



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E405 OF 2018

VICTORY CONSTRUCTION LTD.....1ST PLAINTIFF

AVTER SINGH SURI.....2ND PLAINTIFF

VERSUS

KIRPAL SINGH.....1ST DEFENDANT

AMRITPAL SINGH.....2ND DEFENDANT

TECHNO ASPHALT LIMITED.....3RD DEFENDANT

RULING

INTRODUCTION

1. The 1st plaintiff is a limited liability company in which the 2nd plaintiff and the 1st and 2nd defendants are directors and shareholders. The 2nd plaintiff is also the same time the father of the 1st and 2nd defendants. The plaintiff's claim is that the 1st and 2nd defendants breached their duties as directors of the 1st plaintiff by withdrawing money from the plaintiff's bank account and further that they did not service the 1st plaintiff's loans with several banks thereby exposing the company to the threat of auction of its charged properties.

2. On 29th November 2018 the plaintiffs herein filed the instant suit against the defendants through the firm of LJA Associates Advocates seeking the following orders:

a) A permanent injunction be granted restraining the 1st and 2nd defendants from accessing or withdrawing funds from the 1st plaintiff's official bank with Bank of Baroda, A/C No. 958XXXXXXXXXXXX, Sarit Centre Branch.

b) A mandatory injunction be issued against the 1st and 2nd defendants for them to return all construction equipment belonging to the 1st plaintiff, being used by the defendant for a project in Thogoto where the 1st and 2nd defendants operate the 1st plaintiff's Bitumen Plant.

c) That the 1st and 2nd defendants do render accounts for all monies received from usage of the 1st plaintiff's equipment by the 3rd defendant for the project in Thogoto where the 1st and 2nd defendants operate the 1st plaintiff's Bitumen Plant.

d) That the 1st and 2nd defendants do render accounts for all monies received from usage of the 1st plaintiff's equipment and for funds divested from the 1st plaintiff's accounts for their use.

e) An order that the defendants do pay to the plaintiffs what is found due on taking the account.

f) Interest on (c) and (d) above.

g) Costs of this suit.

3. On 20th February 2019, the firm of C. W. Chege & Company Advocates filed a Notice of Change of advocates signifying that the 1st

plaintiff had instructed them to come on record for them in place of LJA Associates Advocates.

4. When the matter came up for mention on 21st February 2019, Justice Makau noted that there was a dispute over the legal representation of the 1st plaintiff as while the law firm of LJA & Associates maintained that they were still on record for the 1st plaintiff, the firm of C. W. Chege Advocates argued that they had been instructed to take over the case from the said firm of LJA Associates.

5. Makau J. then directed the firm of C. W. Chege & Company Advocates to file documents in court showing that the 1st plaintiff had passed a resolution to appoint them to act in the matter after which the court would determine the issue of representation.

6. On 6th March 2016, the case came up for mention when Miss Muthee, learned counsel for the 1st plaintiff informed the court that the firm of LJA Associates had filed a resolution of the 1st plaintiff made on 16th August 2018 appointing them to act in the suit while Mr. Chege also informed the court that his firm had similarly filed an affidavit sworn by one of the 1st plaintiff's directors and attached a resolution of the 1st plaintiff's board meeting made on 28th January 2019 wherein his law firm was appointed to act for the 1st plaintiff.

7. Counsel thereafter filed written submissions to address the dispute over the issue of representation of 1st plaintiff which they later highlighted during the hearing on 15th May 2019.

8. The issue for determination in this ruling is therefore the question of which law firm between the firm of LJA & Associates advocates and C.W. Chege & Company Advocates should represent the 1st plaintiff in these proceeding.

9. Miss Muthee, learned counsel for the plaintiffs submitted that the question before the court is whether the 1st plaintiff can be represented by two law firms at the same time and argued that under Order 1 Rule 1 of the Civil Procedure Rules, parties must make up their minds on whether they will be co-plaintiffs and act together. Counsel submitted that the firm of C.W. Chege could not purport to come on record for the plaintiff when the 1st plaintiff had not withdrawn instructions from the firm of LJA Associates and without the consent of the said LJA Associates.

