



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Environmental & Land Case 1565 of 2000

LIVINGSTONE KUNINI NTUTU..... PLAINTIFF
VERSUS
COUNTY COUNCIL OF NAROK.....1ST DEFENDANT
OL KIOMBO LIMITED.....2ND DEFENDANT
THE ATTORNEY GENERAL3RD DEFENDANT

RULING

The 1st Defendant herein brought an application dated 12th March 2009 seeking among other orders the stay of a consent judgment and decree entered in the suit herein, and the review, varying or setting aside of the said consent judgment which was entered on 24th November 2005. The said Notice of Motion is pending hearing and determination. The 2nd Defendant then filed a response to the 1st Defendant's Notice of Motion in a replying affidavit sworn by one Tobiko Shunkur dated 30th September 2009 who deponed that he was a Director of the 2nd Defendant and authorized to swear the affidavit on its behalf. A further affidavit was sworn by the same deponent on 18th May 2011. Submissions dated 21st February 2011 on the said Notice of Motion were also filed by Ms J. Maritim & Company Advocates, the Advocates at the time on record for the 2nd Defendant.

The 2nd Defendant has now brought a Notice of Motion dated 18th October 2012 which is the subject of this ruling, seeking orders that it be allowed to strike off the court record the replying affidavit of Tobiko Shunkur sworn on 30th September 2009, and the 2nd Defendant's submissions dated 21st February, 2011, and that it be granted leave to put in a fresh reply and submissions in place of those struck out. The main grounds for the said Notice of Motion are that the deponent of the impugned replying affidavit falsely alleged to be a director duly authorized by the company and he never was. Further, that the Advocates who prepared and filed the impugned submissions were never duly appointed, as the "directors" letter appointing him was signed by persons who were themselves never directors. It was also claimed that the said replying affidavit and submissions do not represent the true position or interest of the 2nd Defendant.

The 2nd Defendant's Notice of Motion is supported by the affidavit sworn on 15th October 2012 by Shadrack Ole Rotiken, a Director of the 2nd Defendant and the annexures thereto. The gist of the 2nd Defendant's case as summarized from the pleadings filed and submissions made in court by its counsel, Mr Ligunya, at the hearing of the Notice of Motion on 15th April 2013 is as follows.

Firstly, that four of its shareholders, namely Kanyinke Ole Ntutu, Partoti Ole Sengeny, Kelemet Ole Sengeny and Tapeet Ole Tira had no power to requisition for a Special general meeting/Extraordinary

general meeting as per their letter dated 14th May 2005, a copy of which letter was attached. The 2nd Defendant argued that under section 56 of the 2nd Defendant's Articles of Association a Special general meeting/Extraordinary general meeting can only be called at the behest of the Board of Directors. Further, that the said requisition of the Extraordinary general meeting did not include an agenda on the inclusion or removal of directors, and no notice of the same was given contrary to sections 185 and 132(2) of the Companies Act. The 2nd Defendant relying on annexures in the Plaintiff's replying affidavit submitted that it was at the said Extraordinary general meeting that Tobiko Shunkur and other directors were appointed.

The 2nd Defendant also attached a copy of a letter dated 21st May 2005 by one of the aforementioned shareholders namely Partoti Ole Sengeny, and addressed to the 2nd Defendant's Board of Directors, to the effect that his signature to the letter dated 14th May 2005 was obtained through deception and bribery.

Also attached as evidence were a bundle of documents from EMU Registrars, including an affidavit sworn on 18th October 2012 by Virginia Ndunge, its Company Secretary and annual returns for the 2nd Defendant filed for the years 2004 to 2012. The said Company Secretary stated in her affidavit that EMU Registrars were appointed as the Company Registrars for the 2nd Defendant on 26th February 2004 and had not been notified of any change since then, and had completed annual returns for the 2nd Defendant from 2004 to 2012.

