REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPEAL NO. 191 OF 2011(JR)

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

IN THE MATTER OF : SECTION 8 & 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

IN THE MATTER OF: SECTION 3.37(1) a, b, 37(2) a, 37(4) OF THE BETTING LOTTERIES AND GAMING ACT, CAP 131

IN THE MATTER OF: ARTICLES 22(1), 23(1) (3), 27(1) AND 165 OF THE CONSTITUTION

REPUBLIC (EX PARTE LIONS HEART SELF HELP GROUP).....APPLICANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

BETTING CONTROL AND LICENSING BOARD.....2ND RESPONDENT

AMAYA GAMING GROUP KENYA LTD.....1ST INTERESTED PARTY

INTERACTIVE MEDIA SERVICES LTD.....2ND INTERESTED PARTY HON. KENNEDY ODHIAMBO

NYAGUDI WERE.....3RD INTERESTED PARTY

RULING

1. By a Notice of Motion dated 3rd October, 2013, the 3rd interested party herein **Hon. Kennedy Odhiambo Nyagudi Were**, seeks the following orders:

1. **<u>THAT</u> this application be heard Exparte in the first instance on account of urgency.**
2. **<u>THAT</u> this Honourable court be pleased to enlarge or extend the time granted to the applicant to file the application herein and that this application be deemed to have been filed within the time limited.**
3. **<u>THAT</u> the 2nd Interested party herein INTERACTIVE MEDIA SERVICES LTD do confirm to this court that the sums of monies held by it as 'aggregator' are still in the 2nd Interested party's custody.**
4. **<u>THAT</u> the firm of ANJARWALLA & KHANNA ADVOCATES expressed to be acting for the 1st Interested Party have infact no express instructions to act for the 1st Interested party herein.**
5. **<u>THAT</u> pursuant to paragraph 4 above all pleadings and applications filed by the firm of ANJARWALLA & KHANNA ADVOCATES be struck out with costs to the Applicant.**
6. **<u>THAT</u> this Honourable court be pleased to make any further order or orders as the justice or this case may require.**

2. The said application is supported by an affidavit sworn by the said applicant on 3rd October, 2013.
3. According o the applicant, he is the holder of permits issued to Amaya Gaming Group (K) Ltd and the conditions stipulated therein are enforceable against him in person. According to him, he has been a director of Amaya Gaming Group (K) Ltd since its incorporation. He however could not recall participating in any Company Board Meeting, passing any resolutions or in any way issuing instructions to the firm of **Anjarwalla & Khanna Advocates** (hereinafter referred to as the firm) to act for the Company.
4. According to him there is no provision of the company's Articles of Association authorised the Advocates to act in the manner that they did at all. In his view the 2nd interested party may, if not checked by this court proceed to release the proceeds of the sums of money held by it to the 2nd interested party (sic) before the issues raised in this application are resolved.
5. It was therefore the deponent's view that the said firm of advocates had not in fact been properly instructed to act for Amaya Gaming Group (K) Ltd and the Court should find so.
6. In a further affidavit sworn by the applicant on 21st November, 2013, the applicant reiterated that to the best of his knowledge he has always been a Director of Amaya Gaming Group Kenya Limited since its incorporation and exhibited a copy of the Registrar of Company's records of the 1st interested in support of this contention. It was further deposed that to the best of his understanding, the 1st interested party has never had more than two Directors at any time.
7. On the part of the firm, a replying affidavit was filed sworn by **Karim Saifudin Anjarwalla**, the Managing partner of the said firm on5th November, 2013.
8. According to the deponent, the allegations that the said firm had no instructions to act for the 1st interested party are untrue and unfounded. It was deposed that on 22nd September, 2011, the 3rd interested party, the applicant herein, wrote a letter addressed to the Registrar of Companies resigning as the 1st interested party's director and requesting to be deregistered as the 1st interested party's Director. The same day the 3rd interested party gave notice of his resignation to the Directors and Shareholders of the 1st interested party and confirmed that he held shares that were in his name in trust for **David Baazov**.
9. It was therefore deposed that in light of the foregoing, the firm could not take instructions from the 3rd interested party applicant since he was nolonger a Director or shareholder.
10. It was further deposed that in Judicial Review Miscellaneous Application No. 219 of 2011 the applicant by an application dated 7th November, 2011 sought to be joined as a party to those proceedings and in his affidavit stated that he was nolonger the Director of the 1st interested party.
11. It was therefore deposed that the present applicant is brought in bad faith with a view to misleading the court and that the applicant is guilty of concealing pertinent information in this and other related proceedings hence the present application ought to be dismissed with costs.
12. In the submissions filed on behalf of the ex parte applicant, it was contended that it is trite law that a company can only commence legal action through a board resolution and without a resolution the company is not before the Court at all. In support of this submission the applicant relied on **<u>Affordable Homes Africa Ltd vs. Ian Henderson & 2 Others Milimani Commercial Courts</u>**

