



Marriot Africa International Limited v Murigu & 3 others; Ukombozi Holdings Ltd (Interested Party); Kangaita Coffee Estate Limited (Counter Claimer); Trendsetters Investments Ltd & 4 others (Defendant to the Counterclaim) (Environment & Land Case 4 of 2021) [2023] KEELC 22073 (KLR) (27 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22073 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 4 OF 2021
JO MBOYA, J
NOVEMBER 27, 2023
[FORMERLY THIKA ELC CASE NO.115 OF 2019]

BETWEEN

MARRIOT AFRICA INTERNATIONAL LIMITED PLAINTIFF

AND

MARGARET NYAKINYUA MURIGU 1ST DEFENDANT

MARY WANJIKU KANYOTU 2ND DEFENDANT

WILLY KIHARA 3RD DEFENDANT

KANGAITA COFFEE ESTATES LIMITED 4TH DEFENDANT

AND

UKOMBOZI HOLDINGS LTD INTERESTED PARTY

AND

KANGAITA COFFEE ESTATE LIMITED COUNTER CLAIMER

AND

TRENDSETTERS INVESTMENTS LTD DEFENDANT TO THE COUNTERCLAIM

MARRIOT AFRICA INTERNATIONAL LTD DEFENDANT TO THE COUNTERCLAIM

UKOMBOZI HOLDINGS LTD DEFENDANT TO THE COUNTERCLAIM

THE CHIEF LAND REGISTRAR DEFENDANT TO THE COUNTERCLAIM



RULING

1. The instant matter was scheduled for further Re-examination of PW1, namely, Mr. Abdul Dawood Hassan, who had hitherto testified on the July 26, 2023; and was thereafter subjected to cross examination by the various advocates for the respective Parties.
2. However, when the matter came up on the November 15, 2023, the firm of M/s Mbugua Ng'ang'a & company Advocates filed a Notice of Change of Advocates for and on behalf of the 4th Defendant; and in respect of which same contended that the firm of M/s Mbugua Ng'ang'a & Co Advocates had been instructed and retained take over the conduct of the 4th Defendant's case from the firm of M/s Wahome & Akedi Advocates.
3. On the other hand, the firm of M/s Wahome & Akedi Advocates Contended that same were lawfully and duly retained by the legitimate Directors of the 4th Defendant and that on the contrary the firm of M/s Mbugua Ng'ang'a & Co Advocates, had not been duly and properly appointed to act for the 4th Defendant.
4. Arising from the foregoing, a scenario arose where two firms of advocates, were tussling over representation pertaining to and concerning the 4th Defendant and neither of the advocates was willing to give in on the question of Representation.
5. Consequently and in view of the foregoing, it became necessary and imperative that the Honorable court does take submissions from the rivaling Advocates; and thereafter make a determination as to who between the two [2] law firms is duly on record for the 4th Defendant.

Parties' Submissions:

a. Submissions By M/s Mbugua Ng'ang'a & Co Advocates:

6. On behalf of the law firm of M/s Mbugua Ng'ang'a & Co Advocates, it was contended that the Directors of the 4th Defendant, namely, John Kariuki Kanyottu, Kenneth Peter Njau and John Kariuki, as the administrator of Sandra Gathoni Kanyottu, respectively, convened and held a board meeting on the September 22, 2023.
7. Furthermore, Learned counsel on behalf of M/s Mbugua Ng'ang'a Advocates submitted that arising from and following the convention of the Board meeting of the 4th Defendant, a resolution was passed which, inter-alia, resolved that the 4th Defendant shall henceforth be represented by the Law firm of M/s Mbugua Ng'ang'a & Co Advocates.
8. Based on the foregoing, it was thereafter contended that the firm of M/s Mbugua Ng'ang'a & Co Advocates thereafter proceeded to and duly filed the Cotice of change of advocates; dated the November 10, 2023 and thus same are duly and lawfully on record for the 4th Defendant.
9. Secondly, it was submitted that the firm of M/s Wahome and Kedi Advocates, who have been on record for the 4th Defendant herein were neither instructed nor engaged by the 4th Defendant, either as alleged or at all.



