REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HC CIV CASE NO E0256 /2020

DIRECTLINE ASSURANCE COMPANY LTD.....PLAINTIFF

VERSUS

AKM INVESTMENTS LTD.....1st DEFENDANT

DR. S. K. MACHARIA AND MRS. SERAH NJERI MACHARIA

(Legal representatives of the late John Gichia Macharia).....2nd DEFENDANT

LISA ANYANGO AMENYA .....3rd DEFENDANT

JANUS LTD.....4th DEFENDANT

TERRY WIJENJE.....5th DEFENDANT

JAMES GACHOKA

T/A Amolo & Gachoka Advocate.....6th DEFENDANT

HARBOUR CAPITAL LIMITED.....7th DEFENDANT

RULING

Introduction

1. This ruling determines three distinct applications, namely; the application dated **15th** January 2021 filed by Serah Njeri Macharia, sued as part of the **2nd** defendant as one of the Legal representatives of the late John Gichia Macharia-deceased, (the first application), the application dated **22nd** January 2021 filed by the **1st** and **3rd** defendants (the second application), and the application dated **16th** February 2021 filed by Dr. Samuel K. Macharia, sued as part of the **2nd** defendant as one of the legal representatives of the deceased (the third application). For the sake of brevity and clarity, I will address and determine each application separately.

The first application

2. The first application dated **15th** January 2021 filed by Serah Njeri Macharia is expressed under Order **1** Rules **10(2)** and Order **51** of the Civil Procedure Rules and all other enabling provisions of the law. She asks this court to strike out her name from the Plaint as a legal representative of the deceased or such other orders the court may deem fit.

3. The grounds in support of the application are that together with her husband Dr. Samuel K. Macharia with whom they are jointly named as the **2nd** defendant they applied for Grant of Letters of Administration to the deceased's estate in Succession Cause No. **691** of 2018. However, on **25th** January 2019 she filed a Notice of Withdrawal of Application for Grant in court, but notwithstanding the Notice, on **5th** April 2019 a Grant was issued in their joint names. She states that she requested the court in writing to rectify the error and issue a fresh grant to Dr. Samuel K Macharia as the sole administrator. She states that she has no interest in being an administrator and has never taken part in administering the estate. Lastly, she states that no party will suffer prejudice if the orders are granted.

4. Dr. Samuel K. Macharia in his Replying affidavit states *inter alia* that the issue as to whether or not Serah Njeri Macharia's name should be in the grant is yet to be resolved.

5. The **3rd** defendant, Lisa Anyango Amenya in her Replying Affidavit deposed that she was aware that Serah Njeri withdrew her Petition for appointment as an Administrator of the deceased's estate and Dr. S. K. Macharia filed a motion seeking to replace her hence the instant application should be allowed.

6. The Plaintiffs' counsel relied on the affidavit filed by Dr. Samuel K. Macharia. He did not file submissions on the application. Also, the **4th**, **5th, 6th** & **7th** defendants did not file any responses or submissions to the application.

7. The applicant's counsel submitted that following the applicant's request to the court to correct the anomaly, a Grant was issued in the sole name of Dr. SK Macharia and that there is a pending application seeking to revoke the grant. Counsel argued that Sarah Njeri Macharia is not an administrator and has no capacity to represent the estate nor can the applicant be forced to act for the estate.

8. On behalf of Dr. Samuel K. Machaia's, it was submitted that the grant is highly contested, that there is a pending application seeking to revoke it, that the grant was illegally and fraudulently obtained because there were several pending applications seeking to revoke it and the validity of her Notice of Withdrawal is under challenge, hence, allowing this application amounts to usurping the jurisdiction of the Family Court.

9. As a general rule it is the discretion of the Plaintiff to choose his adversary because he is the *dominus litis*. The courts should not interfere in it but the court has a duty to do justice and to see all persons who ought to be involved in the controversy are present in order to avoid multiplicity of suits and finally decide all the issues involved in the suit. However, Order **1** Rule **10 (2)** provides for adding or striking out parties. The essential requirements of any civil suit are the opposing parties, the subject matter in dispute, the cause of action and the relief claimed by the plaintiff.[1]

10. Order **1** of the Code of Civil Rules, deals with the parties to the suit and also contains provisions for addition, deletion and substitution of parties, joinder, non-joinder and misjoinder of parties and objections to misjoinder and non-joinder. A person can be joined as a defendant according to the provisions of Rule **3** of Order **1**. The conditions required to be satisfied in the case of defendant are that the right to relief alleged to exist against him/her arises out of the same act or transaction; and the case is of such a character that, if separate suits were brought against such person, any common question of law or fact would arise.