Further, that according to the said Company Registrars' records, K. Ole Ntutu, K. Ole Kirokorr, K. Ole Sengeny and T. Ole Shunkur have never been directors of the 2nd Defendant for the period 2004 – 2012. She stated that the directors of the 2nd Defendant between the years 2005 and 2011 were Hon Justice Moiwo Ole Keiwa (since deceased), Kipeen Ole Siyialel, Shadrack ole Rotiken and Samuel Ole Koriata, as also shown in the filed Annual Returns for the 2nd Defendant for the said years.

The second aspect of the 2nd Defendant's case is that the letter dated 30th November 2005 purporting to appoint the firm of Maritim and Company Advocates was written and signed by a person who was not a director of the 2nd Defendant, and the said Advocates were therefore not properly appointed, and have not acted in the interests of the 2nd Defendant. The 2nd Defendant's counsel submitted that a party is entitled to the representation it chooses and he relied on the ruling delivered by this court on 19th July 2012 in **Ashok Rupshi Shah and Another vs Jacob Juma and Others, Nairobi ELC No. 312 of 2011** in this regard.

Mr Gachuhi the counsel for the 1st Defendant during the hearing held on 15th April 2013 supported the 2nd Defendant's Notice of Motion and submissions made by Mr. Ligunya.

The Plaintiff opposed the 2nd Defendant's Notice of Motion, and filed a replying affidavit sworn on 26th October 2012. His counsel, Mr. Havi, also made oral submissions at the hearing held on 15th April 2013. The court in the said pleadings and submissions was referred to a supplementary affidavit sworn by Tobiko Shunkur on 9th July 2007 and filed in court on the same date, and which detailed the processes and attached evidence to show how the said Tobiko Shunkur and other directors of the 2nd Defendant were appointed.

The attachments included a requisition for an extraordinary meeting dated 7th September 2005 by four members of the 2nd Defendant, namely Kanyinke Ole Ntutu, Partoti Ole Sengeny, Kelemet Ole Sengeny and Tapeet Ole Tira; notice of an extraordinary general meeting dated 3rd October 2005 by the said members of all members of the 2nd Defendant together with the agenda of the said meeting; and the minutes of the said extraordinary general meeting held on 31st October 2005. Also attached were two notifications of change of Directors and Secretaries under the Companies Act (Form 203A) dated 31st May 2005 and 8th December 2005 respectively; notice of a Board of Directors meeting dated 3rd

November 2005; minutes of the said Board of Directors meeting held on 14th November 2005; copies of annual returns filed between 2002 and 2007, and a Form CR12 dated 18th June 2007 by the Registrar General showing the Directors and shareholders of the 2nd Defendant as at that date.

The Plaintiff also relied on correspondence between previous Advocates of the 2nd Defendant and the office of the Registrar General on the issue of change of advocates and on a ruling delivered by Muchelulue J. on 16th December 2010 wherein it was held that Maritim and Advocates were properly on record at the time of entering into the consent by the parties herein. The Plaintiff's counsel submitted that the confirmation as to who is a valid director of a company is given by the Registrar of Companies, and that the Form CR 12 dated 18th June 2008 issued by the Registrar General of companies showed Tobiko Sunkur and Kekanae Kirokor to be directors of the 2nd Defendant. He also relied on the ruling delivered by this court on 30th July 2012 in **Safi Petroleum vs Abdirahman Abdi and Others, Nairobi ELC No. 36 of 2007** in this regard.

I have read and carefully considered the pleadings and submissions by the parties to this application. There are two main issues to be decided. The first is whether the Tobiko Shunkur had the authority to swear the affidavit sworn on 20th September 2009 on behalf of the 2nd Defendant. The second is whether the firm of Maritim and Company Advocates had instructions to act on behalf of the 2nd Defendant and to file the submissions dated 21st February 2011. Before I decide on these issues, I must point out that the ruling delivered by Muchelule J. on 16th December 2010 did not decide on the issue of directorship of the 2nd Defendant and the Honourable Judge did specifically note that the said issue was still outstanding.

