REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 495 OF 2012

IN THE MATTER OF PHILIP AGENCIES LIMITED

AND

IN THE MATTER OF WINES & SPIRITS (KENYA) LIMITED

AND

IN THE MATTER OF NYAM HOTELS LIMITED

AND

IN THE MATTER OF WAIGANJO INVESTMENT LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CAP. 486) LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF INSPECTORS AND AN INVESTIGAITON UNDER SECTIONS 165 (1) (a) AND 166 (b) (i) AND (iii) OF THE COMPANIES ACT (CAP 486) LAWS OF KENYA

BETWEEN

LUCY WAITHERA KIMANGA .... 1ST APPLICANT

DAMARIS WANJIKU WAIGANJO .... 2ND APPLICANT

MARGARET WAMBUI CHUCHU .... 3RD APPLICANT

VERSUS

JOHN WAIGANJO GICHURU .... RESPONDENT

R U L I N G

1. As long ago as 10th August 2012, the Applicants herein filed a Notice of Motion dated 9th August 2012 brought under the provisions of **Order 40 rule 2 and Order 51 rule 1** of the *Civil Procedure Rules, 2010*. The said Application was also brought under the provisions of **sections 165 (1) (a) and 166 (b) (i) and (iii)** of the *Companies Act*, *Cap 486, Laws of Kenya*. The Notice of Motion sought 4 substantial prayers as follows:

    "2. THAT this Honourable Court be pleased to order an investigation into the affairs of the Four (4) related Companies and to appoint two (2) competent Inspectors to do the Investigations and report to Court within a period of Thirty (30) days from the date of such Appointment.

    3. THAT this Honourable Court be pleased to order an Investigation into the internal dealings in Shares and debentures by John Waiganjo Gichuri, the Respondent as a Director of all the related Companies and the Investigations to be expanded to include the power to require production by him of all the documents and books of Accounts within his custody or power relevant to the Investigations as well as provision of all information on Oath relating to the dealing in the related Companies Properties and the Creditors.

    4. THAT pending the hearing and determination of this Application interpartes, the Honourable Court be pleased to issue a temporary Injunction Order restraining the Respondent from doing any of the following acts that is to say, further transferring Members shares in the Companies to himself, disposing off, alienating and/or selling any of the related Companies Properties of whatsoever nature and more specifically from transferring, disposing or selling Land Parcel Number L.R. No. 12714/211 (I.R. No. 44674) – Mombasa Road registered in the names of Philip Agencies Limited, mortgaging and/or charging any of the related Companies Properties with any Financial Institution or individual or in any other manner whatsoever acting in a manner which is unfairly prejudicial to other Shareholders of the related Companies being the Applicants and generally to all other Creditors of the Companies".

2. The said Application was supported by no less than 10 principal grounds as well as the Affidavit of the 1st Applicant sworn on 9th August 2012 and the Affidavit of the second and third Applicants also sworn on 9th August 2012. The Affidavits to a large extent, supported the principal grounds of the said Application which were detailed as follows:

    "1) THAT the 1st Applicant is the Administrator of the Estate of Peter Kimanga Waiganjo (deceased), and the Estate holds shares in the above Companies as listed hereunder:

    a. **66 Shares out of 1,000 in Philip Agencies Limited**
    b. **6,251 Shares out of 75,000 in Wines and Spirits (Kenya) Limited**
    c. **100 Shares out of 1,000 in Nyam Hotels Limited.**

    2) THAT the 2nd and 3rd Applicants are the joint Administrators of the Estate of David Ndotono Waiganjo (deceased) and the Estate holds shares in the above related Companies as follows:

    a. **67 Shares of 1,000 in Philip Agencies Limited**
    b. **6,250 Shares out of 75,000 in Wines and Spirits (Kenya) Limited**
    c. **100 Shares out 1,000 in Nyam Hotels Limited.**

    3) THAT cumulatively therefore the Applicants hold more than one-tenth of the issued shares of each of the Companies and as such qualify within the law to request for an Inspection and Investigation into the affairs of the Companies as well as that the Respondent who is the only Director in the Company acting alone in

contravention of the Companies act.