10. Consequently and in the premises, M/s Mbugua Ng'ang'a & Co Advocates contended that the Notice of Appointment of advocate filed by M/s Wahome and Akedi Advcates, and all the attendant pleadings thereto, were therefore filed by a law firm without the requisite authorization and/or mandate.
11. In view of the foregoing, the law firm of M/s Mbugua Ng'ang'a & Co Advocates thus contended that the firm of M/s Wahome & Akedi Advocates has no mandate and/ or authority to purport to represent the 4th Defendant or at all.

b. Submissions By M/s Wahome & Akedi Advocates:

12. On behalf of M/s Wahome & Akedi Advocates, it was contended that the directors of the 4th Defendant, who are contended to have convened and held the board meeting alluded to on the September 22, 2023 did not have the requisite mandate and/or authority to do so.
13. Secondly, it was submitted that the persons who have been alluded to and contended to have convened and held the Board meeting on the September 29, 2023; are persons who had been restrained from purporting to interfere with the affairs of the 4th Defendant by dint of the orders of the Honourable court issued on the September 28, 2009.
14. For coherence, Learned counsel submitted that on the September 28, 2009; the Honorable Court granted an Order of Temporary injunction restraining, inter-alia, John Kariuki Kanyottu, Kenneth Peter Njau and Sandra Gathoni Njau, respectively, from interfering with the management and affairs of various companies, inter-alia, the 4th Defendant herein.
15. Nevertheless, Learned counsel added that despite the existence of the said orders, the named persons [details in terms of the preceding paragraph], purported to have convened and held a Board meeting of the 4th Defendant herein, which meeting, if any, constitutes Contempt of lawful court order.
16. Thirdly, Learned counsel submitted that the 4th Defendant herein has various Directors, who are seven (7) in number and therefore any Board resolution, ought to be executed and signed by a majority of Directors, who are not handicapped by the existing court order.
17. Lastly, Learned counsel submitted that the question of representation by and on behalf of the 4th Respondent has hitherto been canvassed and addressed by this Honourable court [differently constituted] and wherein the law firm of M/s Wahome & Akedi Advocates were confirmed to be duly and lawfully on record for the 4th Defendant.
18. Arising from the foregoing, Learned counsel therefore contended that the Notice of change (sic) Advocates filed by M/s Mbugua Ng'ang'a & Co Advocates, has therefore been filed albeit without the requisite authority and mandate of the 4th Defendant and thus ought to be expunged.

c. 2nd Defendant's Submissions:

19. On behalf of the 2nd Defendant, it was submitted that there is an affidavit sworn by one, namely, Christopher Kanyottu and which was sworn on the November 17, 2021; and wherein the said Deponent has Exhibited a Copy of CR12 of the 4th Defendant Company.
20. Additionally, Learned counsel for the 2nd Defendant has submitted that from the CR12 annexed to the affidavit of Christopher Kanyottu, it is evident and apparent that John Kariuki Kanyottu and Kenneth Peter Njau, respectively, are not Directors of the 4th Defendant company or at all.
21. Finally, Learned counsel for the 2nd Defendant has submitted that to the extent that John Kariuki Kanyottu and Kenneth Peter Njau, respectively, are not Directors of the 4th Defendant company, same



cannot therefore purport to convene the Board meeting of the 4th Defendant and thereafter purport to appoint (sic) the firm of M/s Mbugua Ng'ang'a & Co Advocates or otherwise.

d. Rejoinder Submissions By M/s Mbugua Ng'ang'a & Co Advocates:

22. It was contended on behalf of the firm of M/s Mbugua Ng'ang'a & Co Advocates that the order of Lady Justice Gacheru which had hitherto addressed the question of representation and the resolution by the 4th Defendant was limited to a particular suit and same was not to apply to and in respect of all matters touching on and concerning the 4th Defendant.
23. Secondly, it was contended that there is yet another suit, namely, Milimani High Court Commercial Number E551 of 2023 JR, wherein the CR12 alluded to by Learned counsel for the 2nd Defendant has been stayed. For coherence, Learned counsel cited and quoted the order issued on the August 1, 2023 by Lady Justice Njoki Mwangi, Judge.
24. In view of the foregoing, Learned counsel on behalf of M/s Mbugua Ng'ang'a & Co Advocates has therefore contended that John Kariuki Kanyottu, Kenneth Peter Njau and Sandra Gathoni, now deceased; represented by John Kariuki Kanyottu, are the lawful Directors of the 4th Defendant and thus authorized to transact the affairs of the 4th Defendant herein.

