



**MAOR v HWMR; MB Ltd (Interested Party) (Matrimonial Cause E002 of 2023) [2023] KEHC 26341 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 26341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MATRIMONIAL CAUSE E002 OF 2023  
G MUTAI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**MAOR ..... APPLICANT**

**AND**

**HWMR ..... RESPONDENT**

**AND**

**MB LTD ..... INTERESTED PARTY**

**RULING**

1. The Applicant and the Respondent, who are former spouses, have shares in Monkey Beach Ltd. The latter company owns Title No. Kwale/Galu Kinondo/646, upon which is erected a house, commonly referred to as the Garden Cottage, that the Claimant/Applicant contends is the parties' matrimonial home, which this Court should divide between the two said ex-spouses. The Claimant/Applicant thus sued the Respondent and enjoined the said company as an interested party in this cause.
2. The Respondent, as a director of Monkey Beach Ltd, purported to appoint the firm of Aroka & Co. Advocates to act for the Interested Party. The Claimant/Applicant contests the said decision on the grounds that there was no resolution of the board of directors of Monkey Beach Limited permitting such an appointment. She argued that the Interested Party, as a limited liability company, can only make decisions through the agency of the board of directors. For want of the board approval, she averred that the appointment of the firm of Aroka & Co. Advocates is invalid. That being the case, the pleadings and documents filed by the said firm are similarly invalid for want of authority and should be struck out, and the said firm be compelled to cease acting for the Interested Party.
3. Vide a Notice of Motion dated 14<sup>th</sup> July 2023, counsel for the Claimant/Applicant sought the following orders: -



- a. Spent;
  - b. Spent;
  - c. That all the pleadings and Court documents filed by Aroka & Co. Advocates on behalf of the Interested Party in this suit be struck out and expunged from the Court record;
  - d. That all submissions and statements filed by Aroka & Co. Advocates on behalf of the Interested Party company in this suit be struck out and expunged from the court record;
  - e. That the firm of Aroka & Co. Advocates be ordered to cease acting as the advocates representing the Interested Party company in this suit;
  - f. The firm of Aroka & Co. Advocates be restrained from filing or serving any pleadings or Court documents on behalf of the Interested Party in this suit;
  - g. That the Respondent be restrained from appointing an advocate on behalf of the Interested Party without valid authority and resolution of the board of the Interested Party, duly signed by its co-directors;
  - h. That a declaration do issue that the firm of advocates of Aroka & Co. Advocates is not duly instructed by the Interested Party to represent the Interested Party in this suit;
    - i. That all other pleadings in this suit be stayed pending hearing of this application; and
  - j. That the cost of this application be provided for personally by the firm of Aroka & Co. Advocates.
4. The application is supported by the grounds on the body of the application and also on the supporting affidavit sworn on 14<sup>th</sup> July 2023 in Melbourne, Australia, before a notary public. In the said affidavit, the Claimant/Applicant deposes that she is one of the only two directors of the company and that as a director, she took no role in the appointment of the firm of Aroka & Co. Advocates as the advocate of the Interested Party. She contended that the appointment of the firm of Aroka & Co. Advocates as the advocate of the Interested Party prejudices her right to a fair trial of the claim and in her words, “compromises most adversely my rights and interests as I have been excluded by the Respondent from appointing the advocate firm for the Interested party despite being one of the only two directors of the Interested Party company”. In her deposition she states that it is likely that the pleadings filed by the Interested party would, in that case, favour the Respondent and thus allow “the Respondent an unfair advantage over me in this matrimonial property suit”. She further deposed that the letter her lawyer wrote to the Respondent seeking joint appointment of counsel was ignored.
  5. The application was opposed by the Respondent and the Interested Party. The Interested Party filed a 74-paragraph Replying Affidavit sworn by the Respondent in his capacity as the co-director of the Interested Party vide which he deposed that the application is frivolous, vexatious and brought in bad faith. In the words of the said deponent, “with the sole aim of forum shopping, unjust environment, and abusing this honourable Court’s process and should thus be dismissed with costs”. It was urged that the Interested Party, being a private company limited by shares, is a separate legal person/entity from its shareholder and directors, and thus, despite being former spouses, the relationship between the Claimant/Applicant and the Respondent with the Interested Party is purely on the basis of being co-directors and shareholders and not former spouses. He denied the jurisdiction of the Family Court to hear and determine the matter as the dispute is commercial and not matrimonial in nature.



