



REPUBLIC OF KENYA



KENYA LAW
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Embakasi Ranching Company Limited v Registrar Of Companies & 14 others (Commercial Case E096 of 2019) [2023] KEHC 24553 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 24553 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E096 OF 2019

MN MWANGI, J

JULY 28, 2023

BETWEEN

EMBAKASI RANCHING COMPANY LIMITED PLAINTIFF

AND

THE REGISTRAR OF COMPANIES 1ST DEFENDANT
WANJIRU RICHU 2ND DEFENDANT
ANDREW OKUMU 3RD DEFENDANT
GABRIEL GOTINGA 4TH DEFENDANT
JAMES MINGI NJOROGE 5TH DEFENDANT
SISTO TUTA MWAMBIA 6TH DEFENDANT
PENINAH NYAIREGI MWANGI 7TH DEFENDANT
JAMES NJEHU MBOCHI NJERU 8TH DEFENDANT
DAVID MWANGI WANDERI 9TH DEFENDANT
PHIDELI WANGARI 10TH DEFENDANT
JANE NJERI MUREGI 11TH DEFENDANT
CHRISTOPHER ELIUD KAKURU NGIGE 12TH DEFENDANT
JOSEPH KINYANJUI NJENGA 13TH DEFENDANT
CHARLES KIHAGI THUAH 14TH DEFENDANT
JOSEPH JUAN KANANI 15TH DEFENDANT



RULING

1. On 4th May, 2023 when this matter came up for mention for directions, Mr. Kithi Advocate, submitted that the directors whose names appear on the CR-12 in this case are his clients and that they instructed him to act for the plaintiff vide a board resolution of 17th March, 2023. He stated that Hon. Judge Nzioka had earlier on issued orders on the powers of directors, to the effect that the directors who are in office remain as such and those on the CR-12 to remain as such. He further stated that the rulings dated 18th October, 2022 and 13th March, 2023 have no bearing on the issue of representation. It was submitted by Mr. Kithi that if the orders of Hon. Justice Nzioka remain in force, then the directors on the CR-12 must be recognized as such since a CR-12 is the legal document which recognizes the directors who have powers of management of companies, including appointment of Counsel.
2. Mr. Muriuki, learned Counsel who has been on record for the plaintiff since the year 2019 submitted that the CR-12 of the years 2022 and 2023 could not have been obtained since there was an order in place for the status quo to be maintained.
3. Mr. Macharia, learned Counsel for the 2nd and 3rd defendants asserted that Mr. Kithi cannot purport to have been appointed by directors whose matter is pending determination by this Court, and as such, Mr. Kithi is irregularly on record. He pointed out that there is an order that was issued against the defendants restraining them from carrying on business in the plaintiff's name.
4. In a rejoinder, Mr. Kithi contended that the orders that subsist and which would regulate the issue of representation are those of 31st July, 2019. In addition, he stated that the Court has regulated the issue of appointment of Advocates thus the directors on the CR-12 can appoint an Advocate to represent the plaintiff. Mr. Kithi submitted that there are no orders barring the carrying out of the activities of the plaintiff company.
5. On consideration of the oral submissions made by Counsel, the issue that arises for determination is whether the directors of the plaintiff company have the legal capacity to appoint another Advocate to represent the plaintiff in place of the Advocate currently representing the said party. In order to determine this matter, this Court shall consider the directions issued by Hon. Justice Nzioka on 31st July, 2019 and the two rulings by Hon. Judge Chepkwony dated 18th October, 2022 and 13th March, 2023, respectively. On 31st July, 2019, Hon. Justice Nzioka issued several orders inter alia –

“That in the meantime status quo on the ground being that the directors in the office to remain in the office and the ones indicated in the CR-12 form as directors to remain as such.”
6. Subsequently, the plaintiff filed an application dated 22nd January, 2022 seeking to withdraw the plaintiff's suit. Hon. Judge Chepkwony vide a ruling dated 18th October, 2022 stated thus –

“Lastly, Mr. Gachichio, in purporting to enter appearance for the plaintiff company under the instructions of the directors whose names are in the plaintiff's company CR-12, has acted in ignorance of the status quo orders issued by Hon. Justice Nzioka on 31st July, 2019 wherein the learned Judge directed that the former Directors who were still in office, continue holding office while the newly elected directors who were in the company's CR-12, to remain as such pending the determination of the dispute. It then follows that the newly elected directors whose names are in the company's CR-12, by virtue of the Court orders, are



precluded from assuming any office duties including appointment of Advocates on behalf of the plaintiff company until the dispute herein pending is heard and determined...”

7. This case came up for mention on 22nd February, 2023 for parties to confirm compliance of directions issued on 30th November, 2022 in respect of an application dated 23rd November, 2022. Several issues however came up. One of them was whether the application dated 23rd November, 2022 should be allowed unopposed. On 13th March, 2023 Hon. Justice Chepkwony gave the following directions in this matter–

“This being the case, I find that the orders issued by Hon. Nzioka have not been set aside on appeal or by review. The orders were made by a Court of competent and concurrent jurisdiction as this Court. For this Court to allow the application dated 23rd November, 2022, it would amount to either varying or overturning the orders by Hon. Justice Nzioka...”

8. As correctly submitted by Mr. Kithi, the orders that would regulate the issue of the plaintiff’s representation are those issued by Hon. Judge Nzioka on 31st July, 2019. In interpretation of the said orders, Hon. Judge. Chepkwony held that by virtue of the Court orders issued on 31st July, 2019, the former directors who were still in office continue holding office, hence the newly elected directors whose names are in the company’s CR-12 are precluded from assuming any office duties, including appointment of Advocates on behalf of the plaintiff company, until the dispute herein is heard and determined.
9. Based on the foregoing and the fact that the aforementioned directions/orders were issued by a Court of competent and concurrent jurisdiction, and they have not been set aside by way of appeal and/or review, it is my finding that the plaintiff’s directors whose names appear on the CR-12 dated 12th September, 2022 do not have the legal capacity to appoint another Advocate to represent the plaintiff in place of the Advocate currently representing it.
10. It is noteworthy that on 21st March, 2023, Mr. Kithi filed a Notice of Appointment of Advocates dated 20th March, 2023 indicating that he had been appointed to Act for the plaintiff but by the said time, the plaintiff already had a Counsel on record. This would mean that in order for Mr. Kithi to come on record for the plaintiff, he would have to comply with the provisions of Order 9 Rules 5 & 6 of the Civil Procedure Rules, 2010 which state as follows –

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

11. The above provisions in essence mean that if the newly elected directors had the legal capacity to appoint an Advocate to represent the plaintiff, the proper document to be filed by the said Advocate would be a Notice of Change of Advocates and not a Notice of Appointment of Advocates.
12. In the circumstances, noting that the newly elected directors whose names appear on the CR-12 do not have the legal capacity to appoint another Advocate to represent the plaintiff, I find that Mr. Kithi is not properly on record. Costs are awarded to the defendants.

It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Maulid Musa h/b for Mr. Kithi for the plaintiff (under Notice of Appointment filed on 21.3.2023 & h/b for Mr. Kariuki for the 6th, 9th, 10th, 12th 13th & 15th defendants

Ms. Nduta h/b for Mr. Muriuki for the Plaintiff (currently on record)

