3ኛ ተከላሽ ም/ሥራ አስኪያጅ እና 4ኛ ተከላሽ የማህበሩ አባል በመሆን ህዳር 27 ቀን 2007 ዓ.ም ባደረጉት ስብሰባ 2ኛ እና 3ኛ ተከላሾች ሕግ እና የመተዳደሪያ ደንብ በመተላለፍ የራሳቸውን ጥቅም የሚመለከት ድምጽ በመስጠት ለራሳቸው ደመወዝ ጭማሪ ስላደረጉ እና ከጠጠሪ ሥራ መስክ ጋር በተያያዘ ወሳኔ የሰጡ ስለሆነ፣ ህዳር 27 ቀን 2007 ዓ.ም የተጻፈ ቃለ ጉባኤ እና ወሳኔው እንዲሻርልን በማለት ከሷል::

ፌዴራል ጠቅላይ ፍርድ ቤት
 ትክክል ገልግጭ
 109  ቀን 29/04/12
 2/4/12

የሥር ተከላሾች በሰጡት መልስ 1ኛ ተከላሽ ማህበር የሥራ አስኪያጅ የደመወዝ ማስተካከያ እና በጠጠር ሥራ መስክ ጋር በተያያዘ መከናወን ያለበትን ጉዳዮች ተወያይቶ ለመወሰን ጠቅላላ ጉባኤ ለማድረግ ለሁሉም አባላት ጥሪ ተደርጎ በሙሉ ፈቃደኝነት እና ነጻነት ተሳትፈው ድጋፍና ተቃዋሚ ተመዝግቦ በ3/4 ድምጽ የተወሰነ ሲሆን፤ አባላቱም ቃለ ጉባኤውን በፈቃዳቸው በሰነዶች ማረጋገጫና ምዝገባ ጽ/ቤት ቀርበው ፈርመዋል፤ የደመወዝ ጭማሪው የተደረገው ለማህበሩ ጥቅም ነው፤ የተወሰነው ደመወዝ በተመሳሳይ ስራ ሌላ ቦታ ከሚከፈለው ደመወዝ ያነሳ ነው፤ የጠጠር ማምረቻ ቦታውን በተመለከተ ህዳር 27 ቀን 2007 ዓ.ም የተወሰነው ወሳኔ ተገቢ ነው በማለት ተከራክሯል።

ከዚህ በኋላ የሥር የመጀመሪያ ደረጃ ፍ/ቤት ግራ ቀኛቸውን በማከርከር በሰጠው ወሳኔ 1ኛ ተከላሽ ማህበር ህዳር 27 ቀን 2007 ዓ.ም ጠቅላላ ጉባኤ ጠርቶ አባላቱ በያዙት ሁለት አጀንዳዎች አንደኛው ለ2ኛ እና 3ኛ ተከላሾች የደመወዝ ጭማሪ እንዲደረግ እና የጠጠር ማምረቻ ቦታን በተመለከተ በአብላጫ ድምጽ የወሰነ ሲሆን፤ 2ኛ እና 3ኛ ተከላሾች በራሳቸው ጥቅም ላይ መክረው የጥቅም አለመስማማት እያለ ድምጽ የሰጡ ሲሆንም ይህን እንዳያደርጉ የህግ ክልከላ እያለ ተላልፈው ድምጽ መስጠታቸው ሕግን የተላለፈ የደመወዝ ማስተካከያ አንጻንዳ ላይ የሰጠው ወሳኔ በንግድ ሕግ አንቀጽ 409 (1) እና 416 (2) መሰረት መሻር አለበት፤ የጠጠር ማምረቻ ቦታን በተመለከተ አጀንዳን ተከላሽ የጥቅም አለመስማማት ያላቸው መሆኑን የሚያስረዳ በዚህ ረገድ ህዳር 27 ቀን 2007 ዓ.ም የተላለፈው ወሳኔ መሻር የለበትም በማለት ወስኗል። ግራ ቀኛቸው ይህን ወሳኔ በመቃወም ይግባኝ ለፌዴራል ከፍተኛ ፍ/ቤት ያቀረቡ ሲሆን ፍ/ቤቱ ግራ ቀኛቸውን በማከራከር ሁለት መዛግት በማጣመር በሰጠው ወሳኔ የሥር ፍ/ቤት ወሳኔ በማጽናት ወስኗል። የአሁን የሰበር አቤቱታ የቀረበው በዚህ ወሳኔ ቅር በመሰኘት ለማስለወጥ ነው።

የአሁን አመልካቾች ጥቅምት 12 ቀን 2011 ዓ.ም በተጻፈ የሰበር አቤቱታ፣ የሥር ፍ/ቤቶች የአሁን 2ኛ እና 3ኛ አመልካቾች በራሳቸው ጉዳይ ወይም ጥቅም ላይ ድምጽ በመስጠት ወሳኔ ሰጥቷል በማለት ወሳኔውን ያፈረሱት የንግድ ሕግ አንቀጽ 409 (1) እና (2) መሰረት ያላደረገ ነው። በንግድ ሕግ አንቀጽ 409 (1) መሰረት «የጥቅም ግጭጥ» አለ ብሎ ለመወሰን ማህበረተኛውን የሚመለከተው ጉዳይ ከማህበሩ ጥቅም ጋር የሚጋጭ፣ ጉዳዩ ለማህበረተኛው ብቻ የተለየ ጥቅም የሚያስገኝ እንደሆነ ሲረጋገጥ ብቻ ነው። የማህበሩ ጠቅላላ ጉባኤ ባስተላለፈው ወሳኔ መሰረት ከ2ኛ እና 3ኛ አመልካቾች በስተቀር ለሌሎች ሙሉ ሰዓት ላበረከቱት ባለሙያዎች ደመወዝ ጭማሪው ተፈጻሚ ተደርጓል። ይህ የደመወዝ ጭማሪ ደግሞ የማህበሩን ሕልውና እና ተወዳዳሪነት ለማስቀጠል የተደረገ እንጂ የድርጅቱን ጥቅም የሚነካ አይደለም። ስለዚህ ለ2ኛ እና 3ኛ አመልካቾች የተወሰነው ደመወዝ ከሌሎች ተመሳሳይ

ፌዴራል ጠቅላይ ፍርድ ቤት
ትክክል ግልጽ
ፊርማ *[Signature]* ቀን 29/6/2013

ድርጅቶች ወስጥ ከሚሰሩት ባለሙያዎች አንጻር በእጁን ያነሰ ስለሆነ የደመወዝ ጭማሪው የጥቅም ግጭት አለው የሚያስብል አይደለም። በዚህ አግባብ ካልሆነ በስተቀር የማህበሩ ሥራ አመራር አባላት ደመወዝ ለመጨመር የሚቻልበት ሌላ አማራጭ የለም። በመሆኑም የሥር ፍ/ቤቶች የሰጡት ወሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት ስለሆነ እንዲሻርልን፣ ወጪዎች እንዲወሰንልን በማለት አመልክቷል።

ይህ ሰበር ሰሚ ችሎት የሰበር አቤቱታው ያስቀርባል በማለት ተጠሪዎች መልስ እንዲሰጡ ባዘዘው መሰረት ጥር 1 ቀን 2011 ዓ.ም በተጻፈ መልስ፣ በዚህ ጉዳይ የሥር ፍ/ቤቶች የሰጡት ወሳኔ በሕግ አግባብ የተወሰነ ነው በማለት በዝርዝር ክርክራቸውን አቅርቧል። የአሁን አመልካች የመልስ መልስ አቅርቧል። ለትክክለኛ ፍርድ አሰጣጥ ይረዳ ዘንድ የመ.ቁ.224149 ቀርቦ ከዚህ መዝገብ ጋር ተያይዟል።

የጉዳዩ አመጣጥ ከፍ ሲል የተመለከተው ሲሆን ይህ ችሎት የግራ ቀኛቸውን ክርክር አግባብነት ካላቸው የህግ ድንጋጌዎች ጋር በማገናዘብ መርምሮታል። እንደመረመርነው በዚህ ጉዳይ ምላሽ ማግኘት ያለበት ፣ የሥር ፍ/ቤቶች የአሁን 2ኛ እና 3ኛ አመልካቾች ህዳር 27 ቀን 2007 ዓ.ም በተደረገው ስብሰባ ለራሳቸው ደመወዝ ማስተካከያ እንዲደረግ ድምጽ መስጠታቸው በንግድ ሕጉ አንቀጽ 409 (1) አንጻር የጥቅም ግጭት አለ ተብሎ ወሳኔው እንዲሻር መወሰኑ መሰረታዊ የህግ ስህተት የተፈጸመበት ነው ወይስ አይደለም? የሚለው ነጥብ መሆኑን ተገንዝበናል። በዚህ መሰረት የአሁን 1ኛ አመልካች ማህበር በ1996 ዓ.ም በ2ኛ እና 3ኛ አመልካቾች፣ በአሁን ተጠሪዎች እና የሥር 4ኛ ተከላሽ አቶ ካሳሁን ዘርጋው በተፈረመው የመመስረቻ ጽሑፍ እና የመተዳደሪያ ደንብ መሰረት መቋቋሙን በሥር ፍ/ቤት የቀረበው ማስረጃ ያስረዳል። የአሁን 1ኛ አመልካች ማህበር በእነዚህ ስድስት አባላት የተቋቋመ ሲሆን፣ 2ኛ እና 3ኛ አመልካቾች የማህበሩ ስራ አስኪያጅ እና ም/ሥራ አስኪያጅ ሁኖ ሲሰሩ እንደነበር መዝገቡ ያሳያል። በዚህ መሰረት እያንዳንዱ ባለአክሲዮን አንድ ሺህ ብር ዋጋ ያላቸው በአጠቃላይ አምስት መቶ አክሲዮኖች ያሉት ሲሆን ጠቅላላ ገንዘቡ ብር 500000 (አምስት መቶ ሺህ) እንደሆነ ከመዝገቡ ወስጥ መረዳት ይቻላል።