4) THAT the Companies are related and constituted by family members with the majority shareholder being one, Philip Waiganjo Gichuri, who is a man at the moment with mental incapacity and in favour of whom proceedings have been filed at the High Court of Kenya being Miscellaneous Case No. 66 of 2012, a Petition filed under the Mental Health Act (Cap 248) Laws of Kenya seeking to declare him mentally unfit and to have the Applicants appointed as Managers of his Estate owing to his poor Mental Health.

5) THAT the said Philip Waiganjo Gichuri, who is ailing is the husband of the 3rd Applicant and father-in-law to the 1st and 2nd Applicants who were wives of his late 2 sons who had shares in the related Companies as above enumerated.

6) THAT the old man had only 3 sons, 2 of whom are the deceased Shareholders and their shares are not held by the Estates as above outlined with the other son being the Respondent who is therefore now the only remaining active member of the related Companies and who passes out as the Self Appointed Managing Director.

7) THAT the respondent has been unlawfully transferring shares of the old and ailing man to himself intending to completely take control of the Companies and which transfers have been made fraudulently and by falsifying documents with the Registrar of Companies.

8) THAT further the Respondent has been disposing of Company properties the latest being L.R. No. 12715/211 (I.R. No. 44674) registered in the name of Philip Agencies Limited and which sale is now underway and ought to be stopped as the same is fraudulent, and he is selling the same at a price of Kshs. 250,000,000/=, whereas the property is estimated to be valued at Kshs. 500,000,000/=.

9) THAT the Respondent has been doing this without regard to the Applicants' interests in the Companies and has further completely failed to disclose to them relevant information related to the Companies and efforts to reason with him have been unsuccessfully.

10) THAT the actions of the Respondent have the effect of defrauding the Companies Creditors thereby causing substantial losses to the Creditors and the other members (Applicants) in equal measure and the other majority member who is ailing has no voice and urgently needs protection".

3. The said Application was brought under Certificate of Urgency and on 10th August 2012, Mr. Justice Mutava granted temporary Orders as below:

"2. THAT a temporary injunction be and is hereby issued restraining the Respondent from doing any of the following acts that is to say, further transferring Members shares in the companies to himself, disposing of, alienating and/or selling any of the related companies properties of whatsoever nature and more specifically from transferring disposing selling Land Parcel Number L.R. No. 12714/211 (I.R. No. 44674) Mombasa Road registered in the name of PHILIP AGENCIES LIMITED, MORTGAGING and/or charging any of the related companies Properties with any Financial Institution or individual or in any other manner whatsoever acting in a manner which is unfairly prejudicial to other shareholders of the related companies being the Applicants and generally to all other Creditors of the companies".

4. On 15th August 2012, the Respondent herein filed a Statement of Grounds of Opposition as regards the said Application dated 9th August 2012. The Grounds of Opposition read as follows:

"1. The entire application commenced by way of a miscellaneous application without any suit being filed is misconceived, incompetent and totally unfounded.

2. The application is incompetent, frivolous and convoluted in so far as it has been filed on omnibus basis for orders to apply across four (4) companies instead of each company being dealt with separately in a separate suit. The shareholdings in each company are different, properties held by the companies are different and different causes of action would apply for each company. It would be difficult and confusing to deal with each of the companies in the same miscellaneous cause. The application must be struck out for incompetence, multiplicity and misjoinder of causes of action.

3. The application has been filed in haste, prematurely without any demands for accounts by the Applicants from the Respondent. No notices have been made to the Respondent seeking explanations of the alleged share transfers and/or sale of the properties. Without prior demand, no cause of action has accrued to the Applicants and their application must be struck out for incompetence, and for rushing to the court prematurely.

4. No notice even to call for shareholder's meetings, special general meetings have been issued, complete with agenda to show what the Applicants' complaint is, and seeking the resolutions of the shareholders. Company matters are regulated by the Articles of Association. The Applicant has not complied with the regulations they subscribed to, as a consequence whereof this application is utterly incompetent and must be struck out.

