



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS SUIT NO. 326 OF 2014

JANET ATIENO OMONDI.....APPLICANT

- VERSUS -

ROSE KAVULANI OMONDI.....1ST RESPONDENT

CAMILUS GERALD MBAGO.....2ND RESPONDENT

PAUL OMONDI MBAGO.....INTERESTED PARTY

JUDGEMENT

1. The suit before me was brought by way of an Originating Motion. It is an application seeking the rectification of the Register of the members of the company named **SOUTHDOWNS DEVELOPERS LIMITED**.
2. The rectification being sought requires the removal of the names of the respondents, **ROSE KAVULANI OMONDI** and **CAMILUS GERALD MBAGO** from the register.
3. The applicant, **JANET ATIENO OMONDI**, complained that those 2 names had been inserted onto the register illegally and without sufficient cause.
4. Secondly, the applicant complained that the 1st respondent, **ROSE KAVULANI OMONDI**, had threatened to alienate or dispose of the assets of the company.
5. When the parties appeared before the court on 1st of October 2014 they recorded a consent order, pursuant to which a prohibition was issued to stop any dealing with the company's properties until this matter was determined. The specific properties which were the subject of that prohibition were;
 - a. **L.R. No. 12325/22, and**
 - b. **L.R. No. 209/10675/20.**
6. It was the evidence of the applicant that she had come to court in her capacity as a member or a shareholder of the company.
7. She said that the other shareholder was her husband, **PAUL VINCENT OMONDI**.
8. It was the further evidence of the applicant that her husband moved in with the 1st Respondent, **ROSE KAVULANI OMONDI**. After the 2 had moved in together, they allegedly cut-off

- communication from the applicant.
9. The applicant later became aware that one house, belonging to the company was being sold. Alarmed at that development, the applicant visited the Companies Registry and conducted a search. The search revealed that the 2 Respondents had, allegedly been allocated one share each, and also that each of them had been appointed as a director of the company.
 10. Those changes were effected after the Board of Directors of the company had, allegedly held meetings on 1st August 2012 and 9th July 2013.
 11. Upon perusing the minutes of those 2 meetings, the applicant noted that she was recorded as one of the persons who attended the meetings.
 12. As she was very sure that she had never attended any of those meetings, the applicant proceeded to inquire from the Company Secretary if he had attended the said meetings. The need for that inquiry stemmed from the fact that in the minutes of the said meetings, it was indicated that the Company Secretary, **FERDINAND G. MUCHOMBA**, had witnessed the minutes of the meetings, the Board Resolutions and the Notifications of change of the directors.
 13. The Company Secretary swore an affidavit, in this case, making it clear that the signatures appearing on the minutes of the Board Meetings; the Resolution dated 9th July 2013 and on the Notification of change of directors dated 9th July 2013 were not his.
 14. After the respondents were served, **PAUL OMONDI MBAGO**, applied to be enjoined to the suit as an Interested Party.
 15. The Applicant consented to the joinder of Paul Omondi Mbago as an Interested Party.
 16. After becoming a party, Paul filed a Replying Affidavit. He countered the applicant's contention regarding the formation of the company. Whilst the applicant had said that it is she and her husband (Paul) who had formed the company, Paul explained that the company was incorporated on 9th November 1989, by **MESHAK ODERO and JOSEPH ANDREW ANDIWO**.
 17. Paul further explained that in 1996 he took over the company as its sole director.
 18. Paul also explained that the 1st Respondent, **ROSE KAVULANI OMONDI**, was his lawful wife. In other words, he and Rose did not simply move in together. They were lawfully married.
 19. I have only pointed out these facts so as to put the whole dispute in its proper perspective.
 20. The parties to the suit were all members of one family. They got together in the company and things went on fairly well. I say so because the company was able to invest handsomely by purchasing houses in Spring Valley, Nairobi South "C" and in Karen.
 21. It would appear that the applicant, as Paul's first wife, actually consented to the marriage between Paul and Rose. I say so because Janet wrote to the Registrar of persons on 11th July 2006, indicating that she had no objections to Rose, who she described as her co-wife, changing her names on her Identity Card.
 22. Bearing those facts in mind, I have concluded that matters later changed dramatically, as Janet accused Rose of cutting off Paul from Janet, the family and friends. Indeed, Janet accused Rose of confining Paul to her house.
 23. The insinuation was that whilst Paul was so confined, and because he was unwell, Rose influenced him to alter the records of ownership of the company.
 24. Paul admitted the fact that he was physically unwell. However, he categorically denied any suggestion of mental infirmity. He went as far as procuring a note from Dr. Opiyo, stating that he was medically fit and that he had no mental insufficiency.
 25. Therefore, I can conclusively state that, based on the available evidence, Paul did not have any mental infirmity.
 26. In his affidavit Paul said that Janet had been invited to attend the Board Meetings on 1st August 2012 and on 9th July 2013, but that she failed to attend the meetings. Paul confirmed that Janet had traveled abroad at the time of the meetings.
 27. This is what Paul said in his affidavit;