በ1ኛ አመልካች ማህበር መተዳደሪያ ደንብ መሰረት የማህበሩ ጠቅላላ ጉባኤ ስልጣን በአንቀጽ 10 ሥር ተዘርዝሮ እናገኛለን። በዚህ አንቀጽ ለጠቅላላ ጉባኤ ከተሰጠው ስልጣን መካከል አንዱ በንዑስ አንቀጽ 3 ሥር የተመለከተው ሲሆን፣ ጠቅላላ ጉባኤው የማህበሩን ሥራ አስኪያጅ እና ም/ሥራ አስኪያጅ እንደሚሾም፣ እንደሚያሰናብት፣ የሚከፈላቸውን ክፍያ እንደሚወስን ተመልክቷል። ጠቅላላ ጉባኤው ይህን ወሳኔ ለመወሰን ደግሞ በመተዳደሪያ ደንቡ አንቀጽ 11 (2) መሰረት ከማህበሩ ካፒታል ሶስት አራተኛው (3/4ኛው) የሆነውን በባለቤትነት የያዙት ባለአክሲዮኖች ተገኝተው በድምጽ ብልጫ ሲደግፉ የጸና እንደሚሆን ይገልጻል።

ፌዴራል ጠቅላይ ፍርድ ቤት
ትክክል ገልጻል
ፊርማ *[Signature]* ቀን 29/04/13
የ/ቤተ-ገ/ሥ

የአሁን 1ኛ አመልካች ማህበር ጠቅላላ ጉባኤ ህዳር 27 ቀን 2007 ዓ.ም ባደረገው ስብሰባ በቃለ ጉባኤ ቁጥር 01/2007 ወሳኔዎችን ማስተላለፉን የሥር መዝገብ ያሳያል። በዚህ ስብሰባ ላይ ከአሁን 1ኛ ተጠሪ በስተቀር ሌሎች የማህበሩ አምስት አባላት መገኘታቸውን ቃለጉባኤው ያመለክታል። የስብሰባው አጀንዳ ሁለት ሲሆን አንደኛው በማህበሩ ውስጥ በአመራርና በሙያቸው በማገልገል ላይ የሚገኙትን ባለአክሲዮኖች /አባላት/ የደመወዝ ማስተካከያ ጉዳይ ላይ ለመወያየት እና ሁለተኛው የጠጠር ማምረቻ ቦታ ጋር የተያያዘ ሊወሰድ የሚገባቸውን ጉዳዮች ለመመካከር እንደሆነ ያስገነዝባል። የመጀመሪያውን አጀንዳ በተመለከተ አባላቱ ከተወያዩ በኋላ የአሁን 2ኛ እና 3ኛ አመልካቾች እና አቶ ካሳሁን ዘርጋው ለአመልካቾች የደመወዝ ማስተካከያ/ጭማሪ ሊደረግ ይገባል በማለት ሲወስኑ፤ የአሁን 2ኛ እና 3ኛ ተጠሪዎች እንዲሁም 1ኛ ተጠሪ በጽሑፍ በላከው ሃሳብ፤ ሥራ አስኪያጅ እና ም/ሥራ አስኪያጅ የራሳቸውን ጥቅም በተመለከተ በራሳቸው ተቧድነው የደመወዝ ጭማሪ ለመወሰን ስልጣን የላቸውም፤ የጥቅም ተቃርኖ ስላለው ተቀባይነት የለውም በማለት ተቃዋሚቸውን መግለጻቸውን ቃለጉባኤው ይገልጻል። ሁለተኛውን አጀንዳም ተወያይቶ ወሳኔ አስተላልፏል። ስለሆነም የአሁን 2ኛ እና 3ኛ አመልካቾች ለራሳቸው የደመወዝ ጭማሪ እንዲደረግ የወሰኑት እነርሱ እና አቶ ካሳሁን ዘርጋው ብቻ መሆናቸውን መገንዘብ ያስፈልጋል። በሥር ፍ/ቤቶች የተረጋገጠው ፍሬ ነገር እነዚህ ሲሆኑ አግባብነት ካላቸው የህግ ድንጋጌዎች ጋር በማገናዘብ መርምረንዋል።

እንደሚታወቀው ከባለአክሲዮኖች ጉባኤ መካከል አንዱ ጠቅላላ ጉባኤ ሲሆን፤ ጠቅላላ ጉባኤ ደግሞ የኩባንያ ወይም ማህበሩ ሁሉም ባለአክሲዮኖች የሚሳተፉበት መሆኑን የንግድ ሕግ ቁጥር 390 ያስገነዝባል። ይህ የባለአክሲዮኖች ጠቅላላ ጉባኤ የአንድ ኩባንያ ወይም ማህበር የበላይ አካል እና የኩባንያ ወይም የማህበሩ ሕልውና ላይ ተጽህኖ የሚያሳድሩትን ወሳኔ ለመወሰን ስልጣን ያላው አካል ነው። የባለአክሲዮኖች ጠቅላላ ጉባኤ በሕግ የተዘረገውን ሥርዓት ተከትሎ ጉባኤውን ለመጥራት ስልጣን ባለው አካል ተገቢውን የጥሪ ማስታወቂያ በመከተል መሆን አለበት። የጠቅላላ ጉባኤው አጀንዳ ደግሞ ከዚህ የጥሪ ማስታወቂያ ጋር ለባለአክሲዮኖች ማሳወቅ የግድ ነው። የንግድ ሕግ አንቀጽ 396 እና 397 ይመለከቷል። በዚህ መሰረት በሕግ ፊት የሚጸና ወሳኔ ለማስተላለፍ የባለአክሲዮኖች ጠቅላላ ጉባኤ በሕግ የተመለከተውን ምልዓተ ጉባኤ መገኘት (በስብሰባው ላይ መገኘት ያለባቸው አነስተኛ የአባሎች ቁጥር) እና ወሳኔው በድምጽ ብልጫ መወሰን እንዳለበት የንግድ ሕግ ቁጥር 399 ሥር ተመልክቷል። እነዚህ አስፈላጊ ቅድመ ሁኔታዎች ማለትም የምልዓተ ጉባኤ መገኘት እና ድምጽ ብልጫ ካልተሟላ ጠቅላላ ጉባኤ በሕግ ፊት ዋጋ ያለው ወሳኔ መወሰን አይችልም። ይህ የድምጽ ብልጫም ሆነ ስብሰባ ለማድረግ አስፈላጊው አነስተኛ የአባሎች ቁጥር መታሰብ ያለበት በስብሰባው ላይ

ፌዴራል ጠቅላይ ፍርድ ቤት
 ትክክል ገልጻል
 ፊርማ
 ቀን 01/06/13
 ገ/ሀ/ገ/ገ/ገ

በተገኙት የአባላት ቁጥር ሳይሆን በስብሰባው ላይ የተገኘው እያንዳንዱ አባል ባለው የአክሲዮን ድርሻ መጠን መሆኑን መገንዘብ ያስፈልጋል (የን.ሕ.ቁ.399 (2))።

ከፍ ሲል እንደተመለከተው ሁሉም ባለአክሲዮኖች በጠቅላላ ጉባኤ የመሳተፍ መብት ብቻ ሳይሆን በሚወሰነው ወሳኔ ድምጻቸውን የመስጠት መብት አላቸው። ነገር ግን ባለአክሲዮኖች በስብሰባ የመሳተፍ እና ድምጽ የመስጠት መብታቸውን የሚነፈጉባቸው ሁኔታዎች በንግድ ሕግ እንደተመለከቱም መገንዘብ አስፈላጊ ነው። ከእነዚህ ሁኔታዎች መካከል አንዱ በንግድ ሕግ አንቀጽ 409 ሥር የተመለከተው የጥቅም አለመስማማት {conflicts of interest} ሲኖር ነው። በዚህ ድንጋጌ ንዑስ አንቀጽ 1 መሰረት «አንድ ማህበርተኛ ስለራሱ ወይም ስለሌላ ሰብተኛ ወገን ከማህበሩ ጥቅም ጋራ የማይስማማበት ጥቅም ባለባቸው ምክሮች በድምጽ መስጠት መብቱ ሊሰራበት አይችልም» በማለት ይደነግጋል። ከዚህ ድንጋጌ ይዘትና ዓላማ የሚንገነዘበው አንድ ማህበርተኛ ድምጽ የመስጠት መብቱን ሊሰራበት የሚገባው የማህበሩን ጥቅም ለማስጠበቅ እንጂ የራሱን ጥቅም ከግብ ለማድረስ እንዳልሆነ ነው። የጥቅም አለመስማማት ያላቸው አባሎች ባይሳተፉና ድምጽ ባይሰጡ ኖሮ አስፈላጊ የሆነ የድምጽ ብልጫ ቁጥር አይሞላም ነበር የሚባል ከሆነ በንግድ ሕግ አንቀጽ 416 መሰረት መቃወም እንደሚቻል የን/ሕ/ቁ.409 (2) ድንጋጌ ያመልክታል። በንግድ ሕግ ቁጥር 416 (3) መሰረት የማህበሩ ጠቅላላ ጉባኤ የሰጠው ወሳኔ እንዲፈረስ ክስ በማቅረብ ዳኝነት መጠየቅ እንደሚቻል ተደንግጓል።

በዚህ አግባብ አሁን ወደተያዘው ጉዳይ ስንመለስ የአሁን 2ኛ እና 3ኛ አመልካቾች የ1ኛ አመልካች ማህበር አባላት እና የማህበሩ ሥራ አስኪያጅ እና ም/ሥራ አስኪያጅ ሆኖ ህዳር 27 ቀን 2007 ዓ.ም በተደረገው ጠቅላላ ጉባኤ ለወይይት ከቀረቡት ሁለት አጀንዳዎች መካከል የራሳቸውን የደመወዝ ማስተካከያ ወይም ጭማሪ ላይ ተሳትፈው ድምጽ በመስጠት ወሳኔ መወሰናቸው በሥር ፍ/ቤቶች የተረጋገጠ ፍሬ ነገር ነው። ህዳር 27 ቀን 2007 ዓ.ም ከተጻፈ ቃለ ጉባኤ ቁጥር 01/2007 መገንዘብ እንደሚቻለው የማህበሩ ስድስት ባለአክሲዮኖች የአክሲዮን ድርሻ ብዛት በአጠቃላይ 500 ሲሆን፣ ከማህበሩ ካፒታል ሶስት አራተኛው (3/4ኛው) የሚሆነው 375 አክሲዮን ድርሻ መሆን አለበት።