11. It is also important to clarify who are necessary parties to a civil suit. A necessary party is a party without impleading whom a claim cannot be legally settled by court. In other words, in the absence of a necessary party, no effective and complete decree can be passed by the court. The test for determining the Necessary parties to a civil suit are: - (a) there has to be a right of relief against such a party in respect of the matters involved in the suit. (b) the court must not be in a position to pass an effective decree in the absence of such a party. The above tests were described as true tests by Supreme Court of India in *Deputy Commr., Hardoi v Rama Krishna.**[2]***

12. Quite plainly, the court has the power under Order **1** Rule **10 (2)** of the Civil Procedure Rules, at any stage of the proceedings to order that the name of any party improperly joined, whether as Plaintiff or defendant, to be struck out, and the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit be added.

13. The Power under Rule 1**0 (2)** can be exercised either on the application of the party or *suo motu* by the court. The object of this provision is to save time and expense, avoid multiplicity of suits and prevent harassment of parties. It is merely an enabling provision. Five considerations must be kept in mind before exercising these powers*: - One,* it must be remembered that the Plaintiff is the best judge of his interest and it is for him to choose his opponent against whom the relief can be claimed. *Two,* if the court comes to a conclusion that the presence of person is necessary to effectively decide the suit or the presence of a person is not necessary then irrespective of the wish of the Plaintiff, the court may join the person as a party or strike out his name. *Three*, the order of addition, deletion or substitution of parties can be made at any stage of the suit. *Four,* where a person is neither a necessary party or proper party, the court has no jurisdiction to add him as a party. The question of necessary party is to be determined with reference to the averments in the plaint and the matter is determined by the court. *Five,* the object of the rule is to promote the cause of justice and to bring before the court at the same time all the persons who are parties to the dispute relating to the subject matter, thereby avoiding inconvenience and separate trials. *Six*, the grant, or refusal to grant, such orders entail the exercise of judicial discretion, the only constraint being such discretion is exercised judiciously.

14. In *Smith v Middleton**[3]*** it was held that the discretion is to be exercised in a selective and discriminatory manner, not arbitrarily or idiosyncratically otherwise as Lord Diplock said in *Cookson v Knowles**[4]*** the parties would become dependent on judicial whim. Discretion must be exercised in accordance with sound and reasonable judicial principles. Here the order is discretionary because it depends on the application of a very general standard— what is 'just and equitable.' The exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit.

15. The basic principle is that the court has discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. What is needed is an objective conspectus of all the facts. This discretionary power is judicial in nature and must be confined to the rules of reason and justice. The applicant states that she applied for her name to be removed as a co-administrator to the deceased's estate. She says she has nothing to do with the administration of the deceased's estate. The import of her contention is that the capacity upon which she was impleaded did not exist or has ceased to exist, and therefore, there is no basis for her being in these proceedings. Simply put, she states she is not a necessary party in these proceedings. I defined a necessary party earlier.

16. The applicant's reasons bring into view several key points. *First*, the capacity under which she was sued stands on shaky ground. If she is not an administrator of the deceased's estate, no valid proceedings can be brought against her in respect of the deceased's estate nor can any

relief be obtained against her. On this ground alone, her being in the case is legally and procedurally wrong. *Second*, the doctrine of necessary and proper parties is eminent when determining this question of joinder or non-joinder of parties or removal of parties from proceedings. There is a vital distinction between a necessary and a proper party to a suit. A necessary party is one whose presence is a *sine qua* non to the constitution of the suit and without whom, no effective order can be passed with respect to the questions arising before the court. In contradistinction to this, a proper party is one in whose absence although an effective order can be passed, but whose presence is necessary for a complete and final decision on the questions involved in the proceeding. The **2nd** defendant while advancing his objection to this application did not deem it fit address this pertinent test. Having withdrawn her name as an administrator to the deceased's estate, and having sworn on oath that she is not involved in *any* manner in the administration of the estate, it is my view she is not a necessary party to this case.

17. The Plaintiff and Dr. Samuel K. Macharia who opposed the application never considered two pertinent tests for demonstrating that the applicant is a necessary party. There was no attempt to show that there is a right to some relief against her in respect of the matter involved in the proceedings in question; and it would not be possible to pass an effective decree in her absence. There was no attempt to show that if she exits these proceedings, no effective relief will be granted. This is the litmus test an objection to an application of this nature should pass. The very object of the "doctrine of necessary and proper" parties is to include all such parties as would be necessary to grant an effective relief for the issues that are *pendente lite* in the matter at hand.

