



**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.....1<sup>ST</sup> PETITIONER

MICHAEL T. MAINA.....2<sup>ND</sup> PETITIONER

WALLACE MUGENDI MURUNGI.....3<sup>RD</sup> PETITIONER

VERSUS

ANTHONY MURIITHI M'BARINE.....RESPONDENT

MARINE POWER GENERATION LILIMITED.....NOMINAL DEFENDANT

**RULING NO. 2**

1. The application dated 28<sup>th</sup> May 2015 was filed by the Petitioners. It is an application which seeks the following substantive reliefs;

- a. *A temporary injunction to restrain the Company (MARINE POWER GENERATION LIMITED) from holding the Board Meeting scheduled for 29<sup>th</sup> May 2015:*
- b. *A Declaration that the Respondents were in breach of the Court Orders made on 7<sup>th</sup> May 2015.*
- c. *A Declaration that the resolutions purportedly passed on 6<sup>th</sup> May 2015, concerning the execution of the amended Shareholders Agreement was null and void.*
- d. *A Declaration that there was an apparent conflict of interest arising from the fact that the Law Firm of WAMAE & ALLEN ADVOCATES were representing the Company as well as the Respondents. Therefore, the company ought to have independent and impartial legal representation.*

2. In the understanding of the petitioners, one Law Firm could not represent both the Company and the Respondent, as the said Respondent was alleged to have been undertaking actions which were prejudicial to the wellbeing of the Company.

3. For that reason, the petitioners submitted that the firm of Wamae & Allen Advocates should be stopped from acting for the Company.

4. The medium chosen by the petitioners, to have the firm of Wamae & Allen cease acting for the company was the striking off, from the Court records, of the Notice of Appointment of Advocates, which had been filed by those lawyers on 4<sup>th</sup> September 2014.

5. In order to place the application in perspective, the petitioners started by pointing out that the very foundation of the substantive petition was the desire by the petitioners to obtain court orders to stop the Respondent, (**ANTHONY MURITHI M'BARINE**), from continuing with his oppressive conduct when running the affairs of the Company.

6. The petitioners, (**ERICK MUGENDI M'BARINE; MIKE T. MAINA and WALLACE MUGENDI MURUNGI**) were shareholders in the Company, **MARINE POWER GENERATION LIMITED**.

7. The Respondent, **ANTHONY MURRITHI M'BARINE**, was also a shareholder in the Company.

8. It was the petitioners' case that the Respondent had conducted the affairs of the Company in an oppressive manner, to the detriment of both the Petitioners and of the Company itself.

9. The parties did, on 25<sup>th</sup> March 2015, agree to refer the dispute to Mediation. On that date, the following Orders were recorded, with the consent of the parties;

***“1. The matter is hereby referred to Mediation.***

***2. The parties are to agree on the Mediator.***

***3. Mention on 04/05/2015 to either record a settlement or to receive a report on the progress in the mediation process.***

***4. As a part of the Mediation process, the Respondents shall make full disclosure to the Petitioners”.***

10. Regrettably, when the case was mentioned before the Court on 4<sup>th</sup> May 2015, the process of Mediation was yet to start.

11. According to the petitioners, the conduct of the Respondent was directly responsible for the failure of the intended Mediation. In particular, the Respondent was said to have withheld necessary documentation from the Petitioners.

12. It was the petitioners case that the parties did agree on how the Respondent was to enable the petitioners to have access to the documents. However, the Respondent, reportedly, failed to do the needful, within the time-span that had been agreed upon.

13. The petitioners therefore blamed the Respondent for the failure of the Mediation process getting off the ground. That was not just because of the failure to provide documents within the agreed time, but even more so because the Respondent is alleged to have refused to make a complete disclosure.

14. In the light of the fact that this court had directed the Respondent to make full disclosure, the petitioners asked the Court to make a finding that the Respondent had failed to comply with the Orders of the Court.

15. The petitioners also complained that the Respondent had violated the Court Orders which had barred the Company from executing any documents which could have the effect of altering the shareholding, the structure; the directors or the ownership of the Company.

16. According to the petitioners, a Resolution had been passed, making **DAVID KABIRU** a director of the company. That Resolution was deemed to be an express violation of the Court Orders, because it constituted an alteration of the structure of management of **MARINE POWER GENERATION LIMITED** (*the Company*).

17. On the other hand, the Respondent insists that it was the petitioners who refused to participate in the Mediation process.