6. The Respondent filed Grounds of opposition vide which he averred that the application is bad in law and incurably defective. Further, the Interested Party has a constitutional and legal right to be represented by counsel of its own choice. The Claimant/Applicant, having sued the Interested Party, cannot “in law or equity be allowed to approbate and reprobate.” It was thus urged that I dismiss the said application with costs.
7. The Respondent, as the director of the Interested Party/Respondent, filed an affidavit sworn on 2<sup>nd</sup> August 2023 in which she contended that “there was no corresponding obligation or requirement for a company that has been sued or cited as an Interested party to file a board resolution as a precondition to defending itself in a suit”. He further contended that in any case the relationship between the Claimant/Applicant and the Respondent is so strained that it would not be possible for them to jointly appoint an advocate for the Interested Party.
8. The Claimant/Applicant filed a Further Affidavit dated 15<sup>th</sup> August 2023, vide which she responded to the issues raised by the Respondent in his various affidavits. The Further Affidavit addressed the dealings of the parties regarding the Interested party that led to the filing of this case.
9. When the application came before me on 3<sup>rd</sup> August 2023, I directed that the same be canvassed by way of Written Submissions. I ordered that the Claimant/Applicant file and serve Supplementary Affidavit together with Written Submissions within 14 days. I further ordered that the Respondent and the Interested party file their Written Submissions within 14 days of being served and slated the matter for ruling on 26<sup>th</sup> September 2023.
10. In her submissions, the Applicant identified five issues as coming for determination in the said application. These are:-
  1. Whether the Respondent had due authority to appoint the firm of Aroka & Co. Advocates to represent the Interested Party in this suit;
  2. Whether Aroka & Co. Advocates has valid instructions from the Interested Party to file Court documents and make submissions on behalf of the Interested Party;
  3. Whether Aroka & Co. Advocates should be removed from acting for the Interested Party and the Court documents and submissions made by Aroka & Co. Advocates should be expunged from the Court record;
  4. Whether the Respondent’s unilateral appointment of Aroka & Co. Advocates to represent the Interested party prejudices the Applicant’s right to a fair trial; and
  5. Whether Aroka & Co. Advocates representing the Interested party in this suit should personally pay the costs of this application.
11. In regard to the 1<sup>st</sup> issue, the Claimant/Applicant averred, relying on the decision of the Court in *Affordable Homes Africa Ltd v Ian Henderson & 2 others*; HCC No 524 of 2004; and *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014]eKLR, that the power to manage the affairs of a company such as the Interested Party, is conferred upon the board of directors, and therefore that the Respondent lacked due authority to unilaterally appoint Aroka & Co. Advocates to represent the Interested Party in the absence of a board resolution duly signed by the Applicant as one of the only two directors of the Interested party. It was submitted that an appointment of legal counsel to represent the company was not a day-to-day activity that could be performed by just one director.
12. On whether the firm of Aroka & Co. Advocates has valid instructions, the Claimant/Applicant, relying on order 9 Rule 2 of the *Civil Procedure Rules*, argued that it doesn’t, as the said firm was



