



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 454 of 2008

LUCY WAITHERA MWANGI 1ST PLAINTIFF

JOHN IRUNGU GITHINJI 2ND PLAINTIFF

JULIUS KARIUKI MWANGI 3RD
PLAINTIFF

VERSUS

STEPHEN KIMANGA 1ST DEFENDANT

PAUL KIMARI 2ND DEFENDANT

FREDRICK NJORA 3RD DEFENDANT

JACKSON MUCHOKI 4TH DEFENDANT

PATRICK GITHINJI 5TH DEFENDANT

MOSES KIMANGA 6TH DEFENDANT

R U L I N G

Application dated 23/4/09 is brought under **Order XLIV Rule 1, Civil Procedure Code, Section 80** and **Section 3A Civil Procedure Rules** seeking orders of stay orders of 24/2/2009 and 20/4/2009 and that court orders issued on 24/2/2009 and 20/4/2009 be set aside or reviewed and that the application dated 19/2/2007 be heard on merit, and that the costs of application be paid by E.K. Njagi personally.

The grounds upon which the application is grounded upon are written and the application is supported by affidavit of Lucy Waithera Mwangi, John Githinji and Julius Kariuki Mwangi sworn and annexed hereto.

I have perused the order made by this court on 24/2/09 and order issued by court on 20/4/2009. Both orders directed that the money awarded by the Commissioner of Lands over compulsory acquisition of L.R.209/1803/4 at Fig Tree Hotel Ltd. be deposited in a joint account of Mr. Omangi Musanga & Co. Advocates and M/S E.K. Njagi & Co. Advocates till finalization of the matter herein.

The supporting affidavit sworn by Lucy Waithera Mwangi testifies that they had employed advocate Mr. E.K. Njagi to act for them in this matter. The plaint was dated 11/8/08 by Advocate E.H. Njagi. At all material times the plaintiffs and defendants were shareholders of the Company "Fig Tree Hotel Ltd." All parties acquired their shareholding by inheritance from the parents.

On or about 26/7/2008, it appears there was a dispute which arose between the plaintiffs and defendants as to the rights of each party in the company. Thereafter in the course of time the above mentioned application was filed on 19/2/09 seeking an order authorizing the parties to deposit some money received from Commissioner of Lands over some compulsory acquisition by Government of some land owned by Fig Tree Hotel Ltd. being L.R.209/1803/2/2. That application is dated 19/2/09.

On 24/2/09, this court made order:-

"The monies pursuant to an award by Commissioner of Lands over compulsory acquisition of plot No.209/1813/2/2 be deposited in a joint account of M/S Omangi Musanga & Co. Advocates and E.K. Njagi & Co. Advocates till finalization of the matter herein."

The applicants have now sought to review or