18. Why does he say so?
19. As far as the Respondent was concerned, he had made available all the relevant documents.
20. The Respondent also drew the court's attention to the fact that the Mediator had given some directions to the parties. Those directions included the requirement that the Mediation Agreement be signed by the parties.
21. Notwithstanding the said directions, the 1<sup>st</sup> petitioner, **ERICK MUGENDI M'BARINE**, was the only petitioner to sign the Mediation Agreement. The failure by the other 2 petitioners, to sign the Agreement, was seen, by the Respondent as an indication that those 2 petitioners were not actually parties to the petition herein.
22. Meanwhile, as regards the attempt to stop the Company from holding the meeting scheduled for 29<sup>th</sup> May 2015, the Respondent pointed out that the meeting had already taken place. Therefore, the attempt to stop it, had already been overtaken by events.
23. In a literal sense, when a party tries to stop something from happening, he cannot do so after the thing had happened. That could be the simple answer to the petitioners' attempt to stop a meeting which had already been held.
24. However, that does not address the substantive issue, concerning the alleged violation of Court orders, which had, in the understanding of the petitioners', stopped the Company from executing documents which could alter the shareholding, the structure or the Directors of the said Company.
25. The Respondent pointed out that on 25<sup>th</sup> March 2015, the Respondent offered to incorporate into the Shareholders Agreement, the fact that this case was in existence.
26. The Court vividly recollects that the Company and the Respondent offered to make a written disclosure, in the Shareholders' Agreement, of the fact that there existed a dispute regarding the shareholding and the Directorships within the Company.
27. The said disclosure, in my understanding, was intended to bring it to the attention of any Third parties who would be involved in negotiations with the company, that there was an un-resolved dispute between the original directors and shareholders, concerning their respective rights in the Company.
28. If any person struck a deal with the Company, when such person was aware of the un-resolved dispute, it would thereafter have been possible to remedy the issue, after the dispute was resolved.
29. In answer to the offer, the petitioners said that it was not necessary to factor into the Shareholders' Agreement, the fact that the directors and shareholders had an un-resolved dispute.
30. In the circumstances, if any Third Parties were to strike a deal with the Company, it could thereafter become difficult to find fault with the Third Parties who might have altered their respective legal positions, when they did not have notice of the dispute pitting the petitioners against the Respondent.
31. Nonetheless, the petitioners did not accept the offer. I must say that I have not understood the reasons which prompted the petitioners to reject the offer. However, the Court respects the right of the petitioners, to reject the offer.
32. The question that now arises is whether or not the petitioners were now estopped from challenging the resolutions made at the meeting held or if the resolutions ought to be set aside, because they were made at a meeting which should not have been held.
33. The Respondent's position was that the petitioners were acting in a way which was inequitable. The Respondent believes that the petitioners did not have the best interests of the Company at heart. The

reason for so believing was that the resolutions which were passed at the meeting which is now being challenged, were said to be beneficial to the Company.

34. Of course, if a resolution was definitely going to be beneficial to a company in which I held shares, I would be expected to support such a resolution.

35. However, the fact that a resolution may be beneficial to the company, cannot be sufficient reason to justify the irregular route which was used to arrive at the resolution: That is what the petitioners are saying.

36. But the Respondent contends that the proper persons, tasked with the responsibility of resolving disputes in a company are the shareholders. Therefore, because the resolutions passed at the meeting on 29<sup>th</sup> May 2015 have not been shown to be ultra vires the memo and articles of the Company, the Respondent suggested that they should not be set aside by the court.

37. On my part, I hold the view that if the meeting had been barred by an order of this court, it should never have taken place.

38. The fact that the resolutions passed at the meeting were either beneficial to the company or that the said resolutions were not ultra vires to the memo and articles of the company, cannot exonerate the company from the consequences of violating the orders of the court.

***Which are the orders which were allegedly violated in this case?***

39. The petitioners identified them as those made on 7<sup>th</sup> May 2015. And the said orders are in the following terms;

“By consent:

1. ***The petition is referred to Mediation.***
2. ***Dr. Kariuki Muigua shall be the Mediator.***
3. ***The process of Mediation shall be concluded and a Report thereof made available to the Court and to the parties within the next 30 days.***
4. ***In order to facilitate the process of mediation, the Respondents will provide the petitioners and the Mediator with all the documents under their control and custody.***
5. ***The Nominal Respondent shall be restrained from executing any documents which will have the effect of altering the shareholding, structure, directors or ownership of the company. This Order will remain in force for the next 30 days, or until further order of the court, so as to safeguard the subject matter of the Mediation.***
6. ***The parties will have liberty to apply.***
7. ***The Respondents will provide the documents to the petitioners within the next 7 days.***
8. ***Mention on 04/06/2015, to get a progress report”***

40. From that consent order, the following facts are clear;

a) **Discovery of Documents**

***The Respondent was required to make available to the petitioners ALL THE DOCUMENTS UNDER HIS CONTROL AND CUSTODY.***

***Therefore, it was not for the Respondent to choose and pick “the Relevant Documents”, as he appears to have done.***

***To the extent that the Respondent withheld some documents from the petitioners, he violated the consent order.***

b) **FRUSTRATION OF THE MEDIATION PROCESS**

*Mediation is a process which is conducted voluntarily. It is facilitated and moderated by the Mediator, who is thereafter precluded from revealing to the court, or to anybody else, the happenings during the process.*