18. The other consideration for the court to take into account is that objections on the ground of non-joinder or misjoinder or an application to be struck out of proceedings must be taken at the earliest possible opportunity and always before settlement of issues, unless the ground of objection has subsequently arisen. To me, the instant application was filed timeously. In fact, the applicant filed an appearance under protect signifying her discomfort in these proceedings and her express intention to challenge her inclusion in these proceedings.

19. Clearly, the grounds cited by the applicant go to the root of the legal capacity upon which the claim against her is premised. Viewed from the lens of the law and all the tests discussed above, the conclusion becomes irresistible that the instant application is merited both in law, in substance and in fact. Her exit from these proceedings will not in any manner injure the Plaintiff's case nor will it affect the prayers sought (if any) against the deceased's estate should the Plaintiff prove its case. Accordingly, I allow the application dated **15th** January 2021 with no orders as to costs.

The second application

20. The **2nd** application dated **22nd** January 2021 was drawn and filed by **1st** and **3rd** defendants. (However, throughout the proceedings and in the pleadings filed, parties referred it as having been filed by the **1st** defendant). The application is expressed under the provisions of Order **46** Rule **2(2)** of the Civil Procedure Rules and Section **3** and **3A** of the Civil Procedure Act and all other enabling provisions of the law. The applicants pray that these proceedings be stayed pending the hearing and determination of Arbitration proceedings arising from HCCC No. **278** of 2019. They also pray for costs of the application.

21. The core ground in support of the application is that the facts pleaded in this suit are directly related to the issues in HCCC No. **278** of 2019 which has been referred to Arbitration and the proceedings thereto stayed, hence it is only fair that the order sought be granted to avoid multiplicity of actions. The application is supported by the annexed affidavit of Lisa Anyango Amenya, the **3rd** defendant, a director of the **1st** defendant.

22. Evans Nyagah, the Plaintiffs executive director swore the Replying affidavit dated **28th** April 2021 in opposition to the application. The substance of the opposition is that the applicant has concealed material facts to mislead the court; that the two suits are not similar; that HCC No. **E278** of 2019 was wholly withdrawn, hence the orders referring it to arbitration ceased to exist; and in any event the instant suit is a claim for liquidated damages while the other suit relates to shareholding; and that the application has no basis in law.

23. The second defendant's response to the application is contained in the Replying affidavit of Dr. Samuel K. Macharia. The nub of the objection is that the instant case is not related or connected to **E278** of 2019 which relates to shareholding while the instant suit relates to recovery of monies and properties illegally taken by the defendants as loans and advances.

24. The **4th, 5th, 6th** and **7th** defendants did not file any response or submissions to the application. However, counsel for the **1st** defendant stated that he was not opposing the application while counsel for Serah Njeri Macharia stated that she was not competent to address the application.

25. Counsel for the applicant in the **2nd** application submitted that *HCCC No. 278 of 2019*- filed by the Plaintiff involves a dispute on the shareholding of the Plaintiff which was referred to Arbitration. She argued that in light of existence of the Arbitral proceedings this suit should be stayed pending the hearing and determination of the Arbitral proceedings. Counsel cited Order **46** Rule **3** of the Civil Procedure Rules and section **6** of the Arbitration Act and relied on *Union Technology Kenya Ltd v County Government of Nakuru**[5]*** and *Young Engineering Company v L.G. Mwacharo T/A Mwacharo Associates & Anotherr**[6]***both of which underscored the need to refer disputes to arbitration parties had entered into an agreement containing a dispute resolution clause providing for arbitration.

26. The Plaintiff's submission was that HCC No. **278** of 2019 was withdrawn hence the orders referring the suit to arbitration died with the withdrawal, and, that the two suits are not similar because the instant suit relates to recovery of debts while the earlier suit involved a dispute on shareholding of the company.

27. On behalf of Dr. Samuel K. Macharia, sued as part of the **2nd** defendant, it was submitted that the disputes in the **2** suits are different, that the dispute in **278** of 2019 was about shareholding of various shareholders in the Plaintiff company while the instant suit seeks to recover debts/monies owed to the company by various parties, and, that, the parties in the two suits are different.

