



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 253 OF 2009

DAVID M GITHERE. 1ST
PLAINTIFF/APPLICANT

ANDREW MATAZZA. 2ND
PLAINTIFF/APPLICANT

BOB KARINA. 3RD
PLAINTIFF/APPLICANT

PETER KUGURU. 4TH
PLAINTIFF/APPLICANT

JENIFFER N BARASSA. 5TH
PLAINTIFF/APPLICANT

BOSTON TANUI. 6TH
PLAINTIFF/APPLICANT

PAUL KAMLESH PATTNI. 7TH
PLAINTIFF/APPLICANT

ALEX MAGERO. 8TH
PLAINTIFF/APPLICANT

CHARLES MUNGE. 9TH
PLAINTIFF/APPLICANT

STEPHEN MBUGUA. 10TH
PLAINTIFF/APPLICANT

GEORGE WAINAINA. 11TH
PLAINTIFF/APPLICANT

SAM MURIITHI. 12TH
PLAINTIFF/APPLICANT

JOAN M MBALANYA. 13TH
PLAINTIFF/APPLICANT

MUGUTU MUCHEMI. 14TH
PLAINTIFF/APPLICANT

MOHAMMED ABBASA. 15TH
PLAINTIFF/APPLICANT

MURUNGI TURUCHIU. 16TH
PLAINTIFF/APPLICANT

KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY. 17TH
PLAINTIFF/APPLICANT

VERSUS

HON. WALTER E O NYAMBATI. 1ST
DEFENDANT/RESPONDENT

EDWARD S M JUMA. 2ND
DEFENDANT/RESPONDENT

REUBEN KIGATI. 3RD
DEFENDANT/RESPONDENT

SIMON N ONDIBA. 4TH
DEFENDANT/RESPONDENT

AND

KIPRONO KITTONY. 1ST
INTERESTED PARTY

LABAN RAO ONDITI. 2ND
INTERESTED PARTY

DR. SAMUEL THINGURI WARUATHE. 3RD
INTERESTED PARTY

GABRIEL MIUNGI. 4TH
INTERESTED PARTY

BERNARD BIFWOLI. 5TH
INTERESTED PARTY

ABDIRAHMAN MOHAMMED ABDILLE. 6TH
INTERESTED PARTY

HERMAN KISIKELIKASILI. 7TH
INTERESTED PARTY

EDWARD TENGA. 8TH
INTERESTED PARTY

JAMES NDUNGU MUREU. 9TH

INTERESTED PARTY

SIMON TOO KOECH. 10TH

INTERESTED PARTY

BENJAMIN ONKOPA NYOOCHI. 11TH

INTERESTED PARTY

R U L I N G

The application before the court is the Notice of Motion dated 30th April, 2015 which seeks a determination of the firm of advocates that rightly represents the National Chamber of Commerce and Industry, the 17th Plaintiff in the main suit.

It is not in dispute that there has been serious dispute as to which is the right and/or lawful Board of Directors which should lawfully exercise and lawful functions and powers of the institution or Company known as the Kenya National Chamber of Commerce & Industry. It is alleged, and not without good cause, that no proper elections have recently been held by the members of the above institution. Whenever elections were scheduled and some form of such elections was held, the resulting elections were never easily accepted by rival groups. Such groups would deny such results and would fight them off even through the office of the Registrar General.

It is during similar circumstances as are described above that the courts have also been thrown into the arena. The record of the material in support of this application appears to show the following situation: -

As a result of the court ruling by Mwera, J in HCCC No. 253 of 2009, the said court with a view, to end the long wrangling and disputes between rival groups ordered that Kenya National Chamber of Commerce & Industry do hold official elections of various offices, both regional and National. Such elections were held on the 18th June, 2012 during a special Annual General Meeting as ordered by the Court under above the cited court case.

It appears that during the said elections, the following persons were elected to the Board of Directors: -

1. Kiprono Kittony
2. Laban Rao Onditi
3. Dr. Samuel Thinguri Waruathe
4. Gabriel Miungi
5. Bernard Bifwoli
6. Abdirahman Mohammed Abdille
7. Herman Kisikelikasili
8. Edward Tenga
9. James Ndungu Mureu
10. Simon Too Koech
11. Benjamin Onkoba Nyoochi

However, immediately the election results were declared, the new group which was due to be registered by the Registrar of Companies as the new Board of Directors, was not so registered because a rival group defeated in the same election objected to the said elections and the intended registration and confirmation. The said group filed a suit in this court, being JR Misc. Application No. 251 of 2012. On 18th June, 2012, the court issued an interim stay order barring the registration of the elected group cited above, until the application would be heard and determined.

In the meantime, the JR Misc. Application No. 251 of 2012 continued being mentioned before the

court and was before Ougo, J on 19th March, 2013. It is clear from the record however, that the Applicants in that application for some reason, deliberate or otherwise failed to seek an extension of the interim stay order which had barred the confirmation and registration of the Board of Directors elected on 18th June, 2012 aforesaid.