10. It was submitted that there was mischief on the part of the 1st and 2nd defendant in passing the resolution to appoint C. W. Chege Advocates to act for the 1st plaintiff because it would effectively mean that the said firm was also acting for the 1st and 2nd defendants thereby making the said defendants co-plaintiffs in the suit. It was further submitted that there is no mandatory requirement under Order 4 Rule 1 of the Civil Procedure Rule, providing that the authority to file suit and resolution by the company must be filed at the same time with the suit.

11. It was submitted that the notice for the meeting in which a resolution was allegedly passed to authorize the firm of C. W. Chege to come on record for the 1st plaintiff was not served on all the directors.

12. Miss Kitui, learned counsel from the firm of C. W. Chege advocates submitted no resolution appointing LJA Associates Advocates to act for the 1st plaintiff was filed together with the suit. She urged the court to take judicial notice of an ongoing case, being HCCC No. 122 of 2008 in which the firm of C.W. Chege acts for the 1st plaintiff and maintained that there was need for a neutral firm of advocates to act for the 1st plaintiff and not the firm of LJA Associates which was also acting for the 2nd plaintiff.

13. Mr. Marangu, learned counsel for the defendants submitted that the defendants were not served with any notice to attend the meeting in which a resolution was passed to appoint LJA Associates to act for the 1st plaintiff.

Determination

14. I have considered the rival submissions made by the parties' respective counsel over the issue of representation of the 1st applicant.

15. In an ideal situation, a party to a suit should be in position to inform the court of the advocate appearing for him. In the instant case, however, the 1st applicant is a company and therefore not a living person capable of talking for itself but is represented by its directors who are apparently at war with each other as is evident from the pleadings filed herein.

16. This court has been called upon to ascertain the issue of legal representation of the 1st plaintiff. The second plaintiff avers that vide a special resolution dated 15th August 2018 the firm of LJA Associates was instructed to commence legal proceedings on behalf of the plaintiff. On their part, the 1st and 2nd defendants, who are also directors of the plaintiff, passed a resolution on 28th January 2019 at 11am in which they resolved that the firm of M/S C.W. Chege & Company Advocates would represent the plaintiff in the suit.

17. The advocate's authority to act stems from the board resolution. In this case, there are two resolutions which give instructions to two different law firms to act for the plaintiff. The next thing is to establish whether the resolutions are valid. The Plaintiff Company is bound by its Articles of Association which under Article 8 states that:

“the quorum for the transaction of business of the Directors may be fixed by the Directors and unless so fixed shall be TWO.”

18. In *Hood Sailmakers Ltd. v Axford & Another (1996) All E.R* it was held that if a resolution is passed in any way other than as authorized by the Articles of Association of the company, it is void and can transact no business.

19. Similarly *East African Safari Air Ltd v Anthony Kegode & Anor* [2011] eKLR Emukule J. had the following to say:

“When an Advocate is however instructed to file a suit, particularly against current or sitting directors or immediate former directors of the company, special care is required on the part of the Advocate or his firm that necessary authorizations by way of clear resolutions of the Board had been taken to institute the suit.”

20. In the instant case the Articles provide that a resolution can be passed by two directors which, in both instances, has been actualized. The defendants however submit that the resolution provided by the 2nd plaintiff is in the format of minutes making it incoherent thereby lacking in consistency. They further contend that the 2nd plaintiff was never issued with authority to institute the suit on behalf of the 1st plaintiff.

21. **Halsbury’s laws of England**, 4th edition, volume 3 (1) at page 369, states as follows on the issue of representation:

“A barrister ought not to accept instructions or a brief to represent two clients whose interest will or may conflict. if, after a barrister has accepted a set of instructions or a brief on behalf of more than one client, there appears to be a conflict of interest between any one or more of such clients, he may not continue to act for any such client unless all such clients consent that he should so act, and he is able to do so without embarrassment. even if there is no conflict of interest, when a barrister has accepted a set of instructions or held a brief for any party in any proceedings, he should not accept a set of instructions or a brief on an appeal or further stage in the proceedings for any other party without obtaining the prior approval and consent of the original client.”

22.