Issues for Determination

25. Having reviewed and considered the submissions made by and on behalf of the respective Advocates, the following issues do emerge and are thus worthy of determination;
 - i. Whether the Directors, who allegedly convened and held the Board meeting on the September 22, 2023, on behalf of the 4th Defendant, had the requisite authority and/or mandate to do so.
 - ii. Whether the Notice of Change by and on behalf of M/s Mbugua Ng'ang'a & Co Advocates on behalf of the 4th Defendant is lawful and legitimate.

Analysis And Determination

Issue Number 1

Whether the Directors, who allegedly convened and held the board meeting on the 22nd September 2023, on behalf of the 4th Defendant, had the requisite authority and/or mandate to do so.

26. Before venturing to deal with and address the issues herein, it is imperative to state and underscore that the 4th Defendant is a limited liability company incorporated pursuant to and in line with the provisions of the [Companies Act](#), Chapter 486 Laws of Kenya (now repealed) and replaced with [Companies Act](#), 2015.
27. To the extent that the 4th Defendant is a limited liability company, there is therefore no gainsaying that same is separate and distinct from her shareholders, subscribers and directors, irrespective of whether or not the said persons are the ones who receive the Profits and/or losses arising from the operations of the Company, namely, the 4th Defendant.
28. To this end, it suffices to recall and reiterate the dictum in the case of *Salmond versus Salmond* (1897) AC page 22, where the court stated and held thus;

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the



same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them not are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act...When the memorandum is duly signed and registered though there be only seven shares taken, the subscribers are a body corporate “capable forthwith” to use the words of the enactments, “of assuming all the functions of an incorporated company”

29. Having taken cognizance of the foregoing position, it is similarly important to observe and state that the affairs of a Company can only be managed and governed pursuant to lawful Board meetings convened and held by the Directors thereof, albeit in accordance with the provisions of the Articles of Association of the Company; culminating into Board resolutions.
30. Nevertheless, it is imperative to underscore that the Board meeting to be convened and held on behalf of the limited liability company, the 4th Defendant not excepted, must be convened by the authorized directors of the company, subject to the operative Regulations and not otherwise.
31. To this end, it is worthy to take cognizance of the holding of the Court in the case of *East African Portland Cement Ltd versus Capital Markets Authority & 4 Others* (2014)eKLR, where the court stated thus;

“The upshot of this consideration is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the Plaintiff”.

32. Furthermore, the role of the Directors of the company in propagating and managing the affairs of the company was also underscored in the case of *Post Bank Credit Limited (In Liquidation) versus Nyamangu Holdings Limited* [2015] eKLR, where the Honourable court held thus;

“And, although it is artificial person that does not possess the body of natural person, a company is a juristic person; a legal person in law. It exists only in contemplation of law. Because of its artificial nature, a company acts through human persons, namely, the directors, officers, shareholders, and corporate managers, etc., for its management and day to day running. But these individuals represent the company and accordingly whatever they do within the scope of the ostensible or authority conferred upon them by the Memorandum and Articles of Association, in the name and on behalf of the company, they bind the company and not themselves”.

33. With the foregoing in mind, it is now appropriate to revert back to the instant matter and to consider whether [sic] the persons who are said to have convened and held the Board meeting on the September 22, 2023; had the mandate and/or authority to act on behalf of the 4th Defendant.
34. To start with, it is worthy to recall that the High Court had issued an order on the September 28, 2009 vide High Court succession Cause No. 1239 of 2008, wherein the court, inter-alia, issued an order of Temporary injunction restraining various persons including, but not limited to John Kariuki Kanyottu, Kenneth Peter Njau and Sandra Gathoni Njau, respectively, from interfering with the management and shareholding in various companies, including but not limited to the 4th Defendant.
35. In my understanding the import and tenor of the order which was issued on the September 28, 2009, was to the effect that the named persons, were barred from, inter-alia, convening and/or holding any Board meetings touching and concerning the affairs of the 4th Defendant.



