



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HCCC NO. 81 OF 2011

CHINA YOUNG ENGINEERING COMPANY.....PLAINTIFF

VERSUS

L.G. MWACHARO T/A MWACHARO ASSOCIATES.....1ST DEFENDANT

RAVASAM DEVELOPMENT COMPANY LIMITED.....2ND DEFENDANT

RULING

Before me is an application by the firm of Ms Muturi Mwangi & Associates dated 30th January, 2012 brought under Sections 1A, 1B,3A,63(e) and 80 of the Civil Procedure Act and order 45 Rule 1(i) of the Civil Procedure Rules. The said application seeks various orders, inter alia, to declare that the Applicants perjured themselves in the Notice of Motion dated 06/10/2011, that the representation of the 2nd Defendant be restored upon the firm of Muturi Mwangi & Associates, that the Notice of Motion dated 6/10/11 be dismissed and that the court do declare and/or find that Eric Agbeko and Phillip Nyambok are the only directors of the 2nd Defendant as recorded and acknowledged by the Registrar of Companies. However, from the submissions of Mr. Muturi on 23/2/2012, it transpired that the motion basically sought to review my Ruling and Order of 24th January, 2012 and reinstate the representation of the firm of Muturi and Mwangi on behalf of the 2nd Defendant in this suit.

It was contended on behalf of the applicants that there is a pending substantive suit in HCCC 450 of 2011 between Mr. Farouk Ravate and Justin Samourgompouille against Eric Agbeko and Phillip Nyambok, that there was an injunction in force made on 7/10/11 by Hon. Musinga J in favour of the Respondents restricting the alteration of the shareholding of the 2nd Defendant, that the directors and shareholders recognized by the Registrar of Companies are the Applicants (Agbeko and Nyambok), that the Plaint in HCCC No. 450 of 2011 which this court had noted and acknowledged sought to compel the applicants to transfer their shareholding in the 2nd Respondent to the Applicants and for an order for the removal of the Applicants as directors of the 2nd Defendant.

The Applicants further contended that the Registrar had vide his CR 12 letter of 26th January, 2012 confirmed that according to the records held at his offices the directors/shareholders of the 2nd Defendant were Agbeko and Nyambok each holding 1 share, in "Exhibit EA7" the Applicants produced a letter of the Registrar of Companies addressed to the firm of Anjarwalla & Khanna questioning the validity of the documents that firm of Advocates had lodged with the Registrar and which had been relied on by the registrar to effect changes on the directorship and share-holding of the 2nd Defendant and requested for an explanation thereof within seven (7) days.

Mr. Muturi, learned Counsel for the Applicants teaming up with Mr. Nyaribo submitted that the main basis for the order of 24th January, 2012 was that Mr. Agbeko and Mr. Nyambok had been removed as shareholders and directors of the 2nd Defendant, that there was an order in force dated 7/10/11 which had frozen change of shareholding in the 2nd Defendant, that the Court was misled by the Affidavit of Noela Lubano as to the correct position with the documents the firm of Anjarwalla Khanna & Company Advocates relied on. Counsel therefore urged the court to restore representation of the 2nd Defendant to the position ante 24/1/12.

On their part, the Respondents filed a Replying Affidavit sworn by Farouk Ravate sworn on 20th February, 2012, the Respondents contended that the application did not meet the criteria for an application for review that is, new evidence unavailable at the time the order was passed, an error apparent on the face of the record and any other sufficient reason, that the transfer of shares to Heaven Heights Properties and BDI were done pursuant to acknowledgement of shareholding of 22nd July, 2008 signed by the Applicants, that due to a Mareva injunction in force made on 7th October, 2011, the Respondents Advocates refrained from effecting the changes at the Registrar of Companies as to the change of shareholding, that therefore the records from the Registrar of Companies is not conclusive and cannot be relied on, that the resolutions by Heaven Heights Properties and BDI Indian Ocean produced in the Affidavits of Noela Lubano of 4th and 8th November, 2011 had appointed the Respondents as the directors of the 2nd Defendant, that the Applicants were aware of these resolutions and had been presented with the opportunity to deny those facts but had failed to do so.