28. Also, counsel for Dr. Samuel K. Macharia distinguished *Union Technology Kenya Ltd and Young Engineering Company* cited by the applicant's counsel on grounds that both cases involved enforcement of agreements which had arbitration clauses and the matter was referred to arbitration as opposed to the instant case in which the plaintiff does not seek to enforce an agreement but to recover a debt, and that, the claim is not based on any agreement but on principles of trust and breach of fiduciary duties.

29. The invitation to stay these proceedings is premised on section **6** of the Arbitration Act and Order **46** Rule **2** of the Civil Procure Act. For starters, the relevancy of the said provisions to instant application is in doubt. A reading of the provisions will attest to this. Order **46** Rules **(1) & 2** provides that: -

> ***Parties to a suit may apply for arbitration [Order 46, rule 1.]***
>
> *Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.*
>
> ***Appointment of arbitrator [Order 46, rule 2.]***
>
> *The arbitrator shall be appointed in such manner as may be agreed upon between the parties.*

30. *First*, the parties in the instant case have not agreed that any matter in difference between them be referred to arbitration nor have they applied to this court for an order of reference. This removes the instant application from the ambit of the above provision. *Second*, it was argued that **E278** of 2019 was referred to Arbitration. This argument as a ground for referring this suit to arbitration collapses on several fronts. *One*, that is not one of the grounds contemplated under the above provision. *Two*, the parties in the two suits are different, and also, the subject matters in the two suits are not the same. *Three*, even if the applicant where to surmount the above hurdles, the plea to stay the matter would still collapse on grounds that **E278** of 2019 was withdrawn.

31. The other hurdle standing on the way of this application is the attempt to invoke section **6** of the Arbitration Act which provides for stay of proceedings pending arbitration. The attempt to invoke this provision collapses not on one but three fronts. *First*, there was no arbitration agreement signed by the parties agreeing to refer disputes to arbitration. It follows that the provisions of the Arbitration Act cannot be imported into these proceedings. "Arbitration agreement" is defined under the Arbitration Act to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

32. *Second*, section **4** of the Arbitration Act defines the form of arbitration agreement. It provides: -

> ***4. Form of arbitration agreement***
>
> *(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(2) An arbitration agreement shall be in writing. (3) An arbitration agreement is in writing if it is contained in—*
>
> > *(a) a document signed by the parties;*
> >
> > *(b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or*
> >
> > *(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.*
>
> *(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*

33. The above provisions extinguish the attempt to invoke the provisions of the Arbitration Act in the instant suit. It will suffice to state that the there is no basis at all upon which the Arbitration Act can be invoked in these proceedings.

34. *Third*, the two decisions cited in support of the application are totally inapplicable to the facts and circumstances of this case. A case is only an authority for what it decides. This is aptly captured in the following passage: -[7]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)*

35. The ratio of any decision must be understood in the background of the facts of the particular case.[8] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[9] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[10] Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[11]In deciding

cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[12] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[13] In the two cases cited by the applicant, the parties had signed an arbitration agreement which contained a dispute resolution clause providing expressly that any disputes under the agreement would be referred to arbitration. On this ground alone, the said decisions are distinguishable from the facts and circumstances of this case.

36. Flowing from my conclusions herein above, it is my finding that the application dated **22nd** January 2021 is unmerited. I dismiss the said application with no orders as to costs.

The third application

37. The third application dated **16th** February 2021 was filed by Dr. Samuel K. Macharia, named as part of the **2nd** defendant in these proceedings. The applicant prays that the Memorandum of Appearance, Defence and the Notice of Motion and/or any other pleadings/documents filed by the firm of W.G Wambugu on behalf of AKM Investments Limited, the **1st** defendant herein, be struck out and/or expunged from the record.

38. Also, he prays that this court holds and declares that the firm of W.G. Wambugu & co advocates was not appointed by the **1st** defendant to act for it in this suit, and that the pleadings filed by the said firm purportedly on behalf of the **1st** defendant are in contravention of the law and therefore null and void. Further, he prays that the costs of and occasioned by the said pleadings be provided for by Messrs W.G.Wambugu personally. Lastly, he prays that this court orders that the applicant be awarded costs for the application.

39. The application is founded on the grounds that the said firm purporting to act for the **1st** defendant filed the said pleadings for the **1st** and **3rd** defendants despite the fact the **1st** defendant has not appointed the said firm to act for it. He states that the said firm acted on the authority of a one David Karanja Macharia and M/s. Stella Nyanjiru Macharia, who purport to be directors of the **1st** defendant whilst they are not. He states that the **1st** defendant is a limited liability company whose majority shareholder was the late John Gichia Macharia-deceased, who subscribed **59,999** shares whilst the **3rd** defendant, his former girlfriend subscribed **1** share which she subsequently set out to transfer to the late John Gichia Macharia but the process of transfer had not been completed by the time he died on **26th** April 2019.