በመሰረቱ በዚህ ማህበር የመተዳደሪያ ደንብ አንቀጽ 10 (2) ሥር እንደተመለከተው የማህበሩ ሥራ አስኪያጅ እና ም/ሥራ አስኪያጅ ለራሳቸው የሚከፈለውን ክፍያ በጠቅላላ ጉባኤ ላይ ተሳትፈው ድምጽ በመስጠት ይወስናሉ ተብሎ አይታሰብም። በዚህ ምክንያት የአሁን 2ኛ እና 3ኛ አመልካቾች የማህበሩ ሥራ አስኪያጅ እና ም/ሥራ አስኪያጅ ሆኖ ለሚሰሩት ሥራ የሚከፈላቸውን ክፍያ ወይም የደመወዝ ጭማሪ በጠቅላላ ጉባኤ ላይ ተገኝተው ድምጽ በመስጠት ለራሳቸው ይወስናሉ ማለት አይቻልም። የአሁን አመልካቾች የማህበሩ አባላት

ፊደራል ጠቅላይ ፍርድ ቤት
ቅክለ ገልጻፍ
11/11/13

ከመሆናቸውም በላይ የማህበሩ አመራር ሆኖ በተጣለባቸው ኃላፊነት ምክንያት ደመወዝ እንዲጨመርላቸው ያቀረቡት ጥያቄ እና የተያዘው አጀንዳ ቀጥታ ከራሳቸው ጥቅም ጋር የሚገናኝ ስለሆነ ግልጽ የጥቅም ግጭት ይኖራል። የአሁን 2ኛ እና 3ኛ አመልካቾች ለራሳቸው የደመወዝ ማስተካከያ ወይም ጭማሪ ለማድረግ በንግድ ሕግ አንቀጽ 409 (1) መሰረት የጥቅም አለመስማማት መኖሩን ያመለክታል። በዚህ ረገድ የአሁን ተጠሪዎች የአመልካቾችን የደመወዝ ማስተካከያ ጥያቄ በመቃወም ለራሳቸው ጥቅም ቡድን ፈጥረው መወሰን እንደማይችሉ እና የጥቅም ተቃርኖ መኖሩን ገልጸው እያተቃወሙ፣ አመልካቾች ይህን አልፎ ለራሳቸው ደመወዝ መጨራቸው ለራሳቸው ጥቅም ቅድሚያ መስጠታቸውን የሚያመለክት ስለሆነ ከማህበሩ ጥቅም ጋር የጥቅም አለመስማማት መኖሩን ያሳያል። አመልካቾች ባቀረቡት ክርክር የደመወዝ ማስተካከያው በተመሳሳይ ድርጅት ከሚሰሩት ባለሙያዎች አንጻር አነስተኛ በመሆኑ ለማህበሩ ጥቅም የተደረገ ነው ይበሉ እንጂ ይህ የደመወዝ ማስተካከያ ለማህበሩ ጥቅም ከሆነ ሌሎች ሶስት ባለአክሲዮኖች ጥያቄውን ይቃወማሉ ተብሎ አይገመትም።

በሌላ በኩል የአሁን 2ኛ እና 3ኛ አመልካቾች እና የሥር 4ኛ ተከላሽ አቶ ካሳሁን ዘርጋው በጠቅላላ ጉባኤ ስብሰባ ላይ ተሳትፈው ድምጽ የሰጡት ከማህበሩ ካፒታል 255 የአክሲዮን ድርሻ ብቻ ያላቸው መሆኑን መገንዘብ ተችሏል። ከፍ ሲል እንደተጠቀሰው በማህበሩ መተዳደሪያ ደንብ አንቀጽ 11 (2) መሰረት ከማህበሩ ካፒታል ሶስት አራተኛው (3/4ኛው) የሆነውን በባለቤትነት የያዙት ባለአክሲዮኖች ማለት 375 የአክሲዮን ድርሻ መጠን መሆን አለበት። ከዚህ አንጻር የአሁን 2ኛ እና 3ኛ አመልካቾች ለራሳቸው የደመወዝ ማስተካከያ አጀንዳ ላይ ተሳትፈው ድምጽ መስጠት አይችሉም፤ እነርሱም ተስተፈው ድምጽ ቢሰጡም እንኳን ከማህበሩ ካፒታል ሶስት አራተኛው (3/4ኛው) የሆነውን በባለቤትነት የያዙት ባለአክሲዮኖች ተገኝተው በድምጽ ብልጫ ደግፈታል ለማለት አይችሉም። ምክንያቱም ይህን የደመወዝ ማስተካከያ አጀንዳ ደግፈው ድምጽ የሰጡት አመልካቾችን ጨምሮ ከማህበሩ ካፒታል 255 የአክሲዮን ድርሻ መጠን በባለቤትነት የያዙት ባለአክሲዮኖች ብቻ ናቸው። የአሁን አመልካቾች ባቀረቡት ቅሬታ ይህ ከሆነ በደመወዝ ማስተካከያ ጉዳይ መቼም ብሆን ጠቅላላ ጉባኤ ተስብሰቦ ወሳኔ መወሰን አይችልም ያሉትን በተመለከተ፣ በማህበሩ መተዳደሪያ ደንብ ላይ በግልጽ የተቀመጠ በመሆኑ ይህን የማህበሩን ደንብ በመጣስ የሥራ አስኪያጅ እና የም/ሥራ አስኪያጅ የደመወዝ ማስተካከያ ጥያቄ ምላሽ ማግኘት አለበት የሚል እምነት የለም። በዚህ ረገድ የማህበሩ ባለአክሲዮኖች ተወያይተው ተስማምተው በህግ አግባብ ለዚህ ጉዳይ መፍትሔ ሊያበጁለት ይገባል እንጂ የማህበሩ መተዳደሪያ ደንብ ተጥሶ ወሳኔ የሚሰጥበት አግባብ ሊኖር አይችልም።

በመሆኑም የአሁን 2ኛ እና 3ኛ አመልካቾች የማህበሩ ሥራ አስኪያጅ እና ም/ሥራ አስኪያጅ ሆኖ ጠቅላላ ጉባኤ ላይ ተሳትፈው ድምጽ በመስጠት ለራሳቸው የደመወዝ ማስተካከያ ወይም

ፈደራል ጠቅላይ ፍርድ ቤት
ትክክለኛ ግልበጭ
19/10/2015
የግ/ሥራ አስኪያጅ

ጭማሪ ማድረጋቸው በንግድ ሕግ አንቀጽ 409 (1) መሰረት የጥቅም አለመስማማት ብቻ ሳይሆን በመተዳደሪያ ደንቡ አንቀጽ 10 (3) እና 11 (2) መሰረት ከማህበሩ ካፒታል ሶስት አራተኛው (3/4ኛው) የሆነውን በባለቤትነት የያዙት ባለአክሲዮኖች ተገኝተው በድምጽ ብልጫ የደገፉት ወሳኔ ስላልሆነ፣ የደመወዝ ማስተካከያውን በተመለከተ የጻፈ ወሳኔ አለ ለማለት አይቻልም። ስለሆነም የማህበሩ ጠቅላላ ጉባኤ ህዳር 27 ቀን 2007 ዓ.ም የአሁን 2ኛ እና 3ኛ አመልካቾችን የደመወዝ ጭማሪ አጀንዳን በተመለከተ የወሰነው ወሳኔ ከሕጉ እና ከመተዳደሪያ ደንቡ ጋር የሚቃረን በመሆኑ በንግድ ሕግ አንቀጽ 416 (3) መሰረት ሊፈርስ የሚገባው ጉዳይ ነው። ይህ ሰበር ሰሚ ችሎት በኢ.ፌ.ዴ.ሪ.ሕገ መንግስት አንቀጽ 80 (ሀ፣ 3) እና በአዋጅ ቁጥር 25/88 አንቀጽ 10 መሰረት ከተሰጠው ስልጣን አንጻር የአሁን አመልካቾች ያቀረቡት የሰበር አቤቱታ የሥር ፍ/ቤቶች ወሳኔ መሰረታዊ የሆነ የሕግ ስህተት የተፈጸመበት መሆኑን የሚያመለክት ስላልሆነ ተቀባይነት የለውም ብለናል።

ሲጠቃለል የሥር ፍ/ቤቶች የአሁን 2ኛ እና 3ኛ አመልካቾች ህዳር 27 ቀን 2007 ዓ.ም በተደረገው ጠቅላላ ጉባኤ ለራሳቸው የወሰኑትን የደመወዝ ጭማሪ ወሳኔ ሊሻር ይገባል በማለት የሰጡት ወሳኔ በሕግ አግባብ ነው ከሚባል በስተቀር መሰረታዊ የሆነ የህግ ስህተት የተፈጸመበት ነው ለማለት ስለማይቻል የሚከተለው ተወስኗል።

ወሳኔ

1. የፌዴራል ከፍተኛ ፍ/ቤት በመ.ቁ.174168 ሐምሌ 20 ቀን 2010 ዓ.ም የሰጠው ወሳኔ መሰረታዊ የህግ ስህተት ያልተፈጸመበት ስለሆነ በፍ/ብ/ሥ/ሥ/ህ/ቁ.348 (1) መሰረት ጸንቷል።
2. የዚህ ወሳኔ ግልባጭ ለሥር ፍ/ቤቶች ይድረስ።
3. ግራ ቀኛቸው በዚህ ችሎት የደረሰባቸውን ወጪና ኪሳራ የየራሳቸውን ይቻሉ።
4. የመ.ቁ.221449 ለፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ልደታ ምድብ ችሎት ይመለስ።
5. ይህ ወሳኔ በ28/2/2012 ዓ.ም ተነቧል።

መዝገቡ ተዘግቷል።

ብ/ም

ፊደራል ጠቅላይ ፍርድ ቤት
 ትክክል ግልባጭ
 ፊርማ *[Handwritten Signature]*
 ብ/ሥ/ሥ/ህ/ቁ.348

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

- ዳኞች:- 1. ተፈሪ ገብሩ (ዶ/ር)
- 2. ቀነዓ ቁጣታ
- 3. ደጀኔ አያንሳ
- 4. ኑረዲን ክድር
- 5. ብርቅነሽ አሱባለወ.