It was further contended for the Respondents that there was neither a mistake nor an error on the face of the court record, that there was no sufficient reason shown, that the records from the Registrar of Companies cannot be relied on as Mr. Koech had failed to effect the transfer in 2008, that the firm of Muturi Mwangi & Co had been removed by a resolution made by the new shareholders of the 2nd Defendant.

Mr. Alibhai, learned Counsel for the Respondent relying on the said Replying Affidavit submitted that the Applicants having chosen not to deny the issues and facts sworn to by the Respondents in November 2011, they cannot seek to re-open the same through the present application, that the application was pegged on the first limb of Order 45 Rules of the Court, they have not shown that the materials being produced could not have been discovered after due diligence that there was no sufficient reason, that the Respondents had acted within the confines of the Mareva injunction obtained on 7/10/11 Counsel urged the court to dismiss the application.

I have carefully considered the Affidavits on record and the submissions of counsel. An application for review under Order 45 of the Civil Procedure Rules can only be predicated on three grounds, that is, that there has been discovery of new evidence or material which after the exercise of due diligence was not within the knowledge of the applicant and could not be produced at the time the order was passed, that there is an error apparent on the face of the record, or for any other sufficient reason.

The application as presented is mumbled and does not specifically clarify under which of the grounds under Order 45 the same is predicated on. Be that as it may, I will consider the facts presented to discern if the application is meritorious or not.

In arriving at my ruling of 24th January, 2012, I considered a total of three (3) Affidavits in support of the application then before me and a Notice of Preliminary Objections and Grounds of Opposition. The Affidavits I considered were the Affidavit of Farouk Ravate sworn on 6th October, 2011, the Further Affidavits of Noella C. Lubano sworn on 19th October, 2011 and 8th November, 2011, respectively.

In the Further Affidavit of Noella C. Lubano sworn on 19th October, 2011 she deponed, inter alia, thus:-

“6. I am further informed by Mr. Ravate and verily believe it to be true that BDI and HHPL have recently resolved to remove Mr. Agbeko and Mr. Nyambok as directors of the Company and appoint

Mr. Abdullah Ravate as a director of the Company. An advance scanned copy of the said resolutions are produced in the bundle hereto marked as Exhibit "NCL4". I am aware that A & K Advocates have also been instructed to file all relevant documents at the Companies Registry reflecting the removal of Mr. Agbeko and Mr. Nyambok as directors of the Company.

7. I verily believe that the foregoing documents demonstrate that Mr. Agbeko and Mr. Nyambok are neither the rightful directors nor the shareholders of the Company and accordingly, have no authority to appoint the firm Mwangi Muturi & Associates to represent the Company in these proceedings. Further, I verily believe that it is necessary and in the interest of justice that this suit and the application dated 6th October, 2011, be stayed pending the hearing and determination of the suit filed by Mr. Ravate and Mr. Samourgompouille in HCCC 450 of 2011 which seeks to determine who the true owners and directors of the company. Only then will the Court be in a position to determine who has authority to appoint an advocate to represent the Company in these proceedings."

In her Further Affidavit of 8th November, 2011, Ms. Noella swore, inter alia, that:-

"8. I am informed by my colleague, Mr. Zul Alibhai, an advocate and partner at A & K Advocates, and verily believe it to be true that further to receiving the documents contained in exhibit "FR 14" in the Supporting Affidavit of Mr. Ravate, BDI ocean Indien and Heaven heights Properties Limited have confirmed and ratified the appointment of Mr. Ravate and Mr. Samourgompouille as directors of the 2nd Defendant and BDI Ocean Indien and Heaven Heights properties Limited have removed Mr. Agbeko and Mr. Nyambok as directors of the 2nd Defendant. Now produced in the bundle hereto marked as Exhibit "NCL 1" are true copies of the above resolutions and the filing receipt in respect of confirmation and appointment of Mr. Ravate and Mr. Samourgompouille as directors of the 2nd Defendant.

9. I verily believe that paragraph 2(i) of the Preliminary Objections is irrelevant as I have been advised by Mr. Ravate and verily believe it to be true that he together with Mr. Samourgompouille are the directors of the 2nd Defendant.