40. The applicant states that according to CR 12 issued on **16th** April 2020, the deceased was registered as being the owner of **600,000** ordinary shares; David Karanja Macharia and Stella Karanja Macharia were wrongly registered as directors of the **1st** defendant on the basis of a limited grant issued for **90** days in Nairobi High Court Succession Cause No 691 of 2018 and their tenure ended on **31st** August 2018 when the limited grant expired.

41. The applicant states that Dr S. K Macharia and Mrs Serah Njeri Macharia are the legal representatives within the meaning of section **79** of the Law of Succession Act by virtue of a grant issued to them by the High Court on **5th** April 2019 and rectified on **23rd** May 2019 and all the deceased's shares vest in them pending distribution to his heir/ heirs.

42. Additionally, he states that by virtue of the rule in *Asia Pharmaceutical v Nairobi Vet nary Center Limited HCC 291 of 2000*, only majority shareholders or directors of a company who can sue or authorize a suit in the name of the company; and neither the **3rd** defendant nor the former directors David Karanja Macharia and Stella Karanja Macharia can confer authority on the firm of W.G. Wambugu and Company Advocates to act for it; but only Dr S. K Macharia and Mrs Serah Njeri Macharia can do so.

43. Also, the applicant states that there is no valid resolution of the **1st** defendant approving the appointment of the said firm and the **3rd** defendant cannot by virtue of her **1** or former **1** share, instruct the said firm to act for the **1st**defendant. He contends that the said David Karanja Macharia and Ms. Stella Nyanjiru Macharia are neither legal representatives of the estate of the late John Gichia Macharia nor directors in the **1st** defendant.

44. The applicant also states that on **5th** April 2019, letters of administration were issued by the court to himself and Serah Njeri Macharia, and the same were rectified on **23rd** day of May 2019, a fact acknowledged by both David Karanja Macharia and M/s Stella Nyanjiru Macharia in Prayer **1** of their Summons for revocation of grant filed in *Nairobi High Court Succession Cause No. 691 of 2018.* He contends that in Company law, a suit on behalf or in the name of the company can be filed only on authority of the Company taking the form of a resolution passed by its directors as was held in *Troustik Union International v Jenny Mbeyu, Court of Appeal at Mombasa, Civil Appeal No. 145 of 1990 and (1993) KLR 230*.

45. Further, he states that by virtue of Section **79** of the Law of Succession Act, the property of the deceased, including the shares held by AKM Investments Ltd is vested in his legal representatives, namely his parents are not directors of the **1st** defendant. Further, he states that in *Civil Case No 3791 of 1993; I.Z Engineering Construction Ltd v Trade Bank Ltd & 2 Other* it was held that an advocate can only be authorised by the lawful directors or shareholders.

The advocates Reply

46. Wanja G. Wambugu, advocate reply vide her Replying affidavit dated **31st** March 2021 is threefold. *One*, that she was appointed to sue and defend on behalf of the company vide a company resolution annexed to her affidavit. *Two*, Serah Njeri Macharia is not an administrator to the deceased's estate. *Three*, the applicant lacks capacity to sue having been adjudged bankrupt by a court of law.

47. Dr. Samuel K. Macharia, swore the Replying affidavit dated **30th** April 2021. The key highlights of the affidavit are that together with his wife Serah Njeri Macharia they are the legal representatives of the deceased and that it is not true that W. G. Wambugu & co Advocate was appointed by AKM Investments Ltd to act for the company.

48. Serah Njeri Macharia, sued as part of the **2nd** defendant did not participate in this application. Counsel for the Plaintiff did not oppose the application. The other parties did not reply to the application or submit on the same.

49. The applicant's counsel submitted that there was no valid resolution authorizing the said firm her to act for the **1st** defendant. He cited *Ohaga & Akiba Bank**[14]*** for the proposition that where a client denies having authorized an advocate to act for it, the burden of proof is on that advocate to establish the retainer or that he was under instructions. Additionally, counsel cited *Kariuki Njoroge & 4 Others v Stephen Mugo Mutothori & 2 Others**[15]***and *Asia Pharmaceuticals v Nairobi Veterinary Center Limited**[16]*** for the proposition that a company can only sue in its own name with the sanction of its Board of Directors or under a resolution in general or special meeting. Further, counsel cited *Troustik Union International v Jenny Mbeyu**[17]*** for the holding that only legal representatives have the capacity to sue or defend a suit on behalf of an estate.