አመልካቾች:- 1. አቶ ሰኢድ አደም } የቀረበ የለም
 2. አቶ ተሾመ አወቀ }

ተጠሪ:- የአዲስ አበባ የገበያ ማዕከል መርካቶ አ.ማ

ይህ መዝገብ ተመርምሮ የሚከተለው ፍርድ ተሰጥቷል።

ፍርድ

ይህ የማህበር ድንገተኛ ጠቅላላ ጉባኤ ቃለ ጉባኤ እንዲሻርልን የሚለው ክርክር የተጀመረው በፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ሲሆን፣ በአሁን አመልካቾች ከሳሾች፣ የአሁን ተጠሪ ተከላሽ ሆኖ ሲከራከሩ ነበር። ጉዳዩ ለዚህ ችሎት ሊቀርብ የቻለው የአሁን አመልካቾች የፌዴራል ጠቅላይ ፍ/ቤት በመ.ቁ.160050 መስከረም 30 ቀን 2010 ዓ.ም የሰጠው ወሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት ስለሆነ እንዲታረምልን በማለት በማመልከታቸው ነው።

የጉዳዩ አመጣጥ ሲታይ ከሳሾች ባቀረቡት ክስ የተከላሽ ማህበር ጠቅላላ ጉባኤ በሰጠው ወሳኔ የማህበሩ አባላት ማህበሩ ባሰረዘው ሕንጻ ተጨማሪ ሱቅ የመከራየት መበት እንዲኖራቸው ወሳኔ ሰጥቶ በዚህም መሰረት በርካታ አባላት ተጠቃሚ ከሆኑ በኋላ የከሳሾች ተራ ሲደርስ ማህበሩ በ8/9/2007 ዓ.ም ባደረገው ድንገተኛ ጠቅላላ ጉባኤ የቅድሚያ ኪራይ መብት በመሰረዝ ሱቆቹ በጨረታ ተወዳድረው መከራየት ይገባል በማለት የቀደመውን ወሳኔ በመሻር የወሰነው ወሳኔ ከሕግ፣ ከመተዳደሪያ ደንብ እና የመመስረቻ ጽሑፍ ወጪ እንዲሻርልን በማለት ዳኝነት ጠይቋል።

ተከላሽ ባቀረበው መልስ የማህበሩ ጉባኤ ወሳኔ ከሕግ ከመተዳደሪያ ደንብ እና ከመመስረቻ ጽሑፍ የሚቃረን አይደለም፣ ከማህበሩ ሕንጻ ተጨማሪ አንድ አንድ ሱቅ ያለጨረታ እንዲከራየ የተወሰነው ከፍተኛ ባለአክሲዮን ድርሻ ላላቸው አባላት እንጂ ለአባላት በሙሉ አይደለም፣ ስለሆነም የማህበሩ ድንገተኛ ጠቅላላ ጉባኤ አስቀድሞ ከተከራየው አንድ ሱቅ ተጨማሪ ሱቆችን ለመከራየት የሚችለው በጨረታ መከራየት አለበት፣ ያለጨረታ መከራየት አይችልም ተብሎ

ፌዴራል ጠቀላይ ፍርድ ቤት
 ትክክል ግልጽ
 9/ [Signature] 6/4/2012
 ለ/ቤ

የተወሰነው ከሕግ ከመተዳደሪያ ደንብ እና ከመመስረቻ ጽሑፍ የሚቃረን ስለሆነ ወሳኔው ሊሻር አይገባም ክሱ ወድቅ ነው በማለት ተከራክሯል።

ከዚህ በኋላ የሥር የመጀመሪያ ደረጃ ፍ/ቤት ጉዳዩን በመመርመር በሰጠው ወሳኔ የማህበሩ ድንገተኛ ጠቅላላ ጉባኤ ግንቦት 8 ቀን 2007 ዓ.ም ስብሰባ ምልዓተ ጉባኤው ተሞልቶ የተላለፈ ወሳኔ በመሆኑ በንግድ ሕግ፣ በማህበሩ መተዳደሪያ ደንብ እና የመመስረቻ ጽሑፍ የሚቃረን ነገር የሌለው በመሆኑ፣ በን/ሕ/ቁ.416 (1) መሰረት ቃለ ጉባኤው ሊሻር አይገባም በማለት ወስኗል።

የሥር ከሳሾች በዚህ ወሳኔ ቅር በመሰኘት ይግባኝ ለፌዴራል ክፍተኛ ፍ/ቤት ያቀረበ ሲሆን ፍ/ቤቱ ግራ ቀኛቸውን ማከራከር በሰጠው ወሳኔ የማህበሩ ድንገተኛ ጠቅላላ ጉባኤ በ8/9/2007 ዓ.ም ባስተላለፈው ወሳኔ የማህበሩ አባላት አንድ አንድ ተጨማሪ ሱቅ ያለጨረታ ተከራይቶ እያለ የእነዚህን አባላት ዕጣ ፈንታ ሳይወስን ወደ ፊት አባላቱ ያለጨረታ መከራየት እንደማይችሉ መወሰኑ የአባላቱን እኩል ተጠቃሚነት ያላገናዘበ በመሆኑ በ8/9/2007 ዓ.ም የተወሰነው ቃለ ጉባኤ ወሳኔ መሻር አለበት፣ መልስ ሰጪ ያቀረበውን መስቀለኛ ይግባኝ ወድቅ በማድረግ ወስኗል።

የሥር ተከሳሽ በበኩሉ ይህን ወሳኔ በመቃወም ይግባኝ ለፌዴራል ጠቅላይ ፍ/ቤት ያቀረበ ሲሆን ፍ/ቤቱ ግራ ቀኛቸውን በማከራከር በሰጠው ወሳኔ የሥር የክፍተኛ ፍ/ቤት ወሳኔ በመሻር የሥር የመጀመሪያ ደረጃ ፍ/ቤት ወሳኔ በማጽናት ወስኗል። የአሁን የሰበር አቤቱታ ያቀረበው ይህን ወሳኔ በመቃወም ለማሻር ነው።

የአሁን አመልካቾች ህዳር 11 ቀን 2011 ዓ.ም በተጻፈ የሰበር አቤቱታ፡ የተጠሪ ማህበር ድንገተኛ ጠቅላላ ጉባኤ ግንቦት 8 ቀን 2007 ዓ.ም ባደረገው ስብሰባ የወሰነው ወሳኔ ከንግድ ሕግ፣ ከማህበሩ መተዳደሪያ ደንብ እና የመመስረቻ ጽሑፍ የሚቃረን ስለሆነ መሻር የሚገባው ነው፤ የሥር የክፍተኛ ፍ/ቤት በሕጉ አግባብ ወሳኔ ሰጥቶ እያለ የፌዴራል ጠቅላይ ፍ/ቤት ወሳኔውን በመሻር የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ወሳኔ በማጽናት የሰጠው ወሳኔ መሰረታዊ የሆነ የህግ ስህተት የተፈጸመበት ስለሆነ የክፍተኛ ፍ/ቤት ወሳኔ እንደጸናልን ወጪና ኪሳራ እንዲወሰንልን በማለት በዝርዝር ቅሬታቸውን አቅርቧል።

ይህ ችሎት የሰበር አቤቱታ ያስቀርባል በማለት ተጠሪ መልስ እንዲሰጥ ባዘዘው መሰረት በ27/5/2011 ዓ.ም በተጻፈ መልስ፡ በዚህ ጉዳይ የፌዴራል ጠቅላይ ፍ/ቤት የማህበሩ ድንገተኛ ጠቅላላ ጉባኤ ግንቦት 8 ቀን 2007 ዓ.ም ባደረገው ጉባኤ ያስተላለፈው ወሳኔ መሻር የለበትም በማለት የወሰነው ወሳኔ በሕግ አግባብ የተሰጠ ስለሆነ አመልካቾች ያቀረቡት ክርክር ወድቅ

ፌዴራል ጠቅላይ ፍርድ ቤት
ትክክል ገልጻል
ግ 6/4/2012
mlb

እንዲሆንልን ወጪና ኪሳራ እንዲወሰንልን በማለት በዝርዝር ክርክራቸውን አቅርቧል። አመልካቾች የመልስ መልስ አቅርቧል።

የጉዳዩ አመጣጥ ከፍ ሲል የተመለከተው ሲሆን ይህ ችሎት የግራ ቀኛቸውን ክርክር አግባብነት ካላቸው የህግ ድንጋጌዎች ጋር በማገናዘብ መርምሮታል። እንደመረመርነው በዚህ ጉዳይ ምላሽ ማግኘት ያለበት የሥር ፍ/ቤት የተጠሪ ማህበር ድንገተኛ ጠቅላላ ጉባኤ ግንቦት 8 ቀን 2007 ዓ.ም ባደረገው ጉባኤ በቃለ ጉባኤ ያስተላለፈው ወሳኔ መሻር የለበትም በማለት የሰጠው ወሳኔ መሰረታዊ የሆነ የህግ ስህተት የተፈጸመበት ነው ወይስ አይደለም? የሚለው መሆኑን ተገንዝበናል። በዚህ መሰረት በሥር ፍ/ቤቶች የተረጋገጠው ፍሬ ነገር ሲታይ የተጠሪ ማህበር ጠቅላላ ጉባኤ ህዳር 1 ቀን 2000 ዓ.ም እና ህዳር 4 ቀን 2000 ዓ.ም ባደረገው ጉባኤ ያስተላለፈው ወሳኔ ከቃለ ጉባኤዎቹ ይዘት ሲታይ ማህበሩ አንድ ሱቅ ቅድሚያ የመከራየት መብት ለሁሉም አባላት መስጠቱን እና አንድ አንድ ተጨማሪ ሱቅ ያለጨረታ የመከራየት መብት የተሰጠው ከፍተኛ አክሲዮን ድርሻ ላላቸው አባላት እንጂ አመልካቾችን ጨምሮ ለሁሉም አባላት አንድ አንድ ተጨማሪ ሱቅ ያለጨረታ የመከራየት መብት በቃለ ጉባኤ ላይ ያልተወሰነ መሆኑን ነው። ነገር ግን ከማህበሩ ጠቅላላ ጉባኤ ወሳኔ ወጪ የማህበሩ ቦርድ ከፍተኛ አክሲዮን ድርሻ ካላቸው አባላት ወጪ ለሌሎች አባላት ሱቆችን ያለጨረታ እያከራየ መሆኑ ስለተደረሰበት የማህበሩ ድንገተኛ ጠቅላላ ጉባኤ ግንቦት 8 ቀን 2007 ዓ.ም ባደረገው ጉባኤ ከፍተኛ አክሲዮን ድርሻ ካላቸው ባለአክሲዮን ድርሻ እንጂ ለሁሉም አባላት አንድ አንድ ተጨማሪ ሱቅ ያለጨረታ የመከራየት አለመስጠቱ መወሰኑ በሥር ፍ/ቤት የተረጋገጠ ፍሬ ነገር ነው። ከዚህ መገንዘብ እንደሚቻለው አመልካቾች የማህበሩ ጠቅላላ ጉባኤ ሁሉም የማህበሩ አባላት አንድ አንድ ተጨማሪ ሱቅ ያለጨረታ የመከራየት መብት ባልወሰነበት፣ ድንገተኛ ጠቅላላ ጉባኤ ግንቦት 8 ቀን 2007 ዓ.ም ባደረገው ጉባኤ ይህን መብት ነፍጎናል በማለት ያቀረቡት ክስ እና የጠየቁት ዳኝነት የሕግም ሆነ የቃለ ጉባኤ ድጋፍ የለውም። በመሆኑም የማህበሩ ድንገተኛ ጠቅላላ ጉባኤ ግንቦት 8 ቀን 2007 ዓ.ም ስብሰባ በማደረግ ያስተላለፈው ወሳኔ የንግድ ሕጉን፣ የማህበሩ መተዳደሪያ ደንብ እና የመመስረቻ ጽሑፍ የሚጥስ መሆኑን በሥር ፍ/ቤቶች የተረጋገጠ ፍሬ ነገር የለም። ስለሆነም የሥር የመጀመሪያ ደረጃ ፍ/ቤት እና የጠቅላይ ፍ/ቤት የማህበሩ ድንገተኛ ጠቅላላ ጉባኤ ግንቦት 8 ቀን 2007 ዓ.ም በያዘው ቃለ ጉባኤ ያስተላለፈው ወሳኔ ሕግን፣ የማህበሩ የመመስረቻ ጽሑፍና የመተዳደሪያ ደንብ ተክትሎ የተሰጠ በመሆኑ መሻር የለበትም በማለት የሰጡት ወሳኔ በሕጉ አግባብ ነው ብለናል። ይህ ሰበር ሰሚ ችሎት በኢ.ፌ.ዴ.ሪ.ሕገ መንግስት አንቀጽ 80 (3፣ ሀ) እና አዋጅ ቁጥር 25/1988