“10. THAT though the Applicant refused to vote by failing to attend both the meetings whose notice was validly given, I as the chairperson of the meeting and as a director as well as a shareholder passed a resolution to have both the 1st and 2nd Respondents as members and shareholders on 1st of August 2012 and the 9th of July 2013, respectively”.

28. In my considered view, the minutes of the meeting held on 1st August 2012 were misleading. I say so because the minutes indicate that the following Board members attended the meeting;

- a. **Paul Omondi Mbago – Chairperson;**
- b. **Janet Atieno Omondi;**
- c. **Rose Kavulani Omondi, and**
- d. **Ferdinand G. Muchomba.**

29. Out of those 4 named persons, there is now consensus that Janet Atieno Omondi was not at the meeting.

30. By citing Janet Atieno Omondi as having attended the meeting when it is well known that she did not do so, the person who recorded the minutes told an untruth.

31. Ferdinand G. Muchomba also did not attend the meeting. Therefore, the inclusion of his name in those minutes is a further statement of untruths.

32. Thirdly, considering that it was at the meeting of 1st August 2012 where Rose Kavulani Omondi was allegedly allocated one share and was also appointed as a director of the company, I find that it was irregular for her to have participated in the Board meeting.

33. In effect, if a meeting was held, that would imply that the only legitimate Board member who attended it was Paul Omondi Mbago. In my view, he could not have conducted a meeting alone. I say so because I am unable to fathom how one person can have a meeting with himself.

34. But whether or not the meeting was held, I find that the minutes extracted from it, and which were then used as the foundation to alter the share-holding and the list of directors was falsified.

35. In similar vein, the minutes of the meeting held on 9th July 2013 were falsified, to show that Janet and Ferdinand attended the meeting, when in truth, they did not attend the said meeting.

36. The falsified minutes cannot, in my considered opinion form a legitimate foundation upon which a lawful change can be made to the composition of the directors or the shareholders.

37. Accordingly, I find and hold that the changes which were effected on the strength of the falsified minutes were a nullity.

38. But the respondents have asserted that the orders of rectification cannot be effected because the company was not a party to these proceedings.

39. I wish to draw attention to Rule 7 of the Companies (High Court) Rules which reads as follows;

“Applications to rectify the register of members of a company under section 118 of the Act shall be by originating motion or when the company is in voluntary liquidation by summons”.

40. Therefore, the Applicant was right to have come by way of an originating motion.

41. As regards the party who has locus in bringing an action to rectify the register of members of a company, section 118 of the Companies Act stipulates as follows;

“1) if –

- a. **The name of any person is, without sufficient cause, entered in or omitted from the register of members of a company;**

or

- b. **Default is made or unnecessarily delay takes place in entering on the register the fact of any person having ceased to be a member,**

the person aggrieved, or any member of the company, or the company, may apply to the court for the rectification of the register”.

42. Clearly, therefore, the applicant, as a member of the company, had the requisite statutory authority to bring this case.

43. There was no legal requirement that the company be either the applicant or be enjoined in these

proceedings.

44. In the final analysis, I find merit in the originating motion. I therefore order that the register of the shareholders and also of the directors of the company, **SOUTHDOWN DEVELOPERS LIMITED**, be rectified by removing therefrom the names of **ROSE KAVULANI OMONDI and CAMILUS GERALD MBAGO**.

45. The costs of the originating motion are awarded to the applicant, and the same shall be paid to her by the respondents and the Interested party.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of November 2015.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Walubengo for Khasiani for the Applicant

Okelo for Wasunna for the 1st Respondent

Okelo for Wasunna for the 2nd Respondent

Okelo for Wasunna for the Interested party

Collins Odhiambo – Court clerk.