It is then the elected group of Directors appears to have moved quickly, and on the 23rd March, 2013, taking advantage of the lacuna, requested the confirmation and registration of the elected names. The Senior Deputy Registrar-General, by a letter dated 27th March, 2013 and directed to the said directors, confirmed the registration of the said Board of Directors. As things stand the same names so registered, remain as directors to the present moment although the rival group did not give up hope. The group has all along thereafter tried to oust the registered group using every possible method available to them.

For example on 4th August, 2014 the revival groups appear to have approached this court through the Deputy Registrar and filed in this file, a purported consent order between the Plaintiffs then represented by the firm of Ochieng Ogutu & Company Advocate on the one hand and the Defendants, represented by the firm of Ogessa and Company Advocates of the second part. The consent presented a list of eleven names, all picked from the rival groups, which were to be deemed as directors of the Kenya National Chamber of Commerce & Industry until fresh elections are held in the future. On filing the purported “**consent**” in court, the groups’ advocates requested the Deputy Registrar to enter the consent as an order of court, which the Deputy Registrar did and then sealed it on 6th August, 2014. He issued the same as an extract to them on the 7th August, 2014. The odd factor about the said consent however, is that it was processed and filed without the input or participation of the duly elected and registered group.

As earlier stated, the present Board of Directors elected on 18th June, 2012, was registered by the Registrar-General as such directors and officials, on the 27rd March, 2013. They found the Company then being legally represented in this case by the firm of Gikera & Company Advocates. On 12th April, 2013 the Board instructed the firm of Kihara Njuguna & company Advocates to take over their legal representation through a company resolution of the same day. Kihara Njuguna & Company then filed a Notice of Change of Advocate dated the 19th May, 2014 on the same day. The same was then served on Ochieng Ogutu & Company on 20th May, 2014, Ogessa & Company on 20th May, 2014, Gikera & Company on 21st May, 2014, Arimi Kimathi & Company on 21st May, 2014, and Chelanga & Company on 20th May, 2014.

The court found it necessary to record the events shown above in order to bring out the basis of the dispute of legal representation now before the court between the firm of Kihara Njuguna & Company Advocates and that of Kenyatta Odiwour & Company Advocates.

It is deposed by Mr. Kenyatta Odiwour for his firm, which is not contradicted, that his firm was appointed to represent Kenya National Chamber of Commerce & Industry on the 27th August, 2014. He was appointed by one Mr. Simon Nyamanya Ondiba, who claimed to Mr. Kenyatta, to be the Vice Chairman and who gave Mr. Kenyatta Advocate a Special Board Resolution purportedly passed on the 27th August, 2014, being the same day of purported appointment (See Annexure ANN2). Mr. Kenyatta conceded that the alleged Vice Chairman belonged to the rival group which was purportedly appointed by a consent order registered in this court file by Deputy Registrar. He did not claim that the duly elected and eventually registered Board of Directors was privy to or was a signatory to the consent order filed by the advocates representing the other Plaintiffs, aside of the National Chamber of Commerce & Industry – the 17th Plaintiff.

Furthermore, Mr. Kenyatta Advocate did not claim that he was not aware that the so called Vice Chairman, who appointed him to represent the Company, was not one of the Board of Directors who was at the material time, duly registered by the Registrar-General. Mr. Kenyatta did not for a moment question the validity of his appointment and if he did, he clearly recklessly decided to act as if he was properly and

lawfully appointed.

He then must have realized that he had serious obstacles he had to overcome before he could settle down to enjoy the appointment. He first had to remove from the record the firm of Kihara Njuguna & Company who had been appointed by the duly registered Board of Directors. Without notifying them, Mr. Kenyatta on 2nd September, 2014 just went ahead and filed a Notice of Change of Advocates dated the 29th August, 2014, thus effecting change of advocates, from Kihara Njuguna & Company to that of Kenyatta Odiwour & Co. However, when he served the Notice of Change upon Kihara Njuguna & Co. on 3rd September, 2014, the latter wrote back to his firm on 4th September, 2014 and indicated that his appointment was invalid as it was not done by the duly elected and registered Board of Directors.

But clearly, as shown on record and conceded by Mr. Kenyatta himself, that information from Kihara Njuguna & Co. did not warn or even caution Mr. Kenyatta to stop and look at the issue again. He did not even find it necessary to respond to the letter from Kihara Njuguna & Co. which questioned his firm's whole purported legal representation of the 17th Plaintiff and which clearly brought out such a conflict of interest against his firm as against that of Kihara Njuguna & Co. that it called for conversation between the two legal firms and their client.

