



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Winding Up Cause 4 of 2009

**CAPITAL CONSTRUCTION CO. LTD. PLAINTIFF
VERSUS
IN THE MATTER OF COMPANIES ACT DEFENDANT**

RULING

The application before the Court is brought by a notice of motion dated 22nd December, 2009, and made under **Section 3A** of the **Civil Procedure Act** and **Rule 3 (2)** of the **High Court Vacation Rules**, and all other enabling provisions of the law. The Applicant seeks from the Court the following substantive orders –

1. ***“That stay of hearing winding up petition and the order by consent dated 13th May, 2009 until the determination of this application” (sic).***
2. ***“That the said order of the 13th May, 2009, be vacated forthwith and the winding up do proceed to hearing or liberty to file a fresh one” (sic).***

According to the record, prayer (1) was granted by the Court as prayed on 24th December, 2009. That left only prayer (2) for hearing.

The application is supported by the annexed affidavit of

Jitendra Lakhamshi Dedhia, a duly appointed nominee of Alkarim Badrudin Suderji, and is based on the grounds that –

- (a) ***Kwengu & Co., Advocates, and Mohamed Madhani, Advocates, filed the consent order of 13th May, 2009, wrongfully or by mistake in that –***
 - (i) ***Kwengu & Co., Advocates, never filed notice of appointment to act for the Petitioner/Applicant.***
 - (ii) ***Mohamed Madhani & Co., Advocates, never filed a notice of appointment to act for Capital Construction Co., Ltd.***
 - (iii) ***Both Advocates had not received any written instructions to file the consent order.***
- (b) ***The Managing Director for Capital Construction Co., Ltd. had written a letter dated 6th April, 2009, to say that no agreement was reached hence the consent order of 13th May, 2009, was vitiated, null and void.***
- (c) ***The Applicants agreed with the Managing Director of Capital Construction Co., Ltd. and consented that any agreement was null and void by a letter dated 7th April, 2009.***
- (d) ***That the Winding Up proceeding do proceeds or liberty to file a fresh one” (sic).***
- (e) ***“That Capital Construction Co., Ltd., a private company with numerous debentures and is insolvent with a debit account with Equity Bank Ltd. of Kshs.6,743,604.77 as at April 2008 and had no capacity to transfer it shares or those of its members in view of Section 30 of company acts and it on articles of associations” (sic).***

The record shows that this application was meant to be served upon

Kwengu & Co., Advocates; Mohamed Madhani, Advocates; and Watta & Associates, Advocates. According to an affidavit of service sworn by one Isaac Okach on 17th May, 2010, Kwengu & Co., Advocates were duly served on 21st April, 2010. The affidavit further shows that Mr. Kwengu accepted service of the hearing notice but refused to sign the documents. The affidavit also shows that Messrs Mohamed Madhani & Co., Advocates were served on the aforesaid date but their rubberstamp shows that they were served on 25th May, 2010. They received the hearing notice under protest as the date was taken *ex parte* and the same was not convenient to them. The firm of Watta & Associates, Advocates, was not served. The explanation by Mr. Owuor, Advocate, addressing the Court from the bar was that Mr. Watta had

passed away in a road accident on 1st May, 2010.

Against that background, Mr. Owuor for the Applicant applied to withdraw the application for service upon Watta & Associates, Advocates. He submitted that both the firms of Kwengu & Co., and that of Messrs Mohamed Madhani & Co, were duly served and none of them had filed any grounds of opposition. He therefore urged the Court to vacate the purported consent order dated 13th May, 2009.

I have considered the pleadings in this matter and the submissions by learned Counsel for the Applicant/Petitioner. I note from the record that by a letter addressed to the Deputy Registrar, Milimani Commercial Courts, Nairobi and dated 21st March, 2009, the authors rendered themselves thus –

“Winding Up Cause No. 4 of 2009 – Capital Construction Ltd.

Further to the consent entered into between the parties herein on the 23rd of February 2009 before the Honourable Justice L. Kimaru, kindly record the following consent;

‘That the matter be and is hereby marked as settled with costs to the Petitioner’.

Yours faithfully

***KWENGU & CO MOHAMMED MADHANI & CO.
ADVOCATES FOR THE ADVOCATES FOR THE
PETITIONER COMPANY”***

It is noteworthy that both firms of Kwengu & Co., Advocates and Messrs Mohamed Madhani & Co., were the authors the above consent. According to ground (1) of the grounds upon which the application is based, none of the said firms had filed a notice of appointment to act for either of the parties. It is further stated in the said ground that none of them had received any written instructions to file the consent order. It is also significant that none of the two firms of Advocates has controverted the said allegation either by way of a replying affidavit or even grounds of opposition. When the matter came for hearing, none of them appeared even though they had been served. In the circumstances, the application is unopposed. Furthermore, where a consent is entered by unauthorized persons, it cannot have any probative value. The Applicant herein is therefore entitled to the orders as prayed.

I accordingly direct that the consent order of 13th May, 2009 be and is hereby vacated and the Winding Up do proceed to hearing. Costs in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of June, 2010.

**L. NJAGI
JUDGE**