



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 241 OF 2012

HANIF SHEIKH 1ST
PLAINTIFF

GULF INVESTMENTS AFRICA LIMITED.....2ND
PLAINTIFF

SOUTHCOTE LIMITED.....3RD
PLAINTIFF

VERSUS

ALLIANCE NOMINEES LIMITED.....
1STDEFENDANT

SUSAN MATIBA MWAMTO(as the duly appointed Attorney of **Kenneth Stanley Njindo Matiba**
.....2ND
DEFENDANT

STEPHEN G. SMITH.....3RD
DEFENDANT

RAYMOND MATIBA.....4TH
DEFENDANT

ANDREW SMITH5TH
DEFENDANT

RITZENNA LIMITED 6TH
DEFENDANT

HAIES LIMITED 7TH
DEFENDANT

FARLO LIMITED.....8TH
DEFENDANT

HILLCREST SCHOOL LIMITED.....	9 TH
DEFENDANT	
HILLCREST SECONDARY SCHOOL LIMITED.....	10 TH
DEFENDANT	
NARU MORU RIVER LODGE LIMITED (in Receivership)	11 TH
DEFENDANT	
COMPUTRON LIMITED.....	12 TH
DEFENDANT	
ALLIANCE HOTELS LIMITED (in Receivership).....	13 TH
DEFENDANT	
ALLIANCE DEVELOPMENTS LIMITED(in Receivership).....	14 TH
DEFENDANT	
MARLBOROUGH HOUSE KINDERGARTEN LIMITED	15 TH
DEFENDANT	
THE PEOPLE LIMITED.....	16 TH
DEFENDANT	
WESTLANDS (K) LIMITED	17 TH
DEFENDANT	
ALLIANCE INVESTMENTS LIMITED.....	18 TH
DEFENDANT	

RULING

1. In the Notice of Motion application dated and filed on 2nd May, 2013 the Plaintiff sought orders that all pleadings on record and all documents made, filed or advanced by the firm of M/S Mboya, Wangong’u & Waiyaki Advocates purportedly on behalf of the 6th Defendant be disregarded in their entirety and that the same be struck out and expunged from the court record for the reason that the said firm of advocates did not have the instructions of the 6th Defendant to file the same.
2. The Plaintiffs also prayed that the said firm of advocates be sanctioned by appropriate orders of this honorable Court for falsely representing themselves as having been retained by the 6th Defendant and further they be barred from appearing for the 6th Defendant in the proceedings herein and the upcoming arbitral proceedings for lack of proper and valid retainer by the 6th Defendant.
3. In the Supporting Affidavit of Hanif Sheikh sworn on 2nd May, 2013 on his own behalf and that of the 2nd & 3rd Plaintiffs, he outlined the background of how the overarching Agreement dated 11th November, 2010 was executed by the parties. He stated that in the said agreement, the 6th Defendant’s address was given as Anjarwalla & Khanna Advocates, ALN Hse Eldama Ravine Gardens Westlands P.O. Box 200 00600 Sarit Centre, Nairobi.
4. It was his contention that when the Plaintiffs obtained an *ex parte* order on 24th April 2012 and served it upon the 6th Defendant, the firm of Mboya, Wangong’u & Waiyaki Advocates filed a Notice of Appointment to act for all the Defendants including the 6th Defendant.
5. He stated that the 6th Defendant’s shareholding was held by:-
 - a. **Haies Limited, (the 7th Defendant/Respondent) representing the Matibas’ interest (36.5%)**

- b. **Farlo Limited, (the 8th Defendant/Respondent) representing the Smiths' interest (36.5%)**
- c. **Southcote Limited, (the 3rd Plaintiff/Applicant) representing his interest (27%)**