On the first issue it is settled under principles of company law that the two main organs of a company are its general meeting and its Board of Directors. In addition under Order 9 Rule 2 of the Civil Procedure Act an officer of a corporation who is duly authorized to act is a recognized agent of the corporation, and can undertake acts on behalf of the corporation including the swearing of affidavits as was held in **Microsoft Corporation vs Mitsumi Computer Garage Ltd (2001) 2 E.A. 460**. Section 2 of the Companies Act defines an officer in relation to a body corporate to include a director, manager or secretary.

It was argued by the 2nd Defendant's counsel on this issue that Tobiko Shunkur was not a director of the 2nd Defendant and therefore did not have authority to swear the impugned affidavit. The provisions on the appointment of Directors of the 2nd Defendant are found in Article 84 of the 2nd Defendant's Articles of Association, which provides as follows:

“The number of Directors shall be not less than two and, unless and until otherwise determined by the company in General Meeting, shall not exceed seven. The first Directors shall be appointed, in writing, by the subscribers to the Memorandum of Association.”

The Directors of the 2nd Defendant are therefore to be appointed in general meetings. Under Article 55 and 56 of the 2nd Defendant's Articles of Association General Meetings are of two types, - the Annual General Meetings and the Extraordinary General Meetings. Article 55 also states that Annual and other General meetings are to be held at such times and places as the Board of Directors shall appoint. The 2nd Defendant's counsel argued that the Extraordinary General Meeting at which Tobiko Shunkur was elected a director was not properly convened as it was not convened by the Board of Directors but by four shareholders. He relied on Article 56 of the 2nd Defendant's Articles of Association in this respect. Article 56 states as follows:

“The Board may, whenever it thinks fit, convene an Extraordinary General Meeting and Extraordinary General Meetings shall also be convened on such requisition or, in default, may be convened by such requisitionists as is provided by Section 132 of the Act. If, at, any, time, there are not within Kenya sufficient Directors capable of acting to form a quorum, any Director or any two Members of the Company may convene an Extraordinary General Meeting in the same manner, as nearly as possible, as

that in which Meetings may be convened by the Board.”

A plain reading of the said Article shows that an extraordinary general meeting can be convened by persons other than the Board of Directors, and specifically such requisitionists as provided for by section 132 of the Companies Act. Section 132 (1) – (4) of the Companies Act provides as follows:

“132. (1) The directors of a company, notwithstanding anything in its articles, shall, on the requisition of members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company, or, in the case of a company not having a share capital, members of the company representing not less than one-tenth of the total voting rights of all the members having at the said date a right to vote at general meetings of the company, forthwith proceed duly to convene an extraordinary general meeting of the company.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more requisitionists.

(3) If the directors do not within twenty-one days from the date of the deposit of the requisition proceed duly to convene a meeting, the requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves convene a meeting, but any meeting so convened shall not be held after the expiration of three months from the said date.

(4) A meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors.”

It is not disputed that the four persons who requisitioned for the extraordinary general meetings in the notices dated 14th May 2005 and 7th September 2005 namely, Kanyinke Ole Ntutu, Partoti Ole Sengeny, Kelemet Ole Sengeny and Tapeet Ole Tira are shareholders of the 2nd Defendant. In addition the 2nd Defendant’s Annual Returns for 2005 produced in evidence by both the 2nd Defendant and Plaintiff indicate that they are shareholders.

On the requirement on the voting rights of requisitionists, Article 73 of the 2nd Defendant’s Articles of Association provides as follows:

“Subject to any special terms as to voting upon which any shares may be issued or may for the time being be held, on a show of hands every Member who (being an individual) is present in person or by proxy or (being a corporation) is present by a representative appointed in accordance with Article 83 shall have one vote. On a poll every Member shall have one vote for each share of which he is the holder.”

The 2nd Defendant’s Annual Returns also show that in 2005 there were twenty shareholders of the 2^d Defendant, and a total shareholding of 44,625 shares. Under Article 73 every member has one vote, and there being twenty members and thereby a total of twenty voting rights of the 2nd Defendant, one tenth of the voting rights would translate to two votes. It is the finding of this court that the aforesaid four shareholders held four votes, and therefore met the requirements of section 132 of the Companies Act as to the voting rights required to be represented for the requisition of an extraordinary general meeting.