36. On the other hand, it is also worthy to note that the High Court vide Ruling issued on the November 8, 2013; similarly ordered and directed that the affairs of the various companies wherein one James Kanyottu, now deceased, was a majority shareholder could not be undertaken without the involvement of Jane Gathoni Kanyottu, Margaret Nyakinywa Murigu and Mary Wanjiku, respectively; who are the Joint administrators of the Estate of the deceased.
37. Additionally, my understanding of the tenor of the Ruling, which was delivered by Hon Justice Luca Kimaru, Judge (as he then was); was to the effect that the 1st and 2nd Defendants herein are critical persons in the convention and holding of any Board meetings that would affect/impact on the affairs of the 4th Defendant.
38. Notwithstanding the foregoing, it is contended that John Kariuki Kanyottu, Kenneth Peter Njau and Sandra Gathoni Njau, now deceased and represented by John Kariuki Kanyottu; purported to convened and hold a Board meeting of the 4th Defendant.
39. Furthermore, it has also been contended that arising from (sic) the Board meeting which was allegedly held on the September 22, 2023, the firm of M/s Mbugua Ng'ang'a Advocates was (sic) appointed to take over the conduct of the instant suit on behalf of the 4th Defendant.
40. Be that as it may, there is no gainsaying that the person(s) who are contended to have convened and held the Board meeting of the 4th Defendant, culminating into the resolution appointing the firm of M/s Mbugua Ng'ang'a & Co Advocates, are the very persons who had been restrained by lawful court orders from inter-alia, interfering with the affairs of the 4th Defendant.
41. Consequently and in the premises, the question that does arise and which this court must grapple with, touches on and concerns whether the impugned actions by the named persons, who were handicapped vide lawful court orders, could culminate into lawful resolutions or at all, capable of being acted upon.
42. Nevertheless, it is imperative to underscore that for as long as the court orders, which have been alluded to elsewhere hereinbefore continue to exist, any action to the contrary constitutes and amounts to contempt and therefore cannot birth any lawful resolutions.
43. Suffice it to point out that all the litigants and persons affected by a lawful court order, are under duty to obey and respect such court order, until and unless same are vacated, discharged, rescinded and/or quashed.
44. To buttress the foregoing position, it is appropriate to take cognizance of the dictum in the case of *Hadkinson versus Hadkinson* [1952] 2 All ER 567, 575, in which Denning LJ said:

“It is plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.

The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”
45. Insofar as the purported Board meeting held on the September 22, 2023, was convened and held by persons who had handicapped vide lawful court orders, the impugned Board meeting was therefore incapable of generating any lawful and valid resolutions or at all.
46. Further and in any event, where an action, the Board meeting and the resultant resolutions are taken in contravention of an existing court order, same amounts and constitutes to a nullity in law and thus have no effect, whatsoever.



47. Without belaboring the foregoing position, it suffices to cite and adopt the case of *Macfoy Versus United Africa Co. Ltd* [1961] 3 All E.R. 1169, where Lord Denning, whilst delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside.

It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

48. In a nutshell, I find and hold that the impugned Board meetings and the attendant resolution(s) arising there from, which are contended to have birthed the instructions in favor of M/s Mbugua Ng’ang’a & Co Advocates, were thus a nullity ab initio and hence cannot be the basis of the purported Notice of Change of Advocates.

Issue Number 2

Whether the Notice of Change by and on behalf of M/s Mbugua Ng’ang’a & Co Advocates on behalf of the 4th Defendant is lawful and legitimate.

49. Having found and held that the Board meeting and the consequential resolutions which gave birth to the instructions in favor of M/s Mbugua Ng’ang’a & Co Advocates were null and void ab initio, the question that remains outstanding and hence deserving of adjudication, is whether such resolution could therefore anchor the Notice of change of advocates.
50. To my mind, where an action and/or decision is illegal and a nullity ab initio, such an action cannot attract and/or anchor any lawful process or at all. Furthermore, it is appropriate to invoke and apply the Doctrine of Ex-Nihilo Nihil-fit [out of nothing comes nothing]
51. Premised on the foregoing observation, it is my humble, albeit considered view and holding that the impugned Notice of change of advocate dated the November 10, 2023; and filed by the firm of M/s Mbugua Ng’ang’a & Co Advocates was/is therefore a nullity.
52. Other than the foregoing, it is not lost on this Honourable court that the firm of M/s Mbugua Ng’ang’a & Co Advocates had also contended that the firm of M/s Wahome & Akedi Advocates, had not been duly and lawfully instructed by the 4th Defendant.
53. Additionally, the firm of M/s Mbugua Ng’ang’a & Co Advocates further contended that insofar as the firm of M/s Wahome & Akedi Advocates, had not been duly instructed, the documents and pleadings filed by the said law firm, were therefore a nullity.
54. Despite making the foregoing submissions, the firm of M/s Mbugua Ng’ang’a & Co Advocates, have nevertheless, purported to file a Notice of change of advocates (sic) to take over the conduct of the 4th Defendant’s case from M/s Wahome & Akedi Advocates.
55. Consequently, the question that does arise is whether or not the firm of M/s Mbugua Ng’ang’a & Co Advocates, can lawfully file a Notice of change of advocate, if at all, to take over from (sic) a law firm that is contended not to have been duly instructed in the first place.