ፊደራል ጠቅላይ ፍርድ ቤት
ትክክል ገልጻል
6/4/2012
ወ/ሮ

አንቀጽ 10 መሰረት ከተሰጠው ስልጣን አንጻር የአሁን አመልካቾች ያቀረቡት የሰበር አቤቱታ የሥር ጠቅላይ ፍ/ቤት የሰጠው ወሳኔ መሰረታዊ የሆነ የህግ ስህተት የተፈጸመበት መሆኑን የሚያስገነዝብ ስላልሆነ ተቀባይነት የለውም ብለናል።

ሲ.ጠቃላል የፌዴራል ጠቅላይ ፍ/ቤት የተጠሪ ማህበር ድንገተኛ ጠቅላላ ጉባኤ ግንቦት 8 ቀን 2007 ዓ.ም በያዘው ቃለ ጉባኤ ያስተላለፈው ወሳኔ መሻር የለበትም በማለት የሰጠው ወሳኔ በሕጉ አግባብ ነው ከሚባል በስተቀር መሰረታዊ የሆነ የህግ ስህተት የተፈጸመበት ስላልሆነ የሚከተለው ተወስኗል።

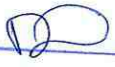
ወ ሳ ኔ

1. የፌዴራል ጠቅላይ ፍ/ቤት በመ.ቁ.160050 መስከረም 30 ቀን 2010 ዓ.ም የሰጠው ወሳኔ መሰረታዊ የሆነ የህግ ስህተት ያልተፈጸመበት ስለሆነ በፍ/ብ/ሥ/ሥ/ሕ/ቁ.348 (1) መሰረት ጸንቷል።
2. የዚህ ወሳኔ ግልባጭ ለሥር ፍ/ቤቶች ይድረስ።
3. ግራ ቀኛቸው በዚህ ችሎት የደረሰባቸውን ወጪና ኪሳራ የየራሳቸውን ይቻሉ።
4. ይህ ወሳኔ በ3/4/2012 ዓ.ም ተነጻል።

መዝገቡ ተዘግቷል።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት።

ብ/ግ

ሊደረገው ጠቅላይ ፍርድ ቤት
 ትዕዛዝ ገልጻል
 :ግ  ቀን 6/4/2012
 ነ/16

Annex - 8

ፍ/ይ/መ/ቁ.170831

መስከረም 27 ቀን 2012 ዓ.ም

ዳኞች- ገበየሁ ፈለቀ

ዓለማየሁ ሹናራ

ሀብታሙ እርቅይሁን

ይ/ባይ - 1. አቶ ጀሚል በድሩ

2. አቶ አብዱልመናን አብደላ

3. አቶ ከድር ሰላሞ መሀመድ

4. ሻለቃ ብርሃኑ ደርቤ

ጠበቃ - አብዱላዚዝ ከሊፋ ቀረቡ

መ/ሰጭ - 1. አቶ ኡመር ብሩ

2. አቶ በድሩ አብዱራህማን

3. አቶ ንቁ ተሠማ

4. አቶ ካሚል ጀማል

ጠበቃ - የሠላም ዜና ቀረቡ

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሠጠ።

ፍርድ

የይግባኝ መዝገቡ የቀረበው የፌደራል ክፍተኛ ፍርድ ቤት በሠጠው ውሳኔ ባለመስማማት ነው። የክርክሩን አመጣጥ ከስር ፍርድ ቤት የመዝገብ ግልባጭ እንደተረዳነው ይ/ባዮች ከሳሾች እና መ/ሰጭዎች ተከላሾች ሆነው ተከራክረዋል። ይ/ባዮች በመ/ሰጭዎች ላይ ያቀረቡት ክስ ይ/ባዮች የንህቅር ሪል ስቴትና ሞል አ.ማ. ባለአክሲዮን ስንሆን መ/ሰጭዎች የአክሲዮን ማህበሩ የቦርድ አመራር ሆነው በሚያዝያ 20 ቀን 2009 ዓ.ም. በጠሩት ድንገተኛ ስብሰባ መተዳደሪያ ደንብ፣ መተዳደሪያ ፅሁፍ እና ከህግ ውጭ ሳይሳውቁንና ሳይጠሩን አክሲዮን ለመሸጥና ካፒታል ለማሳደግ ውሳኔ አስተላልፈዋል። የቦርድ ሰብሳቢው ባለቤት ወ/ሮ እመቤት ባልቻ አክሲዮን ሳይገዙና ገንዘብ ገቢ ሳያደርጉ አክሲዮን ገዝተዋል ተብሎ እንዲጸድቅ ተደርጓል። የ4ኛ ይ/ባይ ቤቴን ለአክሲዮን ማህበሩ ሽጮ ያልወሰድኩት ቀሪ

ፌደራል ጠቅላይ ፍርድ ቤት
ገንዘብ ግልባጭ
ፊርማ Bd ቀን 4/2/12
/ረከፎ

ገንዘብ ብር 800,000.00 ለ9,300 አክሲዮኖች መግዣ እንዲሆን ተስማምተን ሊመዘገብልኝ ሲገባ ካልከፈለ ይሰረዝ የሚል ህገ-ወጥ ውሳኔ አሳልፏል። ስለዚህ ሚያዚያ 20 ቀን 2009 ዓ.ም. ያሳለፉት ውሳኔና ቃለ-ጉባዔ እንዲሰረዝ ይወሰንልን የሚል ነው።

መ/ሰጭዎች በሠጡት መልስ ማህበሩ እንጂ እኛ በግል ልንከሰስ አይገባም የሚል የመጀመሪያ ደረጃ መቃወሚያ ያቀረቡ ሲሆን በፍሬ ነገሩም ካፒታል እንዲያድግና አክሲዮን እንዲሸጥ ከመወሰኑ በፊት በ29/11/07 ዓ.ም.፣ በ03/04/08 ዓ.ም. እና በ05/07/08 ዓ.ም. በተደረጉ ቃለ-ጉባዔዎች ነባር የአክሲዮን አባላት ድርሻቸውን ማሳደግ እንዲችሉና ለአዲስ አባላት የአክሲዮን ሽያጭ እንዲከናወን ውሳኔ ተላልፏል። ጠቅላላ ጉባዔውም በ01/02/08 ዓ.ም. እና የቦርድ አባላት በ21/02/09 ዓ.ም. ባደረጉት ድንገተኛ ስብሰባ ከላይ የተገለጸውን ውሳኔ ያስተላለፉ ሲሆን ውሳኔውም በ26/02/09 ዓ.ም. እንዲመዘገብ ተደርጓል። በዚህ ቀን በሠነዶች ማረጋገጫና ምዝገባ ጽ/ቤት የፀደቀው ቃለ-ጉባዔ አባላት አክሲዮን ለማሳደግ ክፍያ ባለመፈጸማቸው ቃለ-ጉባዔው ውደቅ ተደርጓል። አዲስ አክሲዮን ሽያጭም አልተከናወነም። ስለዚህ ሚያዚያ 20 ቀን 2009 ዓ.ም. ቀደም ሲል ይ/ባዮች ባሉበት የተላለፉ ውሳኔዎችን ለማስፈጸም የተደረገ ቃለ-ጉባዔ እንጂ አዲስ ውሳኔ አይደለም። ውሳኔውም ህጋዊ ነው። 4ኛ ይ/ባይ ገንዘብ ገቢ ስለማድረጋቸው ከባንክ ማስረጃ ሲያቀርቡ ደረሰኝ ይሠጣቸው ተብሎ የተወሰነው በአግባቡ ነው በማለት ተከራክረዋል።

የፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት መቃወሚያውን በማለፍ በጠቅላላ ጉባዔው ሁሉም ባለአክሲዮኖች ተሳትፏል ቢሉም ይ/ባዮች ስለመጠራታቸውና ስለመሳተፋቸው አላስረዱም። ሚያዚያ 20 ቀን 2009 ዓ.ም. የተደረገው ቃለ ጉባዔ የቀድሞ ውሳኔን ለማስፈጸም መሆኑን አይጠቅስም። ወ/ሮ እመቤት ባልቻ ክፍያ ስለመፈጸማቸው አልተረጋገጠም። ወድቅ የተደረገ ቃለ-ጉባዔ ለማስፈጸም ነው ማለቱ እርስ በእርሱ ይጋጫል። ይ/ባዮች ባልተሳተፉበት ጉባዔና ውሳኔ ክፍያ አልፈጸሙም ተብሎ መብታቸው ሊታሰፍ አይገባም። ቃለ-ጉባዔውም ሌሎችም አጀንዳዎች የነበሩት በመሆኑ የመ/ሰጭዎችን መከራከሪያ ተቀባይነት የለውም። 4ኛ ይ/ባይ ቀሪ 800,000.00 ብር ገንዘብ እንዳላቸው ስላልተካደ ገቢ ካላደረጉ መዋጮ እንዳላዋጡ የተወሰነው ሊሰረዝ ይገባል። ስለሆነም ሚያዚያ 20 ቀን 2009 ዓ.ም. የተደረገው ቃለ-ጉባዔ፣ በ01/02/08 ዓ.ም. እና በ21/02/09 ዓ.ም. ተደርጎ በ26/02/09 ዓ.ም. የጸደቀው ቃለ-ጉባዔ ሊሻር ይገባል በማለት ይ/ባዮች የወጭና ኪሣራ ዝርዝር እንዲያቀርቡ ወስኗል።