6. He added that the incorporation of the three (3) shareholder companies appointed Jersey Trust Company (JTC) Group as the Corporate Manager of the 6th Defendant and that on 13th July 2012, he received an email from Mr Daren English, an associate director of the JTC Group to the effect that the firm of Mboya Wangong'u & Waiyaki Advocates had not been instructed to act for the 6th Defendant as no such appointment could be made except by or through the JTC Group. He contended that neither South Cote Limited that represents his shareholding in the 6th Defendant nor himself had been consulted on such an appointment of the said advocates.
7. In his Replying Affidavit sworn on 17th May 2013, Peter Mburu Waiyaki, Advocate and partner in the firm of Mboya, Wangong'u & Waiyaki Advocates furnished the court with a copy of a letter dated 27th April 2013 signed by Raymond Matiba and Andrew Smith, the 4th & 5th Defendants respectively, on behalf of the 6th Defendant. He further stated that there had been correspondence between the said law firm and the JTC Group and that if JTC Group really wanted to appoint another advocate, all that the other advocate would have needed to do was to file a Notice of Change of Advocates. In any event, he contended that the 6th Defendant had not complained about the said firm of advocates acting in this matter. He added that the JTC Group was in the process of relinquishing its directorship position which would leave the 4th & 5th Defendants as the majority directors of the 6th Defendant.
8. In the Replying Affidavits by Raymond Matiba and Andrew Smith both sworn on 17th May 2013, it came out that they owned seventy three (73%) per cent of the shares in the 6th Defendant through the 7th & 8th Defendants and which made it necessary to get the best possible legal representation. They both also averred that the 1st Plaintiff who was also a shareholder in the 6th Defendant had sued the 6th Defendant which needed legal representation. It was their contention that the intention of the present application was to derail proper representation of the 6th Defendant to make it easy to bet undeserved orders.
9. They further averred that the firm of Anjarwalla & Khanna had applied to be joined as an interested party in the suit herein but their application was dismissed. Subsequently, on 29th June 2012 the said firm of Anjarwalla & Khanna filed against the 6th Defendant, amongst others, **Misc. Civil Application No 366 of 2012** claiming an amount of Kshs. 150,000,000/= being legal fees.
10. It was their case that they could not leave the 6th Defendant as unrepresented because JTC Group had failed to act in the best interests of the 6th Defendant.
11. In his Supplementary Affidavit sworn on 28th May, 2012, the 1st Plaintiff stated that the 6th Defendant could only appoint a lawyer through its directors. An advocate could not be appointed by shareholders as through a resolution as had been purported by Raymond Matiba and Andrew Smith, who were both directors of the 6th Defendant.
12. In their submissions dated and filed on 3rd June, 2013, the Plaintiffs argued that the contention herein was not on the choice of advocates but rather that the firm of Mboya, Wangong'u & Waiyaki Advocates was not validly appointed by the 6th Defendant and that such appointment could only be done by the Directors and not shareholder of the 6th Defendants. They therefore submitted that the appointment having been done by the 4th & 5th Defendants who were shareholders and not directors of the 6th Defendant was valid and of no effect. They relied on the case of **Salomon vs Salomon & Co Advocates [1879] AC (House of Lords)** to support their argument that the doctrine of separate legal entity of a Corporate personality must be upheld.
13. They further argued that if the 4th & 5th Defendants were not satisfied with the directors of JTC Group, they ought to have instituted the mechanism of the directors' removal, which the said 4th & 5th Defendants had not done.
14. The Plaintiffs argued that their application dated 23/4/2012 dealt with the question of granting of preservative orders and did not deal with who were the rightful parties to pursue the ensuring arbitral proceedings and consequently, the Defendants could not question their ability to bring this

application.

15. In their written submissions dated and filed on 24th May 2013, the Defendants argued that the Plaintiffs were busy bodies in bringing this application. They submitted that Musinga J had in his ruling found that the 3rd Plaintiff had no capacity to bring proceedings as all its claims against all the Defendants were dismissed and that even if it had capacity to do so, it had sued its own company.
16. The Defendants relied on the case of **Constitutional Petition No. 353 of 2012 Tom Kusienya & others vs Kenya Railways & others** which quoted Justice Okubasu (as he then was) in **Court of Appeal Civil Application No NAI 360/2004 William Audi Odode & Another Vs John Yier & Another** where the court held that a litigant has a constitutional right to be represented by counsel of his own choice unless it could be shown that the interests of justice could not be served if a particular advocate was allowed to remain in a matter.
17. The Defendants relied on the case of **Foss vs Harbottle (1843) 67 ER 189** (quoted by Musinga J) in the matter of **Misc Civil Case 273 of 2012. In the matter of (CMC Holdings Ltd)** where it was held that shareholders could bring a suit on behalf of a company where it was not acting in its interests which could arise in a variety of ways.
18. They also referred the court to **Halsburys laws of England 4th Edition Vol. 7(1)** as quoted in **Supreme Court of Kenya Application No 2 of 2011 Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others** where the court held that the members representing the majority of the company may bring an action in the company's name even if the directors objected.
19. The Defendants were emphatic that the JTC Group were aware of the representation by Mboya, Wangong'u & Waiyaki Advocates and no agreement was effected for the appointment of Anjarwalla & Khanna Advocates.
20. The Defendants therefore sought the dismissal of the Plaintiff's application for being frivolous, an abuse of the process of the court and brought merely to delay the proceedings herein.
21. The court has carefully analysed the pleadings, case law and the submissions by the parties herein and notes that there are ensuring arbitral proceedings. The court must therefore caution itself that it can only interfere with arbitral proceedings only within the confines of Arbitration (Amendment) Act 2009. That is essentially under Section 10 of the said Act which stipulates that:-