*If any person should be in the position to determine which of the parties frustrated the conduct of mediation, it can only be the Mediator.*

*If the court delved into the question about who did or did not frustrate the mediation process, it would have trespassed into the jurisdiction of the mediator: I decline to do so.*

c) **Meeting of 29<sup>th</sup> May 2015**

*The court did not expressly bar the Company from holding the meeting of 29<sup>th</sup> May 2015, or any other meeting.*

*It is the company which was barred from executing any documents which could alter the shareholding, structure, directors or ownership of the Company.*

*Thus, the meeting of itself, could have proceeded. But if the said meeting passed any resolution which altered the company's shareholding, structure, ownership or directors, such a resolution constituted an express violation of the orders of this court.*

41. In that respect, before the Court can give the final orders, the parties will be given an opportunity to address the court on the Resolution (s) which the petitioners say, altered the set-up of the Company.

42. Finally, on the issue of Legal Representation, I note that the Firm of **WAMAE ALLEN & COMPANY ADVOCATES** are currently only representing the Company.

43. On 18<sup>th</sup> June 2015, the Law Firm of **KITHINJI MARETE & COMPANY ADVOCATES** filed a Notice of Change of Advocates. They now represent the Respondent.

44. Therefore, the perceived conflict of interest, whether or not it existed, is no longer an issue requiring determination.

45. The petitioners now assert that Mr. Allen Gichuhi ought not to be allowed to act for the Company because the said lawyer was actually representing the Respondent, whose interests are said to be at variance with those of the company.

46. That is not just a question of the alleged conflict of interest.

47. I say so because the petitioners express' request to the court was that the Notice of Appointment of Advocates filed in court on 4<sup>th</sup> September 2014, be struck out from the record.

48. The petitioners went on to state that the Company would be exposed to prejudice, if the Law Firm of Wamae Allen & Company Advocates continued to represent it.

49. At first glance, it may appear that the petitioners were trying to choose for the Company, the person who could represent it, as its advocates. But when it is borne in mind that the petitioners were also **DIRECTORS** in the Company, then it becomes clear that they would have a legitimate interest in the advocate representing the Company.

50. Similarly, the Respondent is also a **DIRECTOR** of the Company. So, he too has a legitimate interest in the advocate representing the Company.

51. On the one hand, the petitioners seem to suggest that it was they who spoke for the Company, whilst on the other hand, the Respondent seems to suggest that he (together with some other Directors) spoke for the Company.
52. It therefore boils down to the person or persons who had authority to give instructions on behalf of the company. If the director or directors who instructed the Law Firm of **WAMAE ALLEN & COMPANY ADVOCATES** had the requisite authority to do so, then that Law Firm is legitimately representing the company.
53. If there is any director who feels that the company ought not to be represented by the Law Firm of Wamae Allen & Company Advocates, he would be at liberty to challenge that representation upon such ground as he deems appropriate.
54. However, for now, I find no conflict of interest, (apparent or actual), in the representation of the company, by the Law Firm of Wamae Allen & Company Advocates. I so find because that Law firm was currently only representing the company. The firm was no longer representing the Respondent.
55. The situation that was obtaining at the time when the application was filed has changed.
56. The current situation, in which the firm was representing only the company cannot give rise to any conflict of interest, as was alluded to by the petitioners. I say so because the petitioners had expressed the view that the interests of the Respondent were at variance with those of the company. In those circumstances, it was improper for one advocate to act for parties who had different and competing interests.
57. When the advocate stopped acting for the respondent, the perceived conflict of interest evaporated.
58. However, it is possible that something new could have arisen. As I understand the petitioners, they still want the Law firm to stop acting for the Company, even though the original perception of conflict of interest no longer exists.
59. It is suggested that because the Law Firm had acted for the Respondent, whose interests are said to be inconsistent with those of the Company, the Law Firm should not represent the Company.
60. Assuming for a moment that the company's interests and those of the Respondent were at variance, that would mean that each of them ought to have their own lawyer.
61. Already, each of them has a separate lawyer.
62. The issue which is being raised now appears to be that the Law Firm cannot be trusted to represent the company.
63. If the company wishes to appoint another advocate to act for it, they are perfectly in order to do so. They do not need an order of the court to choose their advocate.
64. For now, it has not been shown that the Law Firm of Wamae Allen & Company Advocates did not have authority from the company to file the Notice of Appointment of Advocates on behalf of the company, **MARINE POWER GENERATION LIMITED**. Therefore, I reject the application to strike out the said Notice of Appointment of Advocates.

**DATED, SIGNED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of September 2015.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Mugambi for the 1<sup>st</sup> Petitioner

Mugambi for the 2<sup>nd</sup> Petitioner

Mugambi for the 3<sup>rd</sup> Petitioner

No appearance for the Respondent

Wawire for A. Gichuhi for the Nominal Respondent.

Collins Odhiambo – Court clerk.