5. The application is completely unmerited. The Applicants have not shown, by any empirical evidence that the transfers of shares in favour of the Respondent was unlawful or fraudulent, nor is the alleged sale of properties been proved to be unlawful and/or fraudulent.

6. The transfer of shares complained of does not relate to any of the shares belonging to the minority shareholders. The Applicants' shares are intact. The Applicants have suffered no losses".

5. On the 26th September 2012, Messrs. Kivuva Omuga & Co. filed a Notice of Appointment to act on behalf of the Respondent herein. That firm also filed on 24th April 2013, a Preliminary Objection to the said Notice of Motion dated 9th August 2012. Prior to that date, there had been a consent Order entered on 23rd October 2012 as between the parties in relation to the suit as regards Philip Agencies Ltd and the sale of the L. R. No. 21715/211 owned by that company to Enamor Steel Millers Ltd. Further, an Application was filed by the Applicants on 22nd May 2013 but the same was withdrawn with no order as to costs on 19th June 2013. The said Preliminary Objection dated 11th March 2013 contained the following grounds:

"a) That the orders sought cannot be granted against the respondent as requested in the pleadings before court since this honourable court has no jurisdiction to hear and determine this matter in its current form.

b) That the applicants have no status in law and in fact in demanding the orders sought in the said application.

c) That to grant the orders sought would amount to summary judgment in favour of the applicants.

d) That there is misjoinder of parties leading to gross injustice to the respondent.

e) That the orders sought in the application can only be granted in a substantive

suit.

f) That the applicants suit is vexatious, frivolous, scandalous, fuelled by malice and an abuse of the process of court".

6. Before Court on 23rd September 2013, counsel for the parties agreed that the Preliminary Objection should be disposed of by way of written submissions. As a result, the Respondent filed his written submissions on 4th October 2013 followed by the Applicants' submissions filed on 31st October 2013. The Respondent submitted that the Applicants had no *locus standi* in relation to the institution of these proceedings as the Orders sought in the said Application must be made by a member of the Company, not a stranger. He referred to **sections 165 (1)** and **166 (b) (i) and (iii)** of the *Companies Act*. He noted that the Pleadings herein would appear to have been brought under **section 165 (1) (a)** of the Act which restricted the bringing of such applications before Court to members of the Company.
7. Similarly under **section 211** of the *Companies Act*, an application such as the one before Court could be made by minority shareholders. The Respondent noted that **section 28** of the Act defined a member of the company as a person who has subscribed to the Memorandum of Association of the company or a person whose name is entered in the Register of Members thereof. The Respondent noted that the Applicants had come before Court as administrators of the estate of Peter Waiganjo as for the first Applicant and the estate of David Waiganjo as regards the second and third Applicants. Neither of the Grants of Letters of Administration in relation to the two estates made any mention of the shares in issue in any of the companies referred to in the Application. Accordingly, the Applicants were neither subscribers to the Memoranda of the companies nor were their names entered in the Register of Members of each of the companies. The Respondent referred the Court to the findings of **Ringera J.** in the case of **<u>Re Kahawa Sukari Ltd</u> (2004) 2 EA 93** as regards Grants of Letters of Administration entitling persons therein detailed to bring applications before Court as shareholders. The Respondent also referred to the well-known Court of Appeal case of **<u>Surco Ltd v Prabha M. Gudka</u> (2006) eKLR** as well as the Ruling of my learned brother **Kimondo J.** in **<u>Elkana M. Gatimu & Anor. v John Muya & 2 Ors</u> HCCC No. 611 of 2004** in which the Judge reiterated the finding of the Court of Appeal in the **<u>Surco Ltd</u>** case aforesaid.
8. Under the heading of "Parties to Application", the Respondent maintained that it was now settled law that suit brought against companies must be instituted "in the name and the seal of the company". Such was the doctrine of corporate personality as per the celebrated case of **<u>Salomon v Salomon</u> (1897) AC 22**. The Respondent thereafter referred to the Ugandan case of **<u>Musa Misango v Musugire & Ors</u> (1966) 1 EA 390** in which the supposition had been put forward that the Court had no jurisdiction to entertain the suit because the plaintiff was not entitled to the relief which he sought as the proper plaintiff ought to be the company itself. Further, with reference to the Ugandan case of **<u>Bugerere Coffee Growers Ltd v Sebaduka & Anor</u> (1970) 1 EA 147** the Respondent maintained that when companies authorise the commencement of legal proceedings a resolution to that effect should have been passed either at a company or a Board of Directors' meeting. The proceedings before this Court did not bear the seal of the companies involved nor was there any resolution on their part to file these proceedings. The companies were neither the applicants nor the respondents. The Respondent asked the question as to how he could be compelled to produce the accounts of an independent entity who is not a party to the proceedings.
9. Continuing with his submissions, the Respondent maintained that the Application before Court disclosed no cause of action. The Court was referred to the case of **<u>Mwamba v Bamburi Cement Company Ltd</u> (2008) eKLR** in which this Court had dealt with the definition of what amounted to a frivolous case. The Respondent noted that before this suit was instituted, the Applicants had filed a previous application being *HC Misc Appl. No. 66 of 2012* which was similar in form and in nature to the present Application before Court. The Respondent maintained that it was the applicants' intention to control the Estate of one of the directors to the companies concerned and, as such, was an extension of the first suit. As a result, the proceedings were vexatious, frivolous, scandalous, fuelled by malice and an abuse of the process of the Court. Finally, the Respondent commented upon the procedure for filing this suit. In his opinion, the only vehicle in which the Applicants could come before Court on allegations of fraud was by way of Plaint not by way of