The record further shows that the earlier cited consent signed by several advocates had been filed and entered as an order by the Deputy Registrar. Mr. Kenyatta conceded that the consent was the basis of his firm's acceptance of instructions to act for the 17th Plaintiff. He averred that since the Vice Chairperson who instructed him was in the Group of the members whose names were in the recorded consent, then he saw no reason not to accept the instructions to act.

In the meantime, Kihara Njuguna & Co. had noted that the abovementioned consent purporting to appoint a rival group into the Board of Directors of the 17th Plaintiff, notwithstanding the existence of the properly elected and registered Board. His instructions were to file an application which they did on 5th August, 2014 for stay of implementation of the purported consent orders.

It is not denied by Kenyatta Odiwour's Firm, that in the meantime they on 3rd September, 2014 filed a notice of withdrawal of the application filed by Kihara Njuguna & Co. The ground they did so, was that they were now on record for the Kenya National Chamber of Commerce & Industry and had instructions to withdraw the said application filed by the 17th Plaintiff, through Kihara Njuguna & Co.

As things stand presently, several other parties inclusive of others who are named as Third Parties, thereafter filed several other applications related to the cited Consent Orders. There are withdrawals or purported withdrawals by several parties awaiting determination by this court. What presently requires determination is whether it is Kenyatta Odiwour & Co. Advocates or Kiahra Njuguna & Co. Advocates who are properly on this record for the Kenya National Chamber of Commerce & Industry, the 17th Plaintiff.

The court has put on the record the above information to show how either firm came on and remains on record.

I have carefully considered the issue. There is no dispute that an election of the Kenya National Chamber of Commerce & Industry was ordered by this court by the orders of Mwera J, on 20th July, 2011. The elections took place on 18th June, 2012 and the present Registered Board of Directors was elected. From the record, the said Board could not be registered by the Registrar-General because an interim order barring such registration sought by the rival group in the elections was obtained on the same date of elections. However, it is not also denied that when the interim order aforesaid was not extended by the court on 19th March, 2013, the duly elected members of the Board of Directors were registered and confirmed by the Registrar-General on 27th march, 2013.

It is further clear from the record and Mr. Kenyatta Odiwour so conceded during the canvassing of this

application, that, the person and officer who instructed him knew and was well informed of the above situation and facts.

It is also not denied, therefore, that the rival Group(s) together with the advocates, Ochieng Oguttu and Ogessa & Company, who filed the purported a rival group of a Board of Directors through an order of court recorded by the Deputy Registrar on 6th August, 2014, did so while properly informed that unless the rival group of Board of Directors, Members successfully replaced the already registered elected group, it would become a cropper from day one. Indeed it is not clear whether they after recording the consent, tried to register the consent order and the new group with the Registrar-General. If they did, they must have failed since the elected group is still registered to the present time.

In the meantime, the so called court-appointed group did a lot to over-turn all activities that had been put in place by the elected group. They, among other activities, appointed the firm of Kenyatta Odiwour & Co. to withdraw an application filed by Kihara Njuguna to stay the consent orders filed in court by them.

Be that what it may, the correct legal situation is that the consent orders were halted by further orders of this court. Whether or not Kenyatta Odiwour & Co. knew that they were appointed by so called Vice Chairpersons of a rival group which had no lawful authority to appoint his firm, is really of no legal consequence. The proper position is and remains that the Board of Directors who was properly elected, confirmed and registered did not appoint Kenyatta Odiwour's firm nor did approve the firm's appointment. On the other hand, the lawfully elected, confirmed and registered group of the Board of Directors, had appointed the firm of Kihara Njuguna & Co. in the year 2012 and have not to date withdrawn the same.

This court notes also as earlier mentioned, that the firm of Kenyatta Odiwour's Company, did not wish or bother to clarify the situation of its own appointment. The firm did not consult with Kihara Njuguna & Co. who were on record before the former contemptuously purported to remove them by notice of change. Even after Kihara Njuguna & Co. wrote to Kenyatta Odiwour & Co explaining that they were on record without lawful authority (which must have obvious to Kenyatta Odiwour & Company), the latter did not even have the professional courtesy to reply to the letter. This clearly shows that Kenyatta Odiwour & Co. entered the frey between the rivaling clients groups and were ready to be used, even to the extent of operating recklessly and unprofessionally, as the record bears out.

In the view of this court, the court should in future firmly deal with parties and counsel who clearly may be operating fraudulently and/or unprofessionally, thus prejudicing the rights of those who are members of the Kenya National Chamber of Commerce and Industry.

Be the above as it may, the final result of this application is that the properly appointed legal firm to represent the Kenya National Chamber of Commerce & Industry in this case, is the firm of Kihara Njuguna & Co. Advocates, and not the firm of Kenyatta Odiwour & Company. In consequence, all acts performed by the firm of Kenyatta Odiwour & Company in this case are hereby declared null and *void abinitio*. Orders are made accordingly with costs of this application to the respondents.

Dated and delivered at Nairobi this 28th day of July, 2015.

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D A ONYANCHA

JUDGE