The 2nd Defendant further argued that there was no notice given of the extraordinary general meeting requisitioned by the four shareholders, contrary to section 132 of the Companies Act. Evidence of such a notice dated 3rd October 2005 was however provided by the Plaintiff, which notice was given pursuant to the provisions of section 132(3) of the Companies Act and Article 57 of the 2nd Defendant’s Articles of Association. The Notice stated that the extraordinary general meeting would be held on 31st October 2005 and provided the venue of the meeting. The said notice therefore met the 21 days threshold provided by section 132 (3) of the Companies Act and in Article 57. In addition the notice also specified the details

that are required by Article 57 including the agenda of the meeting. Article 57 provides as follows:

“Every General Meeting shall be called by at least Twenty-one days’ notice in writing (exclusive of the day on which it is served or deemed to be served and of the deemed to be served and of the day for which it is given). The notice shall specify the place, the date and the time of such General Meeting and, in case of special business, the nature of that business and shall be given, in manner hereinafter mentioned or any such other manner, if any, as may be prescribed by the Company in General Meeting to such persons as are, under these Articles, entitled to receive such notices from the Company; Provided that a Meeting may be called by shorter notice than that specified in this Article if so agreed by the Members referred to as otherwise in accordance with Section 133(3) of the Act.”

The minutes of the said extraordinary meeting held on 31st October 2005 produced in evidence by the Plaintiff show that the four shareholders who requisitioned the said meeting were the only members of the 2nd Defendant present. The provisions on quorum in general meetings of the 2nd Defendant are in Article 61 of the 2nd Defendant’s Articles of Association which states as follows:

“No business shall be deemed special that is transacted at an Extraordinary General Meeting unless a quorum is present when the Meeting proceeds to business. Save as otherwise provided by these Articles, two Members present in persons or by proxy or by attorney or, in the case of a corporation, represented in accordance with Article 83 shall be a quorum, provided that one member holding the proxy of one or more other Members or one person holding the proxies of two or more Members shall not constitute a quorum.”

The said meeting was therefore quorate as more than 2 members were present. The said minutes also show that Keturut Ntutu, Kekanae Ole Kirokor, Tobiko Ole Shunkur and Kelemet Ole Sengeny were appointed as additional directors. I must at this stage comment on the letter dated 21st May 2005 produced in evidence by the 2nd Defendant’s counsel written by one of the shareholders, namely Partoti Ole Sengeny, in which he claimed to have been induced and deceived into signing the requisition dated 14th May 2005. It is to be noted in this regard that he signed the subsequent requisition of 7th September 2005, which is the notice that convened the extraordinary general meeting that is being contested. Further, he also attended the said extraordinary general meeting as shown in the minutes. The credibility of the said letter is therefore erased by his subsequent actions.

The Plaintiff in addition brought evidence of a notification of change of directors filed under the Companies Act dated 8th December 2005, together with a copy of a receipt issued by the office of the Registrar General of Companies dated 16th December 2005 showing payment thereof. The said notification of change gave particulars of the appointment of the four afore-stated additional directors. The Plaintiff also brought evidence of a Form CR 12 dated 18th June 2007 issued under the Companies Act by the office of the Registrar General of Companies, also confirming that Keturut Ntutu, Kekanae Ole Kirokor, Tobiko Ole Shunkur and Kelemet Ole Sengeny were directors of the 2nd Defendant company.

The affidavit that is being impugned in the 2nd Defendant’s Notice of Motion under consideration was sworn by Tobiko Shunkur on 30th September 2009, after the issue of the said Form CR12. In addition the 2nd Defendant did not bring any evidence in rebuttal by way of a subsequent notification of change of directors or a subsequent Form CR 12 issued by the office of the Registrar General of Companies showing a contrary position.