Motion. The parties would be required to file substantive documents, witness statements and to give oral evidence for proper determination of the suit. As per the finding of **the Supreme Court** in **Supreme Court Case No. 5 of 2013 <u>Raila Odinga v Uhuru Kenyatta & Ors</u>**, the Respondent submitted that parties must comply with the law and the procedure for coming to court was not an impropriety. The prayers sought in these proceedings could only be determined on merit through a Plaint, not in their current form.

10. The Applicants, in their turn, submitted that the Preliminary Objection had been made purely to frustrate the current Application before Court from moving to being heard. They referred this Court to the finding in the well-known case of **<u>Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd</u> (1969) EA 696**. The Applicant maintained that the Preliminary Objection filed by the Respondent was not confined to a pure point of law. The Respondent had gone into great detail to try to show how the Applicants were not members of the companies as detailed in the Application. Such was not a legal point but a factual issue which would require the Court to examine the Register of Members in order to ascertain that fact. They submitted that the Preliminary Objection was misplaced in law and a waste of judicial time. Thereafter, the Applicants referred the Court to the provisions of **sections 165 (1) (a)** and **166 (b) (i) and (iii)** of the *Companies Act*. Those sections provided that where a Court was satisfied that the company's business was being conducted with intent to defraud or otherwise or in manner oppressive to any part of its members, it may appoint one or more competent inspectors to investigate the company's affairs. The Applicants referred the Court to the case of **Misc. Appl No. 99 of 2005 <u>Re Central Valley Supplies Ltd</u>** (unreported) in this regard.
11. As regards the question of *locus standi*, the Applicants maintained that the law is not to be interpreted thinly in a veiled manner. A member of a company was either a director member who is living or, if dead, his or her Administrator. The Applicants pointed the Court to the provisions of **section 82** of the *Law of Succession Act* as well as the English case of **<u>Re Jermyn Street Turkish Baths Ltd</u> (1970) 3 All ER 57** where the Court of Chancery had held that:

> **"….. Even if the Petitioners were not registered as members of the company, personal representatives of a deceased member must be regarded as members of the company."**

The Applicants asked the Court to distinguish the **<u>Kahawa Sukari</u>** case as above which had concentrated on the issue as to whether a Grant *ad colligenda bono* issued by the Court was sufficient to confer upon the holder thereof, the full powers of an Administrator. The Applicants also referred to the case of **<u>Kenyazuga Hardware Ltd (2005)</u> 2 KLR 381** in which this Court had held:

