



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 424 OF 2016**

**IN THE MATTER OF AN APPLICATION BY MAGNATE VENTURES LIMITED OR THE  
ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE CIVIL PROCEDURE  
ACT, CAP 21 OF THE LAWS OF KENYA, THE ENVIRONMENT AND LAND COURT ACT,  
NO. 19 OF 2011, THE LAND REGISTRATION ACT, NO. 3 OF 2012, THE NATIONAL LAND  
COMMISSION ACT, NO. 5 OF 2012, THE LAND ACT, NO. 6 OF 2012 AND THE FAIR  
ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF MAGNATE VENTURES LIMITED**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION .....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF TITLES, NAIROBI.....2<sup>ND</sup> RESPONDENT**

**AND**

**MAJESTIC SECURITY SYSTEMS LIMITED.....INTERESTED PARTY**

**MAGNATE VENTURES LIMITED.....EX-PARTE**

**RULING ON LEGAL REPRESENTATION**

1. This ruling determines a preliminary issue on who is the legal counsel for the interested party – Majestic Security Systems Ltd as there are two advocates on record each claiming to be representing the interested party, Majestic Security Systems Limited.
2. The advocates concerned are Mr Kandie and Mr Njeru and the issue for determination is who,

legally speaking, is on record as representing the interested party.

3. Mr Kandie submitted, relying on the replying affidavit filed on 9<sup>th</sup> December 2016 and a further supplementary affidavit sworn on 16<sup>th</sup> January 2017 filed on the same date by Esther Jeanette Ngeny together with accompanying annexures and submissions filed on 16<sup>th</sup> January 2017 dated 9<sup>th</sup> December 2016.

4. According to Mr Kandie, Form CR 12 from the Registrar of Companies confirmed that the interested party had only 3 directors since its inception and that two of its directors are deceased. Further, that the main issue emanates from the purported change of directors done outside the purview of the Law and Regulations.

5. That the purported change of directors by Rahab K. Mukiyama and Titus Karauka Mukiyama was through a fake Power of Attorney that was not registered.

6. That the fake Power of Attorney claims that one of the deceased directors Mr Jack Kimkung signed the purported power of Attorney.

7. That in this case, Mr Njeru purports to represent Ms Rahab and Titus Kurauka Mukiyama.

8. It was contended by Mr Kandie that a limited liability company operates through a Board of Directors and for an advocate to be given instructions to represent a limited liability company, a resolution must be passed by a Board of Directors to appoint such counsel and an instructions note given to counsel to act upon it to represent the company.

9. That in this case, there is clear documentation from the Registrar of Companies and instructions given to Mr Kandie's firm of advocates by the Company.

10 Further, that Mr Kandie had instructions to represent the interested party before the National Land Commission while Mr Njeru did not represent the interested party but appeared for Rahab Mukiyama and Titus Mukiyama.

11. Mr Kandie urged the court to unravel the mystery on the issue of legal representation based on documents filed on record since the subject matter of the dispute is very prime land and since even the Registrar of Companies highly suspected fraud on the part of Rahab who applied for a duplicate copy of the Certificate of Incorporation as a director.

12. It was submitted that Rahab and Titus Mukiyama attempted to perpetuate fraud for purposes of transferring the property subject of this case without following due process hence the court should establish who, properly speaking represents the interested party company in these proceedings.

13. Mr Njeru on his part submitted contending that Mr Kandie is addressing issues of fraud which have nothing to do with the issue of legal representation. Further, counsel submitted that he did not see the need to file any affidavit on legal representation because the record is clear that Mr Kandie appears for Ms Esther Jeanet Ngeny as shown by her document from the Registrar of Companies, which are returns for the year 2015.

14. It was submitted that Esther Ngeny is a non director shareholder with nil shareholding of the interested party company. That since the directors/shareholders Mr Eric Naibei and Jack Kimkung died, Esther Ngeny is introduced in a scandalous fashion. That no director gave Mr Kandie instructions to represent the company.

15. That although Mr Naibei complained to the National Land Commission of fraud, he is the one who handed over the company to Mr Njeru's client interested party as represented by Rahab and Titus Mukiyama who in turn transferred the company to the exparte applicant, Magnet Ventures Limited, who are Mr Havi's client.

16. It was submitted that Mr Njeru's client could not be registered as a tax payer using fake documents. Further, that Esther Ngeny does not appear as director on the Memorandum and Articles of Association.

17. Further, that the issue fraud was investigated by CID and dismissed and that more so, the power of Attorney which was prepared by Mr Njeru's office was never used anywhere.

18. That his client took over the company after compensating Mr Naibei who was a director. Mr Njeru insisted that he was properly on record for interested party although he has no objection to Mr Kandie representing his client Esther Ngeny who is not a non director shareholder with no shares.

19. On the part of the ex parte applicant, it was submitted by Mr Havi that according to his clients, the person from whom his client obtained transfer of the company is the one who has proper legal representation before the court and that therefore Mr Njeru Nyaga the appropriate advocate for the interested party.

20. Mr Havi referred the court to the agreement for sale of the company which was signed by Rahab and Titus Mukiyama as Directors of the interested party company. It was submitted that none of the advocates have proved that they were appointed by directors of the interested party since CR 12 dated 9<sup>th</sup> November 2016 does not disclose that Rahab and Titus Mukiyama are Directors. Further, that Sections 105 and 135 of the Companies Act is clear that the register of members and directors is prima facie evidence of who directors and shareholders are unless the contrary is proven, and that the contrary is found in Sections 128-135 of the Companies Act.