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

22. Being a consensual process, it therefore means that parties are free to choose who would want to represent them in arbitral proceedings. Indeed, lay advocates can also represent parties therein. It is on that ground that this court wants to point out right at the outset that this court cannot restrain the firm of Mboya, Wangong'u & Waiyaki Advocates from representing the Defendants in any arbitral proceedings.
23. Be that as it may, the court would not ignore a fact of advocates having a conflict of interest. Where there is proof to show that a firm of advocates is likely or has a conflict of interest in any matter, the court can and will intervene to avoid miscarriage of justice. The Plaintiffs have not provided this court with any proof indicating that they would suffer any prejudice if Mboya, Wangong'u & Waiyaki Advocates were to continue acting in this matter. In that regard, the court is in agreement with regard to the Defendants' submissions on this issue and is wholly in agreement with the holding in the case of **Tom Kusienya & Others Vs. Kenya Railways & Others (supra)**.
24. From the evidence before the court, it is clear that the question of representation of the 6th Defendant by the firm of Mboya, Wangong'u & Waiyaki Advocates did arise. However, JTC Group did not expressly prohibit the said firm of advocates from representing the 6th Defendant and in fact the firm of Anjarwalla & Khanna Advocates did not confirm whether or not they were acting for the 6th Defendant.
25. The court cannot ignore the fact that the Plaintiff's have sued the 6th Defendant. It cannot be reasonably expected that the Plaintiffs would be acting in its interests by appointing or participating in appointing an advocate to act on behalf of the 6th Defendant . The court is also in agreement with the Defendants' submissions that someone had to step in to safeguard the interests

- of the 6th Defendant. The Plaintiffs have not shown this court what prejudice the 6th Defendant suffered or was likely to suffer when the appointment of advocates was done by the 4th & 5th Defendant instead of the directors doing so. Being shareholders, the 4th & 5th Defendants were entitled to safeguard their investment. The 6th Defendant cannot therefore be compelled to take another advocate chosen by the Plaintiffs as that would be prejudicial to their case.
26. The court did not see any complaint from the 6th Defendant or any other partners who are on its opposing side about the representation of the 6th Defendant by MBoya, Wangong'u & Waiyaki Advocates. In the circumstances, the Plaintiff can only be deemed to be busy bodies as was rightly stated by the Defendants.
27. It is the view of the court that if the 6th Defendant did not wish to be represented by MBoya, Wangong'u & Waiyaki Advocates, nothing would have been easier than for Anjarwalla & Khanna Advocates or any other firm to file a Notice of Change of Advocates as required under the Order 9 Rule 5 of the Civil Procedure Rules, 2010. However, the question that would arise is whether Anjarwalla & Khanna Advocates would have safeguarded the 6th Defendant's interests bearing in mind that the said firm of advocates had sued the said 6th Defendant for costs. The court finds that it is the constitutional right of the 6th Defendant to be represented by advocates of its choice.
28. For the going reasons, the court finds itself wholly in agreement with the Defendants' submissions that the Plaintiffs' Notice of Motion application dated and filed on 2nd May 2013 is frivolous, vexatious, an abuse of the process of the court and is intended to cause a delay in the proceedings herein. In the circumstances, the court hereby dismisses the Plaintiffs' said Notice of Motion application dated and filed on 2nd May 2013 with costs to the Defendants.
29. It is so ordered.

DATED and DELIVERED at NAIROBI this 20th day of September 2013

J. KAMAU

JUDGE