



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
WINDING UP PETITION NO. 32 OF 2014

ERIC MUGENDI M'BARINE.....1ST PETITIONER

MICHAEL T. MAINA.....2ND PETITIONER

WALLACE MUGENDI MURUNGI.....3RD PETITIONER

VERSUS

ANTHONY MURIITHI M'BARINE.....RESPONDENT

MARINE POWER GENERATION LILMITED.....NOMINAL DEFENDANT

RULING NO. 3

1. The Petitioners filed an application dated 4th November 2015, seeking a declaration that the Resolution and the Minutes of the **MARINE POWER GENERATION LIMITED**, dated 4th September 2014 were invalid, null and void.
2. Those Resolutions/Minutes determined that the Law Firm of **WAMAE & ALLEN ADVOCATES** be appointed as the advocates for Marine Power Generation Limited (*hereinafter "the Company?"*).
3. The second prayer in the application dated 4th November 2015 was that the Notice of Appointment of Advocates dated 4th September 2014 had been filed without the authority of the company, and was therefore an abuse of the process of the court.
4. In the face of the application the company raised a Preliminary Objection, contending that the matters being raised in the application dated 4th November 2015 were *res judicata*.
5. According to the company, it must be remembered that by an application dated 28th May 2015 the petitioners had asked the court to strike off the Notice of Appointment filed by the Law Firm of Wamae & Allen Advocates.
6. The application dated 28th May 2015 was premised on an alleged conflict of interest because the company and the respondent had conflicting interests which could not, therefore, be handled by the same advocates.

7. By the time the court delivered its Ruling on the application dated 28th May 2015, the Law firm of Wamae & Allen Advocates was only representing the company. As I noted in my Ruling dated 23rd September 2015, the Law Firm of **KITHINJI MARETE & COMPANY ADVOCATES** had come on record as the advocates for the Respondent, **ANTHONY MURIITHI M'BARINE**, from 18th June 2015.

8. In the light of that development, I declared that the perceived conflict of interest, whether or not it existed, was no longer an issue which required a determination by the court.

9. If I had upheld the petitioners' submissions, I would have struck out the Law Firm of Wamae & Allen Advocates from the record.

10. That is the very same relief which the petitioners are seeking through the application dated 4th November 2015.

11. However, the route that the petitioners have set out to use, in order to get to the same destination is different. They now say that the resolution to appoint that Law Firm was a nullity.

12. The resolution was initiated by the Respondent, whose position the petitioners perceive to be in conflict with that of the company.

13. It was the Respondent who called for the meeting, and who, (*in the Notice calling for the meeting*) gave an extremely short period of time.

14. The petitioners thus believe that the respondent had deliberately made sure that they could not attend the meeting. That is not just because of the brevity of the notice calling the meeting, but also because the timing of the meeting was such that the directors who were resident in the United States of America could not be able to attend the meeting.

15. Why is that so?

16. The petitioners pointed out that the meeting was to be held at an hour which is the equivalent to 3.00 a.m. in **USA**.

17. If those submissions were to be canvassed by the petitioners, they would, effectively, be re-visiting the issue about the alleged conflict of interest. Such a move would definitely be barred by the doctrine of *res judicata*.

18. But I also hold the considered view that if the application dated 4th November 2015 was canvassed solely on the question as to whether or not the Resolution to appoint Wamae & Allen Advocates was a nullity, because it lacked the requisite authority, that aspect would not be *res judicata*.

19. Of course, I appreciate that there is a very thin line in this case between the assertion that there was a conflict of interest when the same Law Firm represented the Respondent and the Company; and the contention that the appointment of that Law Firm was done without authority.

20. In an ideal scenario, the petitioners should have raised the issues at one go. But I think that the distinction between the 2 issues is beyond being merely cosmetic. There is a subtle legal difference in the 2 issues.

21. Accordingly, I overrule the Preliminary Objection. I will allow the petitioners to canvass the application dated 4th November 2015. However, in order to ensure that the petitioners do not re-open the question about whether or not there had a conflict of interest, I direct that the parties will not peg any of their respective submissions on the question about whether or not the appointment of one Law Firm to represent the Respondent and the company gave rise to a conflict of interest.

22. The petitioners are awarded the costs of the Preliminary Objection, in any event.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of February 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Okeyo for the Petitioners

Miss Kiongi for Marete for the Respondent

Miss Kiongi for Gichuhi for the Nominal Respondent

Collins Odhiambo – Court clerk.