



**AWG v DNK & another; Gichaga (Proposed Interested Party) (Environment & Land  
Petition 4 of 2022) [2023] KEELC 21775 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21775 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 4 OF 2022  
LN MBUGUA, J  
NOVEMBER 21, 2023**

**BETWEEN**

**DR AWG ..... PETITIONER**

**AND**

**DR DNK ..... 1<sup>ST</sup> RESPONDENT**

**CRESCENT VIEW HOLDINGS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**DANIEL MAHIRI GICHAGA ..... PROPOSED INTERESTED PARTY**

**RULING**

1. The application dated 14.8.2023 is brought forth by one Daniel Mahiri Gichaga (a proposed Interested Party). He seeks orders to be enjoined in the suit as an interested party as well as orders that leave be granted to the firm of Jinaro & Company Advocates to come on record for him and the 2<sup>nd</sup> Respondent.
2. The Applicant further seeks a declaration that the consent dated 20.4.2023 was adopted as an order of the court through material non-disclosure of information, collusion and /or fraud, hence it should be set aside and declared void including any transactions on the property held by the 2<sup>nd</sup> Respondent based on the said consent.
3. The Applicant also seeks orders directed to the registrar of companies to reverse the change of directorship/shareholding of the 2<sup>nd</sup> Respondent to reflect 70% shareholding on himself and 30% shareholding on the Petitioner.
4. The application is based on grounds on its face and on the Applicant's supporting affidavit sworn on 14.8.2023. He avers that he has a majority shareholding in the 2<sup>nd</sup> Respondent (70%). That on 11.8.2023, he learnt that there was a consent recorded in this matter on 20.4.2023 by Agira &



- Associates Advocates purportedly acting for the 2<sup>nd</sup> Respondent which had the effect of removing him as a shareholder of the 2<sup>nd</sup> Respondent.
5. He avers that the 1<sup>st</sup> Respondent had already relinquished his shareholding/directorship to him and therefore had no capacity whatsoever to enter into a consent on anything touching on the 2<sup>nd</sup> Respondent and that in any event, he was very sick in his last days and passed away on 17.6.2023 thus he might not have permitted the events that led to the signing of the said consent.
  6. The Applicant also filed a supplementary affidavit sworn on 28.10.2023 annexing documents showing how he acquired shares in the 2<sup>nd</sup> Respondent.
  7. In response to the application, the Petitioner filed a Notice of preliminary objection dated 17.10.2023 stating that the Applicant has no locus standi to be enjoined as an interested Party as he does not meet the threshold set by order 1 rule 10 (2) of the Civil Procedure Rules. She also states that this court became functus officio after judgment was rendered and decree extracted thus it has no jurisdiction over the issues raised and that there is no pending suit upon which the application dated 14.8.2023 can be premised.
  8. The court directed the parties to file written submissions by 2.11.2021. As at 8.11.2021, only the Applicant had complied by filing his submissions which are dated 20.10.2023. He submits that the Petitioner's preliminary objection is not merited as it is not based on pure points of law. He argues that the court would have to dig facts to find whether he has a stake in the suit. He further submits that Order 1 Rule 10 (2) of the Civil Procedure Rules should not be read in isolation. Rule 7 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and common law also allow this court to enjoin parties in appropriate circumstances.
  9. It is also submitted that under order 10 rule 11 of the Civil Procedure Rules, this court has the power to set aside an order or judgement arising out of consent and the argument that there is no suit does not arise.
  10. In opposition to the Petitioner's preliminary objection, the Applicant relies on the case of *Mukhisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* 1969 EA 696.
  11. It was submitted that at the time of filing this suit, the 1<sup>st</sup> Respondent was no longer a director of the 2<sup>nd</sup> Respondent, thus he had no authority to execute consents which would affect the structure/ ownership of the 2<sup>nd</sup> Respondent.
  12. The Applicant also argues that he did not pass/execute any resolution to allow the commencement of the suit against any party, thereby rendering the entire petition defective. It is argued that the Petitioner being a minority shareholder could not have passed a resolution by herself without involving the majority shareholder.
  13. The Applicant also submits that he should have been enjoined since he is mentioned in the consent dated 20.4.2023 and he has a stake in terms of majority shareholding in the 2<sup>nd</sup> Respondent.
  14. It is also submitted that the threshold to set aside a consent order has been met. In support of his notice of motion application dated 14.8.2023, the Applicant relies on the cases of; Spire Bank Limited v Land Registrar & 2 others [2019] eKLR, Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd, Nairobi (Milimani) HCCC No. 391 of 2000, Communications Commission of Kenya and 4 others v Royal Media Services Limited & 7 others [2014] eKLR as well as the case of Samson Munikah Practicing as Munikah & Company Advocates v Wedube Estates Limited Nairobi Civil Appeal No. 126 of 2005.