መ/ሰጭዎች ይግባኝ ለፌደራል ክፍተኛ ፍርድ ቤት አቅርበው ግራቀኙን አከራክሮ በመተዳደሪያ ደንቡ አንቀጽ 20(18)፣ (19) እና (20) ስር አዲስ አክሲዮን የመሸጥ፣ አዲስ አባል የመቀበልና የማህበሩን ካፒታል የማሳደግ ተግባር የቦርድ አስተዳደሮች ስልጣንና ተግባር ነው። ውሳኔዎችና ቃለ-ጉባዔው ውሳኔ የተሠጠበትና በኋላም በቦርድ አስተዳደሪዎች የተወሰነ መሆኑ ሲታይ በስልጣናቸው የፈጸሙት በመሆኑ ቃለ-ጉባዔው ሊሻር አይገባም በማለት የስር ፍርድ ቤት ውሳኔን በመሻር ወጭና ኪሣራ ግራቀኙ እንዲቻቻሉ ወስኗል።

የፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት
ገዢ ገልጻል
4/2/12
ገ/ክ/ኮ

ይህ ይግባኝ የቀረበው በዚህ ውሳኔ ነው። የይ/ባዮች የይግባኝ ቅሬታ ይዘትም በ27/11/07 ዓ.ም.፣ በ03/04/08 ዓ.ም. እና በ05/07/09 ዓ.ም. የተደረጉ ጠቅላላ ጉባዔዎች አዲስ 20 አባላት የመቀበል፣ አክሲዮኖችን እንዲሸጡና ካፒታል እንዲያሳድጉ በሚል የተያዘ ቃለ-ጉባዔ ሆነ ውሳኔ የለም። የንግድ ሕግ ቁጥር 425(2)(ለ) እና የማህበሩ መተዳደሪያ ደንብ አንቀጽ 16(3) ካፒታል ለማሳደግ ሁሉም አባላት ባልተለያዩ ድምጽ መደገፍ እንዳለባቸውና በድንገተኛ ጠቅላላ ጉባዔ መወሰን አለበት እያለ የስር ፍርድ ቤት የቦርድ አስተዳዳሪዎች ስልጣን ነው ማለቱ በህግ ያልተሰጣቸው ስልጣን ነው እንዲባልልንና የፌደራል ክፍተኛ ፍርድ ቤት ውሳኔ ይሻርልን የሚል ነው።

በዚህ ፍርድ ቤት በ20/08/2009 ዓ.ም. የተደረገው ቃለ-ጉባዔ መ/ሰጭዎች የቦርድ አስተዳዳሪዎች በመሆናቸው በተሰጣቸው ስልጣን የፈጸሙት ነው አይፈርስም ማለቱ በንግድ ሕግ ቁጥር 425(2) አንጻር ለማየት መ/ሰጭዎች ክርክር እንዲያቀርቡበት ታዘው ሀሰተኛ የችሎት ሂደት አካተው ማቅረባቸው ተገቢ አይደለም። የፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት በ20/08/2009 ዓ.ም. የተሰጠው ቃለ-ጉባዔ እንዲሰረዝ ዳኝነት ቀርቦለት እያለ ሌሎች ዳኝነት ያልተጠየቀባቸውን ቃለ-ጉባዔዎችን ጨምሮ እንዲሻሩ መወሰኑ የሥነ-ሥርዓት ሕግ ግድፈት ያለበት ስለሆነ በክፍተኛ ፍርድ ቤት መሻሩ ተገቢ ነው። በ20/08/09 ዓ.ም. ቃለ-ጉባዔ በግልጽ ቀድሞ የተሰጡ ውሳኔዎችን ለማስፈጸም እንደሆነ ይገልጻል። ጠቅላላ ጉባዔ የወሰነባቸው ናቸው። ቦርዱም ለመወሰን ስልጣን ተሰጥቶታል። ቦርዱ የቀድሞ ውሳኔዎችን ማስፈጸሙ ተገቢ ነው። ይ/ባዮች ክፍያ ስላልፈጸሙ የማህበሩ አባል አይደሉም። 4ኛ ይ/ባይ መዋጮ ስላልከፈሉ አባል አይደሉም። ባላቀረቡት ማስረጃ አባል መሆን አይችሉም። ወ/ሮ እመቤት ባልቻ ክፍያ ፈጽመዋል። ማስረጃት እንችላለን ብለዋል። የመልስ መልስ የቀረበ ሲሆን ከላይ ከሰፈረው ጋር ተመሳሳይ ይዘት ያለው በመሆኑ ሳይመዘገብ ታልፏል።

የክርክሩ ሂደት በአጭሩ ከላይ የተገለጸው ሲሆን እኛም ይ/ባዮች የአክሲዮን ማህበሩ አባል አይደሉም በሚል የቀረበው ክርክር የሥነ-ሥርዓት ሕጉን ተከትሎ የቀረበ መሆን አለመሆኑን? የሥር ፍርድ ቤቶች ክርክሩን በተጠየቀው ዳኝነት አግባብ የመሩ መሆን አለመሆኑን? በሚያዚያ 20 ቀን 2009 ዓ.ም. የተደረገው የቦርድ አስተዳዳሪዎች ቃለ-ጉባዔ ሊሰረዝ የሚገባው ነው ወይስ አይደለም? የሚሉትን በጭብጥነት በመያዝ መዘገቡን መርምረናል።

የመጀመሪያውን ጭብጥ እንደመረመርነው ይ/ባዮች ያቀረቡት ክስ የንህቅር ሪል ስቴትና ሞል አ.ማ. ባለአክሲዮን መሆናቸውን በመግልጽ መ/ሰጭዎች ከህግና ከመተዳደሪያ ደንብ ውጭ ሚያዚያ 20 ቀን 2009 ዓ.ም. ያሳለፉት ውሳኔና ቃለ-ጉባዔ እንዲሰረዝ ይወሰንልን የሚል ነው። መ/ሰጭዎች በስር ፍርድ ቤት ያቀረቡት ክርክር ቃለ-ጉባዔ ህግን መሰረት ያደረገ እንደሆነ ነው። በዚህ ፍርድ ቤት ደግሞ ይ/ባዮች የአክሲዮን ማህበሩ አባል አይደሉም በማለት መ/ሰጭዎች አዲስ ክርክር አቅርበዋል። ክርክር በዋነኛነት መቅረብ ያለበት ክስ በመጀመሪያ ደረጃ በሚሰማበት ፍርድ ቤት መሆን ይገባዋል። በፍብ/ሥ/ሥ/ሕ/ቁ. 329(1) መሰረት በይግባኝ ደረጃ አዲስ ክርክር ማቅረብ የተከለከለ ነው። ስለሆነም

ሪል ስቴትና ሞል አ.ማ.
የሥር ፍርድ ቤት
24/12/12
ገ/ሥ/ሥ/ሕ/ቁ. 329(1)

ይ/ባዮች የአክሲዮን ማህበሩ አባል አይደለም በሚል የቀረበው ክርክር የሥነ-ሥርዓት ህጉን ተከትሎ የቀረበ ባለመሆኑ አልተቀበልነውም።

ሁለተኛው ጭብጥ ክርክር በተጠየቀው ዳኝነት አግባብ የተደረገ መሆን አለመሆኑን የሚመለከት ነው። ይ/ባዮች ያቀረቡት ክስ የቦርድ አስተዳዳሪዎች ከህግና ከመተዳደሪያ ደንብ ውጭ ሚያዝያ 20 ቀን 2009 ዓ.ም. ያሳለፉት ውሳኔና ቃለ-ጉባዔ እንዲሰረዝ ነው። የፍብ/ሥ/ሥ/ሕ/ቁ. 182(2) መሰረት ክርክር መመራት ያለበት በተጠየቀው ዳኝነትና በቀረበው ክርክር መሰረት ነው። ስለዚህ ዳኝነቱ መወሰን ያለበት ሚያዝያ 20 ቀን 2009 ዓ.ም. የተሠጠውን ቃለ-ጉባዔ መሰረት በማድረግ ነው። የሥር የመጀመሪያ ደረጃ ፍርድ ቤት በ01/02/08 ዓ.ም. እና በ21/02/09 ዓ.ም. ተደርጎ በ26/02/09 ዓ.ም. የጸደቀው ቃለ-ጉባዔ ሊሸር ይገባል በማለት መወሰኑ ባልተጠየቀ ዳኝነት የተሰጠ እና የሥነ-ሥርዓት ህግ ግድፈት ያለበት ውሳኔ ነው። የስር ከፍተኛ ፍርድ ቤት ግድፈቱ በተከራካሪዎች ባይነሳም ክርክር በሥነ-ሥርዓት ህግ መሰረት መመራቱን የመምራትና የመቆጣጠር ኃላፊነት ያለበት በመሆኑ ስህተቱን ማረም ሲገባው በዝምታ ማለፉ ተገቢ አይደለም ብለናል።

ወደ ሦስተኛው ጭብጥ ስንመለስ ይ/ባዮች ሚያዝያ 20 ቀን 2009 ዓ.ም. የቦርድ አስተዳዳሪዎች የሆኑት መ/ሰጭዎች ያሳለፉት ውሳኔና ቃለ-ጉባዔ እንዲሰረዝ የጠየቁት ሳያሳውቁንና ሳይጠሩን አክሲዮን ለመሸጥና ካፒታል ለማሳደግ ስለተወሰነ፣ የቦርድ ሰብሳቢው ባለቤት ወ/ሮ እመቤት ባልቻ አክሲዮን ሳይገዙና ገንዘብ ገቢ ሳያደርጉ አክሲዮን ገዝተዋል ተብሎ እንዲጸድቅ ስለተደረገ እና የ4ኛ ደ/ባይ ቤት ለአክሲዮን ማህበሩ ተሸጦ ያልወሰዱት ቀሪ ገንዘብ ብር 800,000.00 ለ9,300 አክሲዮኖች መግዣ እንዲሆን ተስማምተን ሲመዘገብ ሲገባ ካልከፈሉ ይሰረዝ በማለት መወሰኑ ውሳኔውን ህገ-ወጥ ያደርገዋል በማለት ነው።