Lastly on this issue, it is apparent from the duplicating Annual Returns presented by both the 2nd Defendant and the Plaintiff’s counsel, and the evidence of two different Company Registrars acting for the 2nd Defendant, that there are internal disputes within the 2nd Defendant company. This is thus a case where the rule in **Royal British Bank v. Turquand [1856] 6 E. & B. 327** properly applies. This rule was restated by the Court of Appeal in **East African Safari Air Limited v Anthony Ambaka Kegode & Another [2011] eKLR** as follows:

“While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called “*the indoor management*” and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained.” (emphasis by the Court Of Appeal).”

An examination of the documents presented in evidence has shown that Tobiko Shunkur was properly appointed as a director of the 2nd Defendant, and it the finding of this court that he was thereby duly authorized to swear the affidavit sworn on 30th September 2009. In the event that there were any defects in the said appointment, the acts of the Tobiko Shunkur are statutorily ratified by section 181 of the Companies Act which provides that the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification. Article 110 of the 2nd Defendants Articles of Association similarly provides for such ratification as follows:

“All acts done by the Board or any Committee of Directors or by any person acting as a Director shall, notwithstanding that it is afterwards discovered that there was some defect in the appointment of any Director or person acting as aforesaid or that they or any of them had vacated office or were not entitled to vote, shall be as valid as if every such person had been duly appointed and had continued to be a Director or to act as aforesaid.”

On the second issue on the appointment of the firm of Maritim and Company Advocates by Kekanae Ole Kirokor, the findings hereinabove also apply to the appointment of Kekanae Ole Kirokor as a Director of the 2nd Defendant. In addition, the Plaintiff brought evidence of a Notice of a Board of Director’s meeting dated 3rd November 2005 by Tobiko Ole Shunkur and an item of the agenda in the said notice was the pending litigation in the suit herein. The minutes of the said meeting which was attended by four directors were also produced in evidence by the Plaintiff, and one of the resolutions recorded in the said minutes was the appointment of Maritim and Company Advocates with specific instructions as to its representation in the suit herein.

An examination of the provisions of Articles 102 and 103 of the 2nd Defendant’s Articles of Association on the proceedings of the Board of Directors show that the requirements of a seven days’ notice and quorum of two board members were met with regard to the convening of the said Board of Directors meeting. The evidence produced shows that both actual and apparent authority was given to the firm of Maritim and Company Advocates by the 2nd Defendant’s Board of Directors to act on their behalf in the suit herein. No evidence was brought by the counsel for the 2nd Defendant to controvert this position.

It is thus the finding of this court that the firm of Maritim and Company Advocates was duly appointed by directors of the 2nd Defendant, and had instructions from the 2nd Defendant to act on its behalf in the suit herein at the time of filing of the submissions dated 21st February, 2011.

Finally, I would like to state that I agree with the 2nd Defendant’s counsel’s submissions that parties should be free to present their case, as was held by this Court in **Ashok Rupshi Shah and Another vs Jacob Juma and Others, Nairobi ELC No. 312 of 2011**. However, the cited case is distinguished as the Chamber Summons, affidavits and submissions that were expunged from the court record therein were not only found to have been made without authority, but also contrary to the express instructions of the instructing authority.

In addition the 2nd Defendant will not suffer substantial prejudice as the door is still open it to present its position and case by way of supplementary and/or further affidavits and submissions if need be, as what it is essentially seeking is to respond to 1st Defendant's Notice of Motion dated 12th March 2009. The said 1st Defendant's Notice of Motion is yet to be fully heard and determined. It is however upon the 2nd Defendant to resolve its internal disputes and present a common and agreed position in this respect.

The 2nd Defendant's Notice of Motion dated 18th October 2012 therefore fails for the foregoing reasons. The 2nd Defendant shall meet the costs of the said Notice of Motion as it has been occasioned by its own internal disagreements.

Dated, signed and delivered in open court at Nairobi this ___27th___ day of ___May___, 2013.

P. NYAMWEYA
JUDGE