21. That Esther Ngeny is a non director and that there is no evidence of how Mr Kandie was appointed in the manner set out in Articles 12 and 22 of the Interested Party's Articles of Association hence Mr Kandie could not have been instructed by Ms Esther Ngeny who is a non director who cannot purport to act as director to initiate litigation. As such, it was submitted that Form CR 12 is not conclusive evidence that Rahab and Titus Mukiyama are not directors of the interested party company. Mr Havi relied on the cases of **Re-chitembe Estates Ltd [2008] e KLR** and **Kabundu Holdings v Ali Ahmed T/A Sky Club Restaurant [2005] e KLR** where the court held that a company cannot have less than 2 directors or more than 7 directors.

22. That in this case, Rahab and Titus Mukiyama signed and executed an agreement under seal transferring the disputed property in favour of Magnate Ventures in the manner set out in Articles 12 and 22 of the Articles of Association of the interested party and that as the Registrar's letter of 3<sup>rd</sup> May 2012 shows that as at 8<sup>th</sup> January 2009 Rahab was on the Register, after being given original documents by the company through a sale.

23. According to Mr Havi, two forensic reports show that Naibei signed the agreement under the Power of Attorney.

24. According to Mr Havi, Rahab and Titus Mukiyama were on the Company's register but it is not clear how they exited the register and that the fact that the Director of Public Prosecutions closed the fraud investigations file is a clear indication that fraud cannot be relied on to raise similar issues before the National Land Commission by Mr Naibei since there was no criminal culpability on the part of Rahab and Titus Mukiyama.

25. In Mr Havi's view, Rahab and Titus Mukiyama are properly before the court to demonstrate their bona fides and that Naibei's Estate too is free to demonstrate its interest in the matter since he died before the issue he had raised before National Land Commission was resolved.

26. Miss Njuguna on behalf of the National Land Commission submitted that the issue was the manner in which the land was transferred and that CR 12 and the Power of Attorney are material to the Commission's determination of the issues of whether the transferors had capacity to do so transfer the property or not to the ex parte applicant.

27. In a rejoinder, Mr Kandie submitted that a limited liability company has perpetual succession whether the directors die or not.

28. Mr Njeru on the other hand maintained that his client was the proper party to these proceedings.

## **DETERMINATION**

29. I have considered the foregoing. The only issue for determination is who between Mr Kandie and Mr Njeru Nyaga represents the interested party therein-Majestic security Systems Ltd.

30. From the submissions of all the parties/advocates on record, it is clear that each of the natural persons Rahab; Titus and Esther claim to have interests in these proceedings, with Esther being found to be a non-shareholder director of the Interested party as per CR12 and no evidence of Rahab and Titus being directors- shareholders of the interested party, as correctly submitted by Mr Havi.

31. Nonetheless, CR 12 is only but prima facie evidence of directorship and the contrary could be proved by other evidence but which contrary evidence is beyond the scope of this ruling on legal representation as it touches on the merits of the substantive application. That being the case, albeit issues of fraud have been raised and argued extensively, to delve into the merits thereof will be to determine the merits of this case by installments which will prejudice the ultimate outcome thereof.

32. As it is clear that Esther Ngeny has interests in the company by virtue of her being found on CR 12 despite being a director non-shareholder - with no shares; and Ms Rahab and Titus Mukiyama too have an interest in the company though their names do not appear CR 12, it will not be appropriate to exclude any of the persons named from being represented by their respective advocates in these proceedings, whether they claim to be directors or not, of the interested party.

33. Since it is clear that Mr Kandie represents the interests of Esther Ngeny who claims that Rahab and Titus Mukiyama who are alleged to have fraudulently acquired the property from the late Naibei and transferred to the ex parte applicant, which allegations are vehemently denied by Rahab and Titus as shown by the submissions of Mr Havi counsel for the ex parte applicant, it is only fair and just that both Esther and her adversaries, Rahab and Titus are legally represented in these proceedings by their respective advocates, whether in their capacities as directors of the interested party or as persons who have an interest in the interested party company and or property subject of these proceedings.

34. Moreso, the record of proceedings before the National Land Commission show that Mr Kandie represented the interested party Majestic Security Systems Ltd. The issue of fraudulent transfer of the company was not considered but not fully canvassed by the National Land Commission in the decision of 4<sup>th</sup> August 2016 and parties were advised to pursue it through relevant jurisdictions.

35. This court is not that relevant jurisdiction to determine on merits the issue of fraudulent transfer of the company as it will only be concerned with the questions of jurisdiction, propriety, legality or reasonableness of the decision made by National Land Commission, especially the question of cancellation of the transfer of the land made to Magnate Ventures Limited and reversion thereto to Majestic Security Systems Limited.

36. In this case, since the issue of fraudulent transfer of the company and the property is at play, and as it is apparent that Esther Ngeny had adverse interests to those of Rahab and Titus Mukiyama, and as it is clear that each of them lay claim to the interested party company, the order that commends itself at this moment is to direct that Mr Kandie continues representing the interested party through Esther Ngeny while Mr Njeru Nyaga continues representing the interested party through Rahab and Titus Mukiyama who also claim the directorship of the interested party.

37. In the end, I decline to hold that any of the two advocates have a better entitlement of legal representation of the interested party Majestic Security Systems Limited. Each of the two advocates hereto, through their respective instructing clients are at liberty to advance their respective client's best

interests and arguments.

38 .I make no orders as to costs and direct that the main motion be set down for hearing inter parties.

Dated, signed and delivered in open court at Nairobi this 22<sup>nd</sup> day of May, 2017.

**R. E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Kandie for Interested Party through Esther Ngeny

Mr Miller h/b for Mr Njeru for Interested Party through Rahab and Titus Mukiama

And h/b for Mr Havi for the exparte applicant

Mr Wahome h/b for Mrs Njuguna for the 1<sup>st</sup> respondent

CA: George