56. Surely, the firm of M/s Mbugua Ng'ang'a & Co Advocates are approbating and reprobating [blowing hot and cold], at the same time and hence their arguments as pertains to the instruction or otherwise in favor of the firm of M/s Wahome & Akedi Advocates, must therefore be ignored.
57. To my mind, assuming for the sake of arguments only, if the firm of M/s Wahome & Akedi Advocates had not been duly instructed, then the only available recourse would be to apply to strike out and expunge the documents and pleadings filed thereto and not otherwise.
58. However, in respect of the instant matter, what the firm of M/s Mbugua Ng'ang'a & Co Advocates seeks to do is to take over the conduct of the 4th Defendant's case from the firm of M/s Wahome & Akedi Advocate and the act of taking over would denote that the firm of M/s Wahome & Akedi Advocates; were duly and lawfully instructed in the first instance.
59. Be that as it may, I have found and held that the firm of M/s Mbugua Ng'ang'a & Co Advocates were neither duly nor lawfully appointed to take over from the firm of M/s Wahome & Akedi Advocates or at all.
60. Consequently and in the premises, there is no gainsaying that the Notice of change of advocate dated the November 10, 2023; and filed by M/s Mbugua Ng'ang'a & Co Advocates, cannot therefore be deemed to be legally and validly on record or at all.

Final Disposition:

61. Arising from the foregoing analysis, it must have become crystal clear that the persons who (sic) purported to convene and hold the Board meeting of the 4th Defendant company on the September 22, 2023; were divested of the requisite mandate and/or capacity [Locus standi], to do so.
62. In the absence of the requisite mandate and capacity to call for and convene the Board meeting of the 4th Defendant, the attendant resolutions, inter-alia, the appointment of (sic) the firm of M/s Mbugua Ng'ang'a & Co Advocates, was therefore a nullity ab initio.
63. Consequently and in view of the foregoing, I am therefore minded to and Do hereby make the following orders;
 - i. The firm of M/s Mbugua Ng'ang'a & Co Advocates; were never duly and lawfully appointed by the 4th Defendant.
 - ii. The Notice of Change of Advocates dated the 10th November 2023; by the firm of M/s Mbugua Ng'ang'a & Co Advocates is illegal, unlawful and void.
 - iii. The Notice of Change of Advocates by the firm of M/s Mbugua Ng'ang'a & Co Advocates be and is hereby struck out and expunged from the record of the Honourable court.
 - iv. The firm of M/s Wahome & Akedi Advocates are lawfully on record for and on behalf of the 4th Defendant, until otherwise removed pursuant to lawful resolutions of the 4th Defendant in accordance with the Law.
 - v. Costs of the issue beforehand shall abide the outcome of the suit.
64. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2023.

OGUTTU MBOYA,



JUDGE

In the Presence of;

Benson Court Assistant

Mrs. Wangui Koech for the Plaintiff.

Ms. Kiunga h/b for Mr. Theuri for the 1st Defendant.

Mr. Ruiru Njoroge for the 3rd Defendant.

Mrs. Akedi for the 4th Defendant.

Mr. Isahi h/b for Mr. Ng'ang'a (sic) for the 4th Defendant

Ms. Waweru h/b for Mr. Thuita for the Interested Party.

Ms. Nyawira h/b for Mr. Allan Kamau for the 3rd and 4th Defendants to the Counter-claim.