> **"If it was found that the deceased indeed had shares, the second petitioner would then by virtue of being one of the administrators of his estate, be registered as a holder of the Shares and therefore have capacity as a shareholder or a contributor under *Section 221 (1)(ii)* to present a petition for winding up."**

Indeed, the Applicants also drew the attention of the Court to the finding of **Khaminwa J.** in the case being **<u>In the Matter of Uniconsult (K) Ltd (2008)</u>** in which the Judge had found:

"For the purpose of the preliminary objection raised this court finds that the petitioner has Locus Standi to present petition for winding up of the company. And she is a contributory herself being a personal representative of a deceased holder of shares which devolve upon her."

12. **Section 28** of the *Companies Act* defines who is a member of a company. It details:

> **"28. (1) The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, and upon registration shall be entered as members in its register of members.**
>
> **(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company."**

To my mind, these provisions are quite clear and the emphasis must be upon the word "agree". Similarly, in **section 28 (2)** to be a member, one's name must be entered in the company's register of members. As I understand it, the principal complaint of the Respondent as detailed in his Preliminary Objection dated 11th March 2013 is that the Applicants herein do not have the *locus standi* as shareholders to bring their current Application before this Court. He maintains that they are not shareholders and thus do not have the capacity to bring their Application dated 9th August 2012, based upon **sections 165 and 166** of the *Companies Act*. I have perused those two sections and in my opinion, only **section 165** can apply to the Application before this Court. **Section 166 (a)** requires a special resolution of the company before the court shall appoint one or more competent inspectors to investigate the affairs thereof. Under **section 166 (b)** the court may appoint one or more competent inspectors upon it receiving a report from the Registrar that there are circumstances suggesting that the affairs of the company are being conducted irregularly by its directors. In this case, there is no report from the Registrar in this connection. As a result, **section 166** of the Act cannot apply to the Applicants' said Application.

13. **Section 165** of the Companies Act reads as follows:

> **"165. (1) The court may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court directs –**

a. **in the case of a company having a share capital, on the application either of not less than two hundred members or of members holding not less than one-tenth of the shares issued;**

b. **in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members.**

> **(2) the application shall be supported by such evidence as the court may require for the purpose of showing that the applicants have good reason for requiring the investigation, and the court may, before appointing an inspector, require the applicants to give security, to an amount not exceeding ten thousand shillings for payment of the costs of the investigation".**

As is clear from **section 165 (1) (a)**, the Court may appoint one or more competent inspectors upon the application either of not less than 200 members or of members holding not less than one 10th of the shares issued in the company. In this regard, I have perused the application in light of the four companies included in the said Application. I have taken it that as there was a consent recorded by the parties on 23rd October 2012 as regards the company Philip Agencies Ltd, the Application before this Court is no longer relevant to that entity. That leaves Wines and Spirits (Kenya) Ltd, Nyam Hotels Ltd and Waiganjo Investments Ltd. for this Court's consideration in terms of appointment of inspectors. As regards Wines and Spirits (Kenya) Ltd the grounds in support of the Application before Court note that the Estate of Peter K. Waiganjo holds 6251 shares out of 75,000 shares in that company. Similarly the Court notes that the Estate of David Ndotono Waiganjo also holds 6251 shares in the company. Together, the two Estates hold 12,502 shares in that company which brings the Estates within the one 10th of shares issued rule. Similarly, the two Estates together hold 200 shares out of a total of 1000 in Nyam Hotels Ltd, again in bringing them within the one 10th requirement of **section 165** of the *Companies Act*. However, there is no evidence brought before this Court by the Applicants as regards the company Waiganjo Investments Ltd and, as a consequence, this Court would be unable to make any Order under section 165 of the Companies Act in respect of that company.