HCCC No. 524 of 2004. It was submitted that in the absence of a resolution exhibited, the inevitable conclusion is that there was no such a resolution without which the 1st interested party is not before the Court.

13. It was further submitted that even if it was assumed that the applicant resigned from the company on 22nd September 2011, that would not take into account the period before the said resignation during which time these proceedings were filed.
14. It was submitted that section 3 of Cap 486 mandates the Registrar of Companies to maintain a record of all matters prescribed by the Act one of which is the list of Directors. According to the applicant the latest form CR 12 indicates that the applicant is still a director of the company. According to that form, it is submitted, there are only two directors of the company and without the applicant having been replaced assuming he resigned, the consequence would be that the company would be operating below the minimum expected directorship under section 33 of Cap 486.
15. It was therefore sought that the application be allowed with costs to be borne by the firm which commenced the action.
16. On behalf of the 3rd interested party, it was submitted that upon this court finding that the firm of Advocates had no instructions to act for the 1st interested party, all the other issues raised by the 1st interested party become moot.
17. On the doctrine of beneficial ownership of shares, it was submitted based on **Vadag Establishment vs. Yashvin Numised AG & Others Civil Appeal No. 83 of 2001** that the Court of Appeal rejected the said doctrine. It was therefore submitted that the Court ought to find the said firm is liable personally to the applicant in costs.
18. I have considered the application as well as the submission made on behalf of the parties herein.
19. First and foremost, the general rule is that it is not the business of the courts to tell litigants which advocate should or should not act in a particular matter as each party to a litigation has the right to choose his or her own advocate and unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel. See **William Audi Ododa & Another vs. John Yier & Another Civil Application No. Nai. 360 of 2004; Delphis Bank Ltd vs. Channan Singh Chatthe & 6 Others Civil Application No. Nai. 136 of 2005; Geveran Trading Co. Ltd vs. Skjevesland [2003] 1 ALL ER 1.**
20. It is however clear that advocates can only act in a matter where they have been instructed either expressly or by implication. Where there is a general retainer given to an advocate by a client, it does not fall in the mouth of the client to argue that the were no instructions given to the advocate in respect of a particular matter falling within the series in which there was a general retainer unless it is shown that there were express instructions given to the advocate not to act in that particular matter. In that event the onus of proving lack of instruction would be on the person alleging the same. It is also trite that an incorporated person is but just a legal person in the eyes of the law. It is therefore axiomatic that an incorporated body has of necessity to act through agents who are usually its Board of Directors by way of resolutions passed thereby. Where for example it is proved to the satisfaction of the Court that legal proceedings were commenced by or on behalf of an incorporation by an advocate contrary to or in the absence of the instructions of an incorporation it is trite in this jurisdiction that such proceedings are liable to be struck out with costs being borne by the advocate concerned. This was the position in **Tavuli Clearing & Forwarding Limited vs. Charles Kalujjee Lwanga Nairobi (Milimani) HCCC No. 585 of 2004** where **Kasango, J** held that under section 27 of the ***Civil Procedure Act*** the Court has wide discretion to make orders in respect of costs and an advocate is liable to pay costs personally for filing a suit he is not authorised to so file and in the case of an incorporated company such authority can only be by resolution or resolutions passed either at a company or board of director's meeting, recorded in the minutes. It follows that if the firm of **Anjarwalla and Khanna Advocates** had no instructions in this matter all the pleadings filed by the said firm would be liable to be struck out with costs to be borne by the said firm. It is however to be noted that an action commenced without authority is capable of being ratified. As was held by **Hewett, J** in **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000:**