11. Paragraph 2(k) of the Preliminary Objections is also untrue. I am aware that A & K Advocates had been appointed by the 2nd Defendant to represent it in these proceedings on 22nd September, 2011. I am also aware and verily believe it to be true that the 2nd Defendant has resolved in a board meeting held by Mr. Ravate and Mr. Samourgompouille as directors of the 2nd Defendant on 2nd November, 2011 to confirm and ratify the appointment of A & K Advocates to represent the 2nd Defendant in all matters relating to it as well as requiring the firm of Muturi Mwangi and Associates to cease acting for the 2nd Defendant including in all existing court proceedings particularly this one. Produced in the bundle hereto marked as Exhibit "NCL 3" is a copy of the minutes of the 2nd Defendant's said board meeting." (emphasis supplied)

On the strength of the said Affidavits, I held in my ruling of 24th January, 2012:-

"Further to the Affidavits of Farouk Ravate and Noella C. Lubano of 6th and 19th October, 2011, respectively, Noella C. Lubano did also file another Affidavit of 8th November, 2011. In that Affidavit, it was sworn that Eric Agbeko and Phillip Nyambok had since been removed as directors and shareholders of the 2nd Defendant and new directors and shareholders had been appointed. That resolution of 17th October, 2011 was exhibited as "NCL1". It ratified the appointment of Ms. Anjarwalla and Khanna Advocates as the new Advocates acting for the 2nd Defendant in this case. The said appointment of new directors and shareholders had been registered with the Registrar of Companies and the receipt No. BO456647 was exhibited evidencing the filing thereof.

On my part therefore, there is evidence on record that has not been disputed which shows that new directors and shareholders of the 2nd Defendant have ratified the appointment of Ms Anjarwalla &

Khanna to take over the conduct of this suit on behalf of the 2nd Defendant.”

In the Supporting Affidavit of Eric Agbeko sworn on 31st January, 2012, he has exhibited the following documents:-

a) Exhibit “EA2” being form CR12 dated 23rd November, 2011. That form was issued by the Assistant Registrar of Companies over 10 days after the application had been argued before me and the ruling reserved. The same is obviously new evidence that did not exist at the time the parties were before me. What is clear from the said form CR 12 is that as at 23rd November, 2011, Mr. Farouk Ravate and Justin Samourgompouille were directors non shareholders but Agbeko and Phillip Nyambok were still directors and shareholders holding one (1) share each in the 2nd Defendant.

b) Exhibit “EA3” being form No.203A dated 17th October, 2011. The same concerned the appointment of Farouk Ravate and Justin Samourgompouille as directors of the 2nd Defendant. That form was stamped by the Registrar of Companies on 1st November, 2011 and endorsed with words Receipt No. B0456647 and signed by the issuing officer. Exhibit “EA3” also had a resolution dated 17th October, 2011 appointing Farouk Ravate and Justin Samourgompouille directors of the 2nd Defendant. There was also a letter dated 1st November, 2011 by the firm of Anjarwalla & Khanna, Advocates applying for a comprehensive official search from the Registrar of Companies in respect of the 2nd Defendant. That letter was also stamped by the Registrar and endorsed with Receipt No.B0456647.

c) Exhibit “EA1” being form CR 12 dated 26th January, 2012 addressed to the directors of the 2nd Defendant confirming that as at that date the names of the directors/shareholders of the 2nd Defendant was Phillip Nyambok and Eric Agbeko each holding one (1) share.”

It is obvious that in the ruling of 24th January, 2012, I relied on the positive averments by Noella C. Lubano that Agbeko and Nyambok had been removed as the directors and shareholders of the 2nd Defendant. It was predicated on the fact that the 2nd Defendant now had new and different directors other than Mr. Agbeko and Mr. Nyambok.

In Noella Lubano’s Further Affidavit of 8th November, 2011 in paragraph 8 thereof, she swore that Agbeko and Nyambok had been removed as directors and Ravate and Justin had been appointed. She concluded that:-

“Now produced in the bundle hereto marked as Exhibit “NCL1” are true copies of the above resolution and the filing receipt in respect of confirmation and appointment of Mr. Ravate and Samourgompouille as directors of the 2nd Defendant.”