ይ/ባዮች ዳኝነት የጠየቁት በቦርድ አስተዳዳሪዎች ውሳኔ ላይ በመሆኑ እና በጠቅላላ ጉባዔ ውሳኔ ህጋዊነትና ተገቢነት ላይ የቀረበ ዳኝነት ባለመኖሩ እንዲሁም ይ/ባዮች የቦርድ አስተዳዳሪዎች አባላት ባለመሆናቸው ሳያሳውቁንና ሳንጠራ የተሰጠ ውሳኔ ስለሆነ ሊሰረዝ ይገባል በሚል የቀረበውን ምክንያት አልተቀበልነውም።

የአክሲዮን ማህበር ባለአክሲዮኖች ያላቸውን ካፒታል ለማሳደግ ወይም ተጨማሪ ኢንቨስትመንት እንዲያደርጉ መወሰን የሚችለው በጠቅላላ ጉባዔ ድንገተኛ ጉባዔ ስለመሆኑ በንግድ ሕግ ቁጥር 425(2)(ለ) ላይ የተመለከተ በመሆኑ የሥር ከፍተኛ ፍርድ ቤት ይህ ስልጣን የቦርድ አስተዳዳሪዎች ነው ሲል የደረሰበት መደምደሚያ ተገቢነት የለውም።

በሌላ በኩል መ/ሰጭዎች የጠቅላላ ጉባዔ ውሳኔ ነው ያስፈጽምነው በማለት ስለተከራከሩ ጉዳዩን መመርመር ተገቢ ነው። ሚያዝያ 20 ቀን 2009 ዓ.ም. የያዙትን ቃለ-ጉባዔ እንደተመለከትነው ሲጀምር በጠቅላላ ጉባዔ ድንገተኛ ጉባዔ በተለያዩ ቀናቶች የተሠጠን የአክሲዮን ሽያጭ ውሳኔዎች አፈጻጸም ውሳኔ ለመስጠት እንደሆነ በሠነዱ ላይ ተመላክቷል። በቃለ-ጉባዔው ሦስት አጀንዳዎች የተያዙ ሲሆን

ፊርማ  ቀን 24/2/12
ገ/ፍ/ፍ/ፍ


አጀንዳ አንድ 10 መስራች አባላት ተጨማሪ ዕጣ ገዝተው ካፒታል እንዲያሳድጉ መወሰኑን የተመለከተ ሲሆን ይህ ውሳኔ በአክሲዮን ማህበሩ ጠቅላላ ጉባኤ በ29/11/07 ዓ.ም. እና በ05/07/09 ዓ.ም. የተወሰነውን መሰረት አድርጎ የተፈጸመ ነው። አጀንዳ ሁለት አዲስ አባላትን መቀበል የተመለከተ ሲሆን ማህበሩ በጠቅላላ ጉባኤ ውሳኔው በ29/11/07 ዓ.ም. ሦስት አባላትንና በ05/07/09 ዓ.ም. አዲስ አባላትን ለመቀበል በወሰነው መሰረት የተፈጸመ ነው። አጀንዳ ሦስት ተጨማሪ አዲስ አክሲዮኖች እንዲታተሙ የሚገልጽ ሲሆን ይህም በ05/07/09 ዓ.ም. በጠቅላላ ጉባኤ የተወሰነውም መሰረት ያደረገ ነው። ስለሆነም መ/ሰጭዎች በጠቅላላ ጉባኤ የተወሰነ ውሳኔን መሰረት አድርገው ለማስፈጸም ያሳለፉት ውሳኔና ቃለ-ጉባኤ መሆኑን ተገንዝበናል።

4ኛ ይ/ባይ ቤታቸውን ለአክሲዮን ማህበሩ ስለመሸጣቸው እና ቀሪ ገንዘቡ በቼክ እንዲከፈላቸው ተወስኖ ቼክ የወሰዱ መሆኑን በማስረጃነት ከቀረበው ሠነድና ቃለ-ጉባኤ ተረድተናል። 4ኛ ይ/ባይ ቼኩን ባንክ ቀርቦው ቢመነዘሩት ወይም ባይመነዘሩትም ቼክ የገንዘብ መክፈያ መንገድ ስለሆነ አክሲዮን ማህበሩ እንደከፈላቸው የሚቆጠር ነው። ስለዚህ በማህበሩ ስለሚኖራቸው አክሲዮን ዋጋ ከፍለው የባንክ ደረሰኝ ሲያቀርቡ እንዲመዘገቡ ተብሎ በመ/ሰጭዎች መወሰኑ ስህተት ያለበት ሆኖ አላገኘነውም።

በመጨረሻም የወ/ሮ እመቤት ባልቻን በተመለከተ የተሠጠውን ውሳኔ ተገቢነት የመረመርን ሲሆን ይ/ባዮች ወ/ሮ እመቤት ባልቻ የቦርድ ሰብሳቢው ባለቤት በመሆናቸው ምክንያት አክሲዮን ሳይገዙና ገንዘብ ገቢ ሳያደርጉ አክሲዮን ገዝተዋል ተብሎ እንዲጸድቅ መወሰኑ ተገቢ አይደለም ያሉ ሲሆን መ/ሰጭዎች በፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት በሠጡት መልስ ላይ ስለዚህ ጉዳይ ያቀረቡት ክርክር አለመኖሩ በፍብ/ሥ/ሥ/ሕ/ቁ. 83 እንደተመለከተው በግልጽ ያልተካደ ፍሬ ነገር እንደታመነ የሚቆጠር ነው። መ/ሰጭዎች በዚህ ፍርድ ቤት ገንዘብ ስለመክፈላቸው እናስረዳለን ያሉ ቢሆንም በስር ያልቀረበ ክርክር በፍብ/ሥ/ሥ/ሕ/ቁ. 329(1) መሰረት በይግባኝ ደረጃ አዲስ ክርክር ማቅረብ የማይቻል ከመሆኑም በላይ መ/ሰጭዎች በመልሳቸው ይህን ሊያስረዳ የሚችል የማስረጃ ዝርዝር ያላቀረቡ በመሆኑ ክርክሩ ተቀባይነት የለውም። ወ/ሮ እመቤት ባልቻ ለአክሲዮን ዋጋ ገንዘብ ስለመክፈላቸው ስላልተረጋገጠ አክሲዮን ገዝተዋል ተብሎ እንዲጸድቅ ሚያዚያ 20 ቀን 2009 ዓ.ም. የተሠጠው ውሳኔና ቃለ-ጉባኤ ሊሻር ይገባዋል ብለናል።

ውሳኔ

1. የፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት በመዝገብ ቁጥር 254923 የካቲት 27 ቀን 2010 ዓ.ም. እና የፌደራል ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 214597 ጥር 03 ቀን 2011 ዓ.ም. የሠጡት ውሳኔ በፍብ/ሥ/ሥ/ሕ/ቁ. 348(1) መሰረት ተሻሽሏል።
2. በጠቅላላ ጉባኤ በ01/02/08 ዓ.ም. እና በ21/02/09 ዓ.ም. ተደርጎ በ26/02/09 ዓ.ም. የጸደቀው ቃለ-ጉባኤ ሊሻር አይገባም በማለት ወስነናል።

የፌደራል ጠቅላይ ፍርድ ቤት
ገንዘብ ገባባዊ
ፊርማ  ቀን 24/2/12
በፍብ/ሥ/ሥ/ሕ/ቁ. 348(1)

3. ሚያዚያ 20 ቀን 2009 ዓ.ም. በመ/ሰጭዎች ወ/ሮ እመቤት ባልቻ አክሲዮን ገዝተዋል ተብሎ እንዲጸድቅ የተሠጠው ውሳኔና ቃለ-ጉባዔ እንዲሻር ወስነናል። ቀሪው ቃለ-ጉባዔና ውሳኔ ሊሻር አይገባም ብለናል።


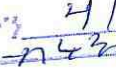
4. ወጭና ኪሣራ ግራቶች የየራሳቸውን ይቻሉ ብለናል።

ትዕዛዝ

1. የውሳኔው ግልባጭ ለስር ፍርድ ቤቶች ይላክ። የፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት በውሳኔው መሰረት እንዲያስፈጽም አዘናል። ይፃፍ
2. የሥር ፍርድ ቤት መዝገቦች ይመለሱ።
3. መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለስ።

የማይነበብ የሶስት ዳኞች ፊርማ አለበት

ብ/ታ

ፊርማ  ቀን 4/2/12
ፊርማ  ቀን 4/2/12

Annex - 9

የይ/መ/ቁ. 175530

ታህሳስ 20 ቀን 2012ዓ.ም

ዳኞች፡- ረታ ቶሎሳ

እንዳሻዉ አዳነ

አበባ እምቢአለ

ይ/ባይ-አቶ ዮሃንስ ሳሙኤል

መ/ሰጪዎች 1. ጌሻ ቪ.ሌ.ጅ ኮሬ እስቴት

2. ሚ/ር አዳም አሻርተን

3. ወ/ሮ ሪቼል ሳሙኤል

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል።

ፍርድ

ጉዳዩ ሂሳብነቱ የተወሰነ የግል ማህበር ጠቅላላ ጉባኤ የተሰጠ ወሳኔን ከማሰረዝ ጥያቄ ጋር ተያይዞ የቀረበ የይርጋ ክርክርና እንዲሁም የኩባንያው ስራ-አስኪያጅ ከስራ አስኪያጁነት ቦታቸው ሊሰናበቱ ይገባል የሚል መሰረት ያደረገ ጥያቄን የሚመለከት ሲሆን ክርክሩም የጀመረው ያሁን ይ/ባይ በፊ/ ከፍተኛ ፍ/ቤት ባሁን መ/ሰጪዎች ላይ ባቀረበው ክስ መነሻነት ነው።