14. What as regards the Applicants' status as to bring their Application before Court under **section 165** of the *Companies Act?* The Respondent pursued the line in his Preliminary Objection that the Applicants had no *locus standi* as they were not members/ shareholders of the (now) two companies in contention – Wines and Spirits (Kenya) Ltd and Nyam Hotels Ltd. To this end, I have perused the various authorities produced before this Court by both the Applicants and the Respondent. To my mind, the question of whether the Applicants were members or otherwise of the two companies cannot form a matter for consideration under a Preliminary Objection. Whether the Applicants were members or not is a matter of evidence and should be gone into at the hearing

of the substantive Application. As per the judgement of **Law JA.** in the case of **Mukisa Biscuit Company (supra)**:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

15. What is more a matter of law is whether the Orders sought in the Application dated 9th August 2012 can only be granted in a substantive suit. Further, the Respondent has taken the point in his Preliminary Objection that there is a misjoinder of parties. With due respect to the Respondent, all the authorities that he has produced before this Court referred to matters relevant to the substantive Application. None of them support his contentions by way of Preliminary Objection. Similarly, the authorities produced by the Applicants also relate to the substantive Application. **Section 344 (1)** of the *Companies Act* allows for rules to be made by the Minister for providing for any matter or thing which by the Act is to be or may be provided for by rules. **Rule 8 (c)** of the *Companies (High Court) Rules* detail that applications for the appointment of inspectors under **sections 165 and 166** of the Act shall be made by way of Notice of Motion. This is precisely what the Applicants have done in their Application before Court. In my view, that Application is properly before this Court for its consideration and determination. As a result, this point of the Respondent's Preliminary Objection fails. I do not consider that the Orders sought in the Application can only be granted in a substantive suit. Further, I do not consider that the Orders sought would amount to summary judgement in favour of the Applicants. The substantive Application herein still remains to be determined. There is no question of summary judgement.
16. Finally amongst his points of Preliminary Objection, the Respondent has maintained that the Applicants' suit is vexatious, frivolous, scandalous, fuelled by malice and an abuse of the process of court. To this end, the Respondent has referred the Court to the **Mwamba v Bamburi Cement Ltd** case (supra). The learned judge in that case **Lesiit J.** adopted the finding in the English Court of Appeal case of **Day Williams Hill (Park Lane) Ltd (1949) 1 All ER 219** where it is held that a pleading is frivolous when:

"(a) A party is trifling with the court (Chaffners vs. Goldmid [1894] 1 QB. 186 (action against M.P. at … for refusing to attend a Harambee).

(b) When to put it to forward would be wasting the time of the court (Dawkins vs. Prince Edward of Saxe-Weimar [1878] Q.B.D. 499 per Mellor J.

(c) When it is not capable of reasoned argument or is unarguable, or,

(d) It is without foundation or

(e) Where it cannot possibly succeed or

(f) Where the action is brought or the defence is raised only for annoyance; or

(g) To gain some fanciful advantage, or

(h) When it can really lead to no possible good;-

(Willis vs. Earl of Beanchamp [1886] 11 P.D. 59 per Bowen L.J. at 65 described the action as "hopeless … and would lead to no good result".

I have looked at the substantive Application by the Applicants. From the Affidavits in support thereof, there would seem to be some genuine concern on the part of the Applicants in their capacities as the

Administrators of the Estates of the two deceased shareholders in the two companies to which I have narrowed down, requires the consideration of the Court as regards the substantive Application to be proceeded with. I do not consider the Application as frivolous and find that on this ground of his Preliminary Objection, the Respondent also fails.

17. As a result, I hold that none of the points raised by the Respondent by way of his Preliminary Objection dated 11th March 2013 hold sway before this Court. However in relation to the costs of the same, I take cognizance of the fact that consent orders have been entered into in respect of Philip Agencies Ltd and that the Applicants have produced no evidence before this Court as to their shareholding by way of Grant of Administration or otherwise in Waiganjo Investments Ltd. In all the circumstances therefore and in dismissing the Respondent's Preliminary Objection, I make no award as to costs in relation thereto.

DATED and delivered at Nairobi this 25th day of February, 2014.

J. B. HAVELOCK

JUDGE