“NCL1” exhibited the two resolutions and Form 203 on the appointment of Ravate and Samourgompouille. Obviously the form expressing the removal of Agbeko and Nyambok as directors was never exhibited. Indeed, my take of the matter as at the time I made the ruling of 24th January, 2012 was that the Receipt No. 0456647 that formed part of “NCL1” also related to the removal of Agbeko and Nyambok as directors. Indeed from my ruling, it is quite clear that I proceeded on the basis that shareholding and directorship of the 2nd Defendant had changed. Obviously, with what I have analyzed above, that is not the case. There was clear mischief in the Further Affidavit of Noella C. Lubano of 8th November, 2011, in that the firm of Anjarwalla & Khanna presented to court documents in a selective manner. The letter dated 1st November, 2011 by the said firm to the Registrar of Companies was never exhibited although it seems to have been presented together with Form 203A dated 17th October, 2011 and the resolutions exhibited as “NCL1”. Further, nowhere in that Affidavit did Ms. Lubano disclose that her firm had applied to the Registrar of Companies for a comprehensive search and was awaiting the

results. Ms Lubano also swore that Mr. Ravate and Mr. Samourgompouille had held a meeting as directors of the 2nd Defendant and had appointed Ms Anjarwalla and Khanna Advocates to represent the 2nd Defendant in these proceedings. She failed to disclose that the alleged resolution purporting to remove Ms. Agbeko and Nyambok as directors of the 2nd Defendant had not been filed with the Registrar of Companies and it was therefore not effective.

My view is, when there is a dispute as to directorship and shareholding of a company, the best evidence to be relied on is the updated records from the Registrar of Companies. That registry is meant to keep the records of all Companies and for the purposes of the public to rely on the same as reflecting the true record of any particular company. If there is a fighting amongst directors and shareholders of a company, that is none of the business of third parties and/or the public. This is why there is penalty in late filing of change of particulars so that companies do file their returns in time so as to warn and/or inform the public as to who is the authorized officer or owner of a particular company. If there be declarations of trusts and other hidden dealings between promoters of a company and persons whom it publicly holds to be the shareholders and/or directors, that is an issue to be resolved by a court before whom those parties may decide to sort out that dispute.

I note from the Complaint filed in **HCCC No. 450 of 2011 Farouk Ravate & Another –vs- Eric Agbeko**, prayer No. (f) calls for the removal of the said Agbeko and Nyambok as directors and prayer (g) prays for a declaration that the said Ravate and Justin are the true directors of the 2nd Defendant. In the Order obtained by the said Ravate and Justin ex parte in that suit on 7th October, 2011, Mr. Ravate and Justin did not ask the court to restrain Agbeko and Nyambok from acting as directors or holding themselves as such. While they had the two restrained from undertaking various matters relating to the 2nd Defendant, Farouk Ravate, through Anjarwalla and Khanna Advocates were busy attempting to interfere with the management structure of the 2nd Defendant. That is a despicable conduct. It is not a conduct of acting in good faith. The lesser I address the issue the better.

That being the case I am satisfied that the evidence alluded to in exhibit “EA1”, “EA2” and “EA3” in the Replying Affidavit of Erick Agbeko sworn on 30th January, 2012, in my view is new evidence as well as sufficient reason to warrant my revisiting the ruling and order of 24th January, 2012.

Accordingly, I am of the view that it is proper that the issue of who are the proper shareholders and/or directors of the 2nd Defendant with legal capacity to run the affairs of the 2nd Defendant including the power to appoint its Advocates be resolved in the aforesaid HCCC No. 450 of 2011 wherein that issue seems to squarely lie. As for this matter, the evidence before me shows that contrary to the averments in Noella C. Lubano’s Affidavits of 19th October and 8th November, 2011, Agbeko and Nyambok have never been removed from the directorship of the 2nd Defendant. They have not been incapacitated from running the affairs of the 2nd Defendant in any way except as ordered by the Court Order of 7th October, 2011. That order did not restrain them from acting as directors of the 2nd Defendant. The issue of declaration of trusts transfers of shares by Agbeko and Nyambok to Ravate and Justin and the appointment of true and proper directors of the 2nd Defendant is an issue that is live in **HCCC No. 450 of 2011** which as I held on 24th January, 2012, I cannot address.

Accordingly, I allow the Notice of Motion dated 30th January, 2012 in terms of prayers Nos. 3, 7 and 8. As regards prayers Nos.6 and 9 I will dismiss them for they lack any legal basis.

I will not award any costs of the motion since the application was successful only partially.

Orders accordingly.

DATED and delivered at Nairobi this 19th day of April, 2012.

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A MABEYA

JUDGE