15. It is settled law that a Preliminary Objection must raise a pure point of law. See *Oraro v Mbaja* [2005] eKLR. I have considered the grounds raised in the Preliminary Objection and I find that, all of them would require an interrogation of the facts herein.
16. On the consent dated 20.4.2023, I find that the same was entered into between advocates for the parties herein in Mediation Reference No. MLM/MED/279/2002. For a consent judgment to be set aside, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of the Court. See Board of Trustees National Social Security Fund versus Micheal Mwalo [2015] eKLR.
17. The Applicant argues that the consent recorded in this matter on 20.4.2023 was adopted as an order of the court through material non-disclosure of information that he is the majority shareholder of the 2<sup>nd</sup> Respondent and that by the time the consent was recorded, the 1<sup>st</sup> Respondent had no capacity to enter into any consent.
18. The Applicant annexed documents showing that vide a resolution dated 15.1.2021, the 1<sup>st</sup> Respondent transferred all his shares in the 2<sup>nd</sup> Respondent to him and voluntarily retired as its director.
19. Further, paragraph 5 of the consent in question states;

“That the shares transferred to Daniel Mahiri Gichaga in Crescent View Holdings Ltd, the 2<sup>nd</sup> Respondent during the pendency of the suit be reversed to Kamau David Ndungu, the 1<sup>st</sup> Respondent”
20. However, it is evident that as constituted on 20.4.2023, the parties had no capacity to sign the consent without the consent and or knowledge of the Applicant who was the majority shareholder at the time. On the said basis, the consent dated 20.4.2023 should be set aside.
21. On joinder the provisions of order 1 rule 10 (2) of the Civil Procedure Rules gives this court discretion to enjoin a party whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions in the suit.
22. The threshold set out in the case of *Francis Kariuki Muruatetu and Another v Republic & 5 Others* [2016] eKLR is that for admission as an interested party:

The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is merely peripheral.”
23. Further, in *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR, the court held;

“Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined....”
24. Having found that the Applicant was a majority shareholder at the time of entering into the impugned consent, and since he is directly affected by the litigation herein, and he was specifically mentioned in the consent, then I conclude that he has established grounds to be enjoined herein.
25. In the final analysis, the Preliminary Objection dated 17.10.2023 is dismissed while the application dated 14.8.2023 is allowed in the following terms:
  - i. Jinaro & Co. Advocates are allowed to come on record for the applicant and 2<sup>nd</sup> defendant.



- ii. Daniel Mahiri Gichaga is joined in these proceedings as an Interested Party.
- iii. The consent dated 20.4.2023 is hereby set aside and any transactions arising out of the said consent relating to share holding in the 2<sup>nd</sup> defendant are hereby set aside.
- iv. Each party is to bear their own costs of the preliminary objection and the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2023  
THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Keya holding brief for Njeru Nyaga for Petitioner

Kimtai for Applicant

A. Mwangi for 1<sup>st</sup> Respondent