"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect……As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

21. In this case, it is alleged by the 3rd interested party that despite being one of the only directors of the 1st interested party, he is unaware of any resolution made by the 1st interested party authorising the said firm to act for the 1st interested party.
22. The firm on its part alleges that it had no obligation to seek authorisation from the 3rd interested party who had carried out himself as having ceased to be a director of the 1st interested. In my view if the 3rd interested party had ceased to be director of the 1st interested party, he would have no locus standi or capacity to question the internal affairs of the company.
23. In an affidavit, sworn by the 3rd interested party in Nairobi High Court J R Miscellaneous Application No. 219 of 2011 on 4th November, 2011 the 3rd interested party deposed that he was nolonger the Country Director of Amaya Gaming Group (K) Ltd and was hence not in a position to effectively participate in those proceedings unless joined therein. This averment has not been controverted by the 3rd interested party despite having sworn a further affidavit in these proceedings on 21st November 2013.
24. The 3rd interested party is however, of the view that even if he was not a director without the firm exhibiting a resolution passed by the 1st interested party instructing the firm to prosecute these proceedings, the firm would still be acting without authority. As I have held hereinabove, without the 3rd interested party disclosing its interest in light of an averment from him that he had ceased to be a director of the 1st interested party, the 3rd interested party would not have the capacity to question the firm's instructions. Apart from that as already held hereinabove an incorporation can ratify the prosecution of legal proceedings even if there was no such authority at the commencement of legal proceedings. Under section 109 of the ***Evidence Act***, the law as I understand it is that whereas under section 107 of the ***Evidence Act***, (which deals with the evidentiary burden of proof), the burden of proof

lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence. In this case, it is the 3rd interested party who wishes the Court to believe in the fact of non-existence of an authority given by the 1st interested party to the firm. The burden was upon the 3rd interested party to adduce material before this court which would prove this point.

25. Whether or not the 1st interested party's existence would have been contrary to the provisions of the ***Companies Act*** on the ground that the number of directors would have fallen below the minimum stipulated under that Act is beyond the scope of this determination.
26. In light of the averments made by the 3rd interested party on oath which averments have neither been clarified nor controverted, this court is not in a position to find that the contention by the 3rd interested party that the firm had no authority to prosecute these proceedings has not been proved to the standard expected in these kind of proceedings. In my view, and it is trite that with respect to the credibility of a witness or a deponent of an affidavit, a person upon whose evidence it is proposed to rely "should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence". See **Ndung'u Kimanyi vs. Republic [1979] KLR 282.**

27. In this case, based on the material on record this court is unable to find whether or not the firm was instructed by the 1st interested party and as was held by **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001** it is a "fundamental rule of evidence, which is codified in Section 3 of the ***Evidence Act*** Cap 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved".
28. In the result the order that commends itself to me and which I hereby grant is that prayers 4 and 5 in the Notice of Motion dated 3rd October, 2013 lack merit. With respect to prayer 3, similarly no basis was laid either in the affidavit or in the submissions to warrant the grant of the said order. The same is similarly disallowed. The costs of this application are awarded to the firm of **Anjarwalla and Khanna Advocates** to be borne by the 3rd interested party.

Dated at Nairobi this 29th day of January 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Aduda for the Applicant and holding brief for Mr Wanga for the 3rd Interested Party

Mr Hirani for the 1st Interested Party