50. The **1st** defendant's counsel submitted that the **1st** defendant produced a CR12 showing its directors and shareholders as at **13th** January, 2021 and a copy of the **1st** defendant's minutes of the Board of Directors meeting held on **13th** October, 2020 resolving that the company appoints the firm of W.G Wambugu & Company Advocates to represent the company in the civil proceedings to protect and pursue the Company's interests. Counsel relied on *Bugerere Coffee Growers Ltd v Sebaduka & Another* and *Fidelity Commercial Bank Limited v Simon Maina Gachie**[18]*** which underscored the need for companies to pass resolutions when authorizing commencement of legal proceedings. Further reliance was placed on *Presybetarian Foundation & Another v East Africa Partnership Limited & Another**[19]*** for the holding that failure to file a resolution is not fatal.

51. Additionally, the court was referred to the definition of an advocate at section **2** of the Advocates Act *"any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ an Advocate and any person who is or may be liable to pay to an advocate any costs."* Also, counsel submitted that Dr. Samuel K. Macharia is not a director of the **1st** defendant, he has no locus or authority to instruct and/or appoint an Advocate on behalf of the **1st** defendant, and, in any event, he has been adjudged bankrupt by a court of law.

52. Lastly, counsel relied on *Safina Properties Ltd. v Migui Macharia Mungai & Another**[20]*** which decried the practice of advocates and clients coming to court because the decision as to who should or should not represent a company in court should be taken by the company itself.

53. A useful starting point is to mention that the profession of law is called a noble profession. It does not remain noble merely by calling it as such unless there is a continued, corresponding and expected performance of a noble profession. Its nobility has to be preserved, protected and promoted. An institution cannot survive in its name or on its past glory alone. The glory and greatness of an institution depends on its continued and meaningful performance with grace and dignity. The profession of law being noble and honourable one, it has to continue its meaningful, useful and purposeful performance inspired by and keeping in view the high and rich traditions consistent with its grace, dignity, utility and prestige.

54. A lawyer's duty to the court relates to his or her status as a professional who serves, not only clients, but also the public interest. A lawyer's duty to the court also helps to define the limits of the zealous representation of a client. Historically, a professional was distinguished from a tradesperson by a public declaration – demonstrated by the oath taken at admission to the Bar. This was captured by E.W. Roddenberry's 1953 article *Achieving Professionalism* in which he states:-

> *"It was probably inevitable that certain occupations requiring public avowals of faith or purpose should become known as professions. Originally, there were three: medicine, law, and theology. They were dignified by that title and set apart from other occupations because they were more than a livelihood: they represented a calling to some higher satisfaction than a commercial gain...Although rigorous asceticism was seldom required, doctors, lawyers and clergymen demonstrated enough selflessness down through the years to gain general respect."**[21]***

55. Addressing the need to create ethical boundaries within an adversarial system, Gavin MacKenzie in his article *The ethics of advocacy*[22] states: -

> *"Adversarial tactics tend to escalate despite the best of intentions in a competitive system. Lawyers adopt adversarial tactics...because to refrain from doing so would put their clients at a competitive disadvantage relative to the clients of lawyers who show no such restraint…We should be sceptical of justifications of questionable conduct that appeal to the ethics of the adversary system."*

56. On one hand, lawyers are asked to raise fearlessly every issue, advance every argument and ask every question, however, distasteful. On the other hand, a lawyer's duty to the court may take priority over the interests of the client. Without such limits being adequately defined and respected, the profession risks an ethical race to the bottom.

57. The courts must adhere to an exacting standard when considering motions to disqualify so as to discourage their use as a dilatory tactic. Thus, the burden is on the movant to establish with specificity a violation of one or more of the disciplinary rules or prove the grounds relied upon in the application. Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules or by simply alleging absence of instructions as has happened in this case will not suffice under this standard. However, I must point out that a court has the power, under appropriate circumstances, to disqualify an advocate, but the grounds cited must pass the high degree of scrutiny and the court must be satisfied that the application is not geared at obtaining a tactical advantage over the opposing counsel in a

case. The court must therefore determine whether, under the particular facts of the case, the application is *bona fide* and that the grounds cited are sufficiently proved to the required standard.