ጥቅምት 13 ቀን 2010 ዓ.ም በተጻፈ ስር ፍ/ቤት ቀርቦ የነበረው የክስ ይዘትም ባጭሩ፡- 2ኛ እና 3ኛ መ/ሰጪዎች የ1ኛ መ/ሰጪ ኩባንያ መተዳደሪያ ደንቡ ከሚያዘው ውጭ የጋብቻ ትስስራቸውን መሰረት በማድረግ ይ/ባይን ከስራ-አስኪያጁነት ቦታ አወርደው 2ኛ መ/ሰጪን የኩባንያው ስራ አስኪያጅ እንዲሆን እርስ በርሳቸው በመመራረጥና ወሳኔ በማስተላለፍ ኩባንያውን በዚህ መልኩ ቁጥጥራቸው ስር ካደረጉ በኋላ የማህበሩን ካፒታል ለማሳደግ በሚል ሰብብ የካቲት 21 ቀን 2008ዓ.ም ለሽያጭ እንዲቀርብ ካደረጉት 59,744 አዳዲስ አክሲዮኖች

ፌዴራል ጠቅላይ ፍርድ ቤት
ትክክል ግልግጭ
1 ቀን 14-7-12
ቤት

ውስጥ ይ/ባይ በያዘው አክሲዮን ድርሻ ልክ የመግዛት መብቱን በመንፈግና ይልቁንም ለራሳቸው ብቻ በማድረግ የተከፋፈሉ ሲሆን እንዲሁም 2ኛ እና 3ኛ መ/ሰጪዎች ከፍ ሲል ከተገለፀው በተጨማሪ አሁንም ከነበራቸው አክሲዮኖች ላይ የይ/ባይን የቅድሚያ ግዢ መብት በጣሰ መልኩ ብዛታቸው 4,850 የሆኑ ብር 727,500 ዋጋ ያላቸው አክሲዮኖችን የማህበሩ አባል ላልሆነ አሜሪካዊ ዜጋ በሽያጭ ማስተላለፋቸው ያላግባብ መሆኑን ጠቅሰው ይሄንን መ/ሰጪዎች አዳዲስ አክሲዮኖችን ለሽያጭ አቅርበው 2ኛ እና 3ኛ መ/ሰጪዎች ለራሳቸው ብቻ የተከፋፈሉበትና እንዲሁም የይ/ባይን የቅድሚያ ግዢ መብት በጣሰ መልኩ ከአክሲዮን ድርሻቸው የተወሰነውን በቀጥታ የማህበሩ አባል ላልሆነ ሰው በሽያጭ እንዲተላለፍ ያስተላለፉት ቃለ-ጉባኤ ወሳኔ እንዲሰረዝ እንዲሁም 2ኛ መ/ሰጪ ከፍ ሲል የተገለፁትን ያልተገቡ ተግባራትን በስራ አስኪያጅነቱ እንዲፈፀም ያደረገ ከመሆኑም በላይ ሌላኛው የማህበሩ አባል ከሆኑት 3ኛ መ/ሰጪ ጋር በጋብቻ የተሳሳሰሩ በመሆኑ ከማህበሩ አባልነት በዘለለ ሁለታቸውን ብቻ የጋራ የጥቅሙ ተካፋይ የሚያደርጋቸው ሁኔታ ያለ ከመሆኑ አንጻርም ጉዳዩ ሲታይ 2ኛ መ/ሰጪ በዚህ ረገድ ከሚፈጠርበት ጥቅም ግጭት ነፃ ሆኖ የይ/ባይን አነስተኛ ድምፅ ጭምር ባስጠበቀ መልኩ ማህበሩን ስራ በገለልተኝነት መምራት የማይችል ስለሆነ ከስራ አስኪያጅነቱ ተነስቶ ከማህበሩ የጥቅም ግጭት በሌለው ሌላ ተቀጣሪ ስራ-አስኪያጅ ተተክቶ እንዲመራ ጭምር ይወሰን ዘንድ ዳኝነት የተጠየቀበት መሆኑን የሚያሳይ ነው።

መ/ሰጪዎችም ቀርበው ለክሱ በሰጡት ምላሽ ከአዳዲስ አክሲዮን ሽያጭም ሆነ ነባር አክሲዮን ሽያጭ ጋር በተያያዘም ሆነ እንዲሁም 2ኛ መ/ሰጪን ከስራ-አስኪያጅነት ቦታ ለማስነሳት በይ/ባይ የቀረበው ዳኝነት ጥያቄ በንግድ ህጉ አንቀፅ 416(2) መሰረት በሶስት ወር ይርጋ የሚታገድ መሆኑን፣ 2ኛ መ/ሰጪ ማህበሩን በስራ-አስኪያጅነት ሊመሩ አይገባም የሚለው ዳኝነት ጥያቄም ከዚህ ቀደም በፌ/መ/ደረጃ ፍ/ቤት ኮ/መ/ቁ.236194 ቀርቦ ውድቅ ተደርጎ የታለፈና የመጨረሻ ወሳኔ ያገኘ ጉዳይ በመሆኑ ይህ ጥያቄ በድጋሚ ሊቀርብ አይገባም የሚልና እንዲሁም ከስራ-አስኪያጅነት ጋር በተያያዘ በዚህ መዝገብ የቀረበው ዳኝነት ጥያቄ ከከዚህ ቀደም የተለየ ነው ቢባል እንኳ ይ/ባይ ይሄንን በዚህ መዝገብ አሁን ያቀረበውን ጭምር በአንድ ላይ በማጠቃለል በወቅቱ የፍ/ብ/ሰ/ሰ/ህ/ቁ.216 ድንጋጌ በሚያዘው መልኩ ማቅረብ ሲገባው ይሄንን ክስ ነጣጥሎ በተለያየ ጊዜ ማቅረብ አይችልም በማለት ወደ ክሱ ፍሬ- ነገር ሳይገቡ በመጀመሪያ ደረጃነት ክሱን በዚህ መልኩ በመቃወም ከወዲሁ በዚህ ምክንያት ውድቅ ይደረግላቸው የተከራከሩ ሲሆን ፍሬ-ነገሩን በተመለከተም አለን የሚሉትን

ፌዴራል ጠቅላይ ጽ/ቤት
 ትክክል ግልጽ
 ፊርማ _____ ቀን 14-7-12

ቤተ

ወይም ወሳኔው ወጤት እንዳይኖረው የሚለውን ክስ ለፍ/ቤት ማቅረብ እንደሚጠበቅበት በቀጣዩ ንዑስ አንቀፅ ድንጋጌ ን/ሀ/ቁ. 416(2) ስር በግልፅ ተመልክቶ እናገኛለን።

ይሁንና በተያዘው ጉዳይ ይ/ባይ ለዚህ ይግባኝ ክርክር መነሻ የሆነውን ዳኝነት ጥያቄ ስር ፍ/ቤት ያቀረበው ጥቅምት 13 ቀን 2010ዓ.ም ስሆን ይህ ለክሱ ምክንያት የሆነው አዳዲስም ሆነ ነባር አክሲዮኖች ሽያጭን በሚመለከት በማህበሩ ጠቅላላ ጉባኤ የተላለፈው ወሳኔ ደግሞ ከፍ ሲል እንደጠቀሰው ክሱ ከመቅረቡ ከ 3 ወር በፊት በየካቲት ወር 2008ዓ.ም እና ግንቦት ወር 2009ዓ.ም ነው። እንዲህ ከሆነ ደግሞ ይ/ባይ የማህበሩ አባል ከመሆኑ አንጻር እኚህ የማህበሩ ጠቅላላ ወሳኔዎች ያላገባብ በህግ የተረጋገጥልኝን ቅድሚያ ግዢ መብት የጣሱ ስለሆነ ወሳኔዎቹ ፈራሽ ሊደረጉ ይገባል ካለ ይህንን ዳኝነት ጥያቄውን በን/ሀ/ቁ. 416(2) ስር በተደነገገው 3 ወር ጊዜ ውስጥ ማቅረብ ሲገባው ይህንን በተጠቀሰው ጊዜ ውስጥ አላቀረበም።

በእርግጥ የይ/ባይ ክርክር ይዘት ራሱ ሲታይ ክሱ ይህ መቃወሚያ የቀረበባቸው ወሳኔዎች በተሰጡ በ3 ወር ጊዜ ውስጥ ለፍ/ቤት ቀርቧል የሚል ሳይሆን በንግድ ህጉ አንቀፅ 416(2) ስር የተመለከተው የ3 ወር ይርጋ ደንብ ለጉዳዩ አግባብነት የለውም፤ ይህ በን/ሀ/ቁ. 416(2) ስር የተመለከተው ይርጋ ደንብ ለጉዳዩ አግባብነት እንደሌለው የፌ/ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በተመሳሳይ ጉዳይ ላይ በሰ/መ/ቁ. 52269 አስገዳጅ የህግ ትርጉም ሰጥቶበታል፤ በመሆኑም የፌ/ ከፍተኛ ፍ/ቤት ይህንን ጉዳይ በሚመለከት የሰጠው ብይን የፌ/ጠቅላይ ፍ/ቤት ሰበር ችሎት አስቀድሞ በተመሳሳይ ጉዳይ ከሰጠው አስገዳጅ ወሳኔ ጋር የሚጣረስ በመሆኑ ብይኑ ከዚህ አንጻርም ተገቢነት ያለው አይደለም በማለት በዚህ ዙሪያ አጥብቆ በሰፊው የሚከራከር መሆኑን ተገንዝበናል።

በእርግጥ ይ/ባይ በይግባኝ ክርክሩ እንደጠቀሰው የፌ/ጠቅላይ ፍ/ቤት ከአምስት ባላነሱ ዳኞች በተሰየሙበት ሰበር ችሎት በተመሳሳይ ጉዳይ የተሰጠ የህግ ትርጉም በየትኛውም ደረጃ ላይ በሚገኝ የፌዴራልም ሆነ ክልል ፍ/ቤት ላይ አስገዳጅነት እንዳለው በአዋጅ ቁ. 454/97 አንቀፅ 2(1) ስር መመልከቱ ግልፅ ነው።

ይሁንና ከዚህ ጋር በተያያዘ ግራ ቀኝን ያከራከረው ጉዳይ እና በዚህ ችሎት ምላሽ ሊሰጥበት የሚገባው አከራካሪ ነጥብ ሁለቱ ጉዳዮች ከአዋጅ ቁ. 454/97 አንቀፅ 2(1) ድንጋጌ አንጻር ተመሳሳይ ናቸው? ወይስ አይደሉም? የሚለው ጉዳይ ሲሆን በዚህ መሰረት በእነዚህ ሁለቱ

ፌዴራል ጠቅላይ ጽ/ቤት
ትክክል ግልጽ
ፊርማ *[Signature]* ቀን 14-7-18
ቆይታ