- appointed without due instructions. For not having valid instructions, the Claimant/Applicant, relying on order 9 Rule 12 of the *Civil Procedure Rules*, sought to have the said firm be ordered to cease acting for the Interested Party. The Claimant/Applicant submitted that having been unilaterally appointed the representation of the Interested party by the firm of Aroka & Co. Advocates would prejudice the Applicant's right to a fair trial. It was submitted that by having deponed to affidavit both for himself and the Interested Party, the Claimant/Applicant's right to a fair trial would be prejudiced.
13. Ms Mwasame, learned counsel for the Claimant/Applicant, submitted that having drawn and filed the affidavits, "said counsel and law firm is aware that they should have been duly authorized by a board resolution before engaging in litigation to represent the Interested Party". Relying on the case of *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014]eKLR, she urged that the said firm should be made to bear the costs of the application personally.
  14. For the foregoing reasons it was urged that I allow the application dated 14<sup>th</sup> July, 2023, it being meritorious, and that I award costs as prayed.
  15. The Respondent submitted that I shouldn't allow the application vide submissions filed on 22<sup>nd</sup> August 2023. Mr. Njoroge Mwangi, learned counsel for the Respondent, submitted that the Applicant sued the Interested party unilaterally without involving the Respondent and that no board meetings were held. He submitted that the Notice to Appear was served on Respondent by the Claimant/Applicant's counsel long after he had appeared in person and that the instant application amounts to approbation and reprobation. I was referred to the cases *Republic v Institute of Certified Public Secretaries of Kenya ex-parte Mundia Njeru Gateria* [2010]eKLR and *Bangue de Moscou v Kindersley* [1950]2 ALL ER 59. It was urged that having sued the Interested Party the Claimant/Applicant could not appoint or participate in the appointment of the advocate of the Interested Party. The Respondent also relied on the doctrine of estoppel and contended that the Claimant/Applicant, having sued the Interested Party and having issued a Notice to Appear against the Interested Party, is estopped by conduct from challenging the appointment of an advocate for Monkey Beach Ltd by the Interested Party's majority shareholder.
  16. The Respondent further submitted that having sued the Interested Party, the Claimant/Applicant's interests conflicted with those of the Interested Party. The Respondent relied on the case of *Belvic Wanjiru Namu v National Police Service & Another* [2019]eKLR in support of the contention.
  17. The Respondent submitted that the authorities relied upon by the Applicant were inapplicable. I was, therefore, urged to dismiss the application with costs.
  18. The Interested Party opposed the application. It was submitted that the application amounts to match-fixing in so far as the Applicant was seeking, in the view of the Interested Party, to appoint an advocate for the party against which she had filed a suit.
  19. Ms Aroka, learned counsel for the Interested Party, submitted that the Interested Party is a private company limited by shares in which the Respondent held 99% shares while the claimant had 1%. The Respondent, it was further submitted, is in charge of the day-to-day management of Monkey Beach Limited, which company owns a property known as Garden Cottage, erected on Title No. Kwale/Galu/Kinondo/646, Beach Road, Galu Beach, Diani. The Applicant seeks to have the said property declared as matrimonial property and thus be distributed between her and the Respondent, who is her ex-husband.
  20. The Interested party identified three issues as falling for determination: -



- a. Whether it is a mandatory requirement for a company to file a board resolution as a prerequisite to defending itself in a suit, more so where the suit has been filed against the company by the only other shareholder of the company;
  - b. Whether Aroka Co. Advocates the Advocates who represent the Interested Party in this suit should be removed from acting and ordered to pay the costs of this application personally; and
  - c. Whether the application by the Claimant/Applicant is *bona fide* or *mala fide*.
21. The Interested party contended, in respect of the first issue that Order 9 Rule 2 of the [Civil Procedure Rules](#) does not place an obligation on a party defending a suit to file a board resolution. Relying on the case of [Saraf Limited v Augusto Arduin](#) [2016]eKLR Ms Aroka submitted that Order 9 Rule 2 only applies to Plaintiffs and not to a party that has sued or cited.
  22. On whether the director who instructed the firm of Aroka & Co. had the authority to do so, she submitted that he did. Ms Aroka contended that the cases relied on by Applicant were now bad law as recent decisions of the Kenyan and Ugandan Courts had held that any director of a company who is authorized to act on behalf of a company has the power to file proceedings on behalf of or company. I was referred to the case of [Fubeco China Fushon v Naiposha Co. Ltd & 11 others](#) [2014]eKLR.
  23. Counsel for the Interested Party submitted that there was no reason to remove her firm as she was not dead, had not been declared bankrupt, was untraceable, without a valid practising certificate or had been struck off the roll of advocates.
  24. It was further submitted by the Interested Party's counsel that the application before me had been filed in bad faith as it was the Applicant that sued the Interested Party. The Interested Party denied that the Applicant's right to fair would be prejudiced. Counsel submitted that since the subject property was registered in the company's name, the Interested Party has a subsisting direct, clearly identifiable, proximate and substantial interest in the issues raised in the main suit and, therefore, has a right to defend itself. Counsel submitted that there would be a serious conflict of interest if the Applicant were permitted to choose counsel for a party she had sued. She also submitted that there would be no prejudice to the Applicant if the application was refused. She thus urged that I dismiss the application with costs.
  25. I have perused the application, the various affidavits and documents and considered the submissions of the parties. In my view, there is broadly one issue in the matter that calls for my determination, which is whether the Respondent's action of appointing a legal counsel for the Interested Party was lawful. The Claimant/Applicant avers that it wasn't, as there was no approval of such action by the board of directors of the Interested Party. As adverted to earlier this is based on the Applicant's understanding of the company law, which is that a company acts through its board. It is also based on the provisions of Order 9 Rule 1 of the [Civil Procedure Rules](#), 2010.
  26. It is therefore necessary that I set out the provisions of the said Rule. Order 9 Rule 2 provides that: -
    - “The recognized agents of parties by whom such appearances, applications and acts may be made or done are—
    - (a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;
    - (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which



limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

- (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.”

My reading of the said provision is that a plaintiff in a cause is required to provide a resolution permitting the filing of a suit. In my view, there is no corresponding requirement on the part of a defendant or an interested party to file such authority. I am guided by the decision of the Court of Appeal in *Saraf Limited v Augusto Arduin* [2016]eKLR, where it was held that:-

“In short, the Respondent's case -for striking out the appellant's defence was that the latter had not demonstrated that it had legal capacity to defend the suit. We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict timelines within which appearance and defence must be filed...”

27. On whether the Respondent could appoint a legal counsel for the Interested party. I note that the Respondent has 99% shares in the company. The Applicant has 1% share. It would appear to this Court that given the fact that the Applicant is based in Australia, demonstrated by the fact that her affidavits in respect of this application are sworn before a Notary Public in Melbourne, Australia, the Respondent, it is reasonable to assume, has control of the Interested Party, being the party that is domiciled in Kenya.
28. The Applicant has argued, relying on the case of *Affordable Homes Africa Ltd v Ian Henderson & 2 others and East African Portland Cement Ltd (supra)*, that the board of directors should have authorized the appointment of Messrs. Aroka & Co. Advocates. I am not persuaded by the said argument on two grounds:-
1. More recent decisions of the High Court and the Court of Appeal, such as *Fubeco China Fushon v Naiposha Co. Ltd & 11 others* [2014]eKLR say that no such authority is required. In the said decision, the Court held as follows  

“... it is now settled as the law that it does not require a board of directors, or even the general meeting of members to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director is authorized to act on behalf of the company unless the contrary is shown, has the powers of the board to act on behalf of that Company.” and
  2. Appointment of counsel for a company sued in contentious litigation would appear to me to be an exercise of management discretion that does not require the board of directors' acquiescence.
29. In any case, I must be alive to the nature of the matter before me. The Claimant/Applicant and the Respondent are engaged in an acrimonious dispute. It does appear likely that the Board would be able to jointly appoint an advocate to represent the Interested Party. In the ensuing stalemate, this cause would not be prosecuted.
30. Having found that the advocate for the Interested Party was properly appointed, it is not necessary for me to make a determination on the remaining prayers.



31. The foregoing notwithstanding, it isn't clear at this point whether the Interested Party is a necessary party in these proceedings. As a limited liability company, the Interested Party has its own legal personality, separate from the Claimant/Applicant and the Respondent. Being a matrimonial cause for the division of matrimonial properties between the Claimant/Applicant and the Respondent, it is my view that the Interested Party has a very limited role. In the circumstances, I do not, therefore, think that the Claimant/Applicant will suffer prejudice if her application is not allowed.
32. The upshot of the foregoing is that I find no merit in the application. The same is dismissed. This being a family matter, each party shall bear her/his/its own costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023 AT MOMBASA VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Ms Mwasame for the Claimant/Applicant;

Ms. Njoroge Mwangi for the Respondent;

Ms. Aroka for the Interested Party;