58. Disqualification is a severe remedy.[23] It can result in immediate and palpable harm, disrupt trial court proceedings, and deprive a party of the right to have counsel of choice.[24] In considering a motion to disqualify, the trial court must strictly adhere to an exacting standard to discourage a party from using the motion as a dilatory trial tactic.[25] This Court often looks to the disciplinary rules to decide disqualification issues or unethical conduct. Simply put to borrow from the language deployed in the Advocates Act, the test is whether an advocate has committed an act or conduct which amounts to professional misconduct to warrant the drastic orders sought. The applicant never suggested either directly or otherwise that the advocate id guilty of professional misconduct yet he is inviting the court to unleash such a drastic and draconian order. He never alleged or even suggested breach of rules governing professional conduct.

59. In *Julius Kimani Watenga v Advocates Disciplinary Tribunal, & 2 others and Mshamba Housing Co-operative Society Limited (Interested Party)*,[26] I observed that:-

> *"Advocacy is a noble profession and an advocate is the most accountable, privileged and erudite person of the society. Professional misconduct is the behaviour outside the bounds of what is considered acceptable or worthy of its membership by the governing body of a profession. Professional misconduct refers to disgraceful or dishonourable conduct not befitting an advocate. Generally legal profession is not a trade or business, it's a gracious, noble, and decontaminated profession of the society. The credibility and reputation of the profession depends upon the manner in which the members of the profession conduct themselves.*
>
> *Misconduct, according to Oxford dictionary means a wrongful, improper, or unlawful conduct motivated by premeditated act. It is a behavior not conforming to prevailing standards or laws, or dishonest or bad management, especially by persons entrusted or engaged to act on another's behalf. The expression professional misconduct in the simple sense means improper conduct. In law profession misconduct means an act done willfully with a wrong intention by the people engaged in the profession. It means any activity or behaviour of an advocate in violation of professional ethics for his selfish ends. If an act creates disrespect to his profession and makes him unworthy of being in the profession, it amounts to professional misconduct.*
>
> *To understand the scope and implication of the term 'misconduct', the context of the role and responsibility of an advocate should be kept in mind. Misconduct is a sufficiently wide expression, and need not necessarily imply the involvement of moral turpitude. 'Misconduct' per se has been defined in the Black's Law Dictionary to be "any transgression of some established and definite rule of action, a forbidden act, unlawful or improper behavior, willful in character, a dereliction of duty." In a different context, the Supreme Court of India opined that the word "misconduct" has no precise meaning, and its scope and ambit has to be construed with reference to the subject matter and context wherein the term occurs. In the context of misconduct of an advocate, any conduct that in any way renders an advocate unfit for the exercise of his profession, or is likely to hamper or embarrass the administration of justice may be considered to amount to misconduct, for which disciplinary action may be initiated.*
>
> *Misconduct is sufficiently comprehensive to include misfeasance as well as malfeasance. It includes unprofessional acts even though they are not inherently wrongful. The professional misconduct may consist the fact in any conduct, which tends to bring reproach on the legal profession or to alienate the favourable opinion which the public should entertain concerning it. In state of Punjab v Ram Singh[27] the Supreme Court of India held that the term misconduct may involve moral turpitude, it must be improper or wrong behaviour, unlawful behaviour, willful in character, a forbidden act, a transgression of established and definite rule of action or code of conduct, but not mere error of judgement, carelessness or negligence in performance of duty."*

60. In *Noratanman Courasia v. M. R. Murali* the Supreme Court of India explored the amplitude and extent of the words "professional misconduct." In arriving at the decision, the Supreme Court carried out an over-view of the jurisprudence of the courts in the area of misconduct of advocates. It reiterated that the term "misconduct" is incapable of a precise definition. Broadly speaking, it envisages any instance of breach of discipline. It means improper behavior, intentional wrongdoing or deliberate violation of a rule of standard of behavior. It stated that the term may also include wrongful intention, which is not a mere error of judgment. Therefore, "misconduct," though incapable of a precise definition, acquires its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty.

61. The standard of conduct of advocates flows from the broad cannons of ethics and high tome of behavior. Misconduct of advocates should thus be understood in a context-specific, dynamic sense, which captures the role of the advocate in the society at large. Misconduct is of infinite variety; the expression professional or other misconduct must be understood in their plain and natural meaning and there is no justification in restricting their natural meaning. The term misconduct usually implies an act done willfully with a wrong intention and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful.

62. The burden is on the party moving to disqualify counsel to establish with specificity a violation of one or more of the disciplinary rules or sufficient grounds to warrant such a drastic measure. [28]As stated earlier, mere allegations or evidence showing only a remote possibility of a breach will not suffice. The allegations must satisfy the exacting standards required in applications of this nature. The applicant premised his application on several grounds. *One,* that the firm of W.G. Wambugu & Co was not properly instructed by the **1st** defendant and that it is not supported by a valid resolution passed by the company's directors/shareholders. It was argued that the **3rd** defendant is not a director of the **1st** defendant and the persons who instructed the advocate are not directors. This argument fails on several fronts. *First,* as the applicant himself admits, the issue of directorship/shareholding of the company is subject to a pending dispute in court. Unless and until the issue is resolved by the court, the applicant cannot competently tell this court who are and who are not directors/shareholders.

63. *Second,* the advocate produced a CR 12, minutes and a company resolution authorizing the appointment. These are *prima facie* evidence of the directorship and her appointment unless the contrary is proved. The contrary can only be proved by the court handling the dispute on directorship/shareholding. The CR 12, the minutes/resolution before have not been impugned. Not with the material before me. The applicant also produced a CR12. This adds credence to the fact that there exists a dispute on the shareholding/directorship. The question of the bona fide directors/shareholding will be determined in the said dispute, not in the instant case. *Third,* it was argued that the **3rd** defendant

"purported" to be a director and the persons who instructed her are not directors. As stated above, the dispute of directorship is pending court resolution.

64. *Fourth*, the applicant argued that himself and his wife are the legal representatives of the deceased's estate and therefore the rightful persons to claim his shares in the **1st** defendant. However, this argument ignores the fact that Serah Njeri Macharia withdrew from the grant and has deposed on oath that she has nothing to do with the deceased's estate. Also, it ignores the fact the grant is subject to a pending court dispute.

65. *Fifth*, the applicant in support of his application placed reliance on the grant claiming it was issued to him and his wife and together they are the administrators of the deceased's estate. This line of argument contradicts the applicant's argument in opposition to the first application where he maintained that the same grant was obtained illegally and it is subject to a court dispute. Whereas in the first application he maintained that the grant in subject to a live court dispute, in the instant application he is advancing a diametrically opposed position.

66. Upon carefully analysing the facts, the law and the authorities and upon subjecting the applicants' grounds to the exacting standards required in applications of this nature, it is my finding that the thitd application does not qualify for any of the orders sought. The allegation that the firm of W.G. Wambugu & co advocates was not properly instructed are legally frail and cannot meet the heightened degree of scrutiny required in applications of this nature. The upshot is that the third application dated **16rd** February 2021 is dismissed with no orders as costs.

Orders accordingly.

SIGNED AND DATED AT NAIROBI VIA E-MAIL THIS 23RD DAY OF JULY, 2021.

JOHN M. MATIVO

JUDGE

---

[1] Krishnappa v. Shivappa, Bombay High Court, (1907) 5 Cal. L. J. 564.

[2] AIR 1953 SC 521.

[3] {1972} SC 30.

[4] {1979} AC 556.

[5] {2017} e KLR.

[6] {2013} e KLR

[7] As observed in State of Orissa vs. Sudhansu Sekhar Misra MANU/SC/0047/1967

[8] Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986

[9] Ibid

[10] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[11] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[12] Ibid

[13] Ibid

[14] {2008} 1 EA 300.

[15] {2004} e KLR

[16] {2000} e KLR.

[17] Court of Appeal at Mombasa, Civil Appeal No. 145 of 1990 and (1993) KLR 230.

[18] {2016} e KLR.

[19] Hccc No. 314 of 2012.

[20] {2010} e KLR.

[21] Scott, David W. Q.C., *Law Society of Upper Canada Report to Convocation of the Futures Task Force Working Group on Multi-discipline Partnerships* (September, 1998) cited in Paul Perell, "Elements of Professionalism" (Chief Justice of Ontario Advisory Committee on Professionalism June 2002) online: <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf> at 5.

[22] (1985) 19 Law Soc. of Upper Canada Gaz. 153-54.

[23]*Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex.1990).

[24] *See Hoggard v. Snodgrass*, 770 S.W.2d 577, 581 (Tex.App.-Dallas 1989, orig. proceeding).

[25] *Spears*, 797 S.W.2d at 656.

[26] JR No. 507 of 2017.

[28] In re Meador, 968 S.W.2d 346, 350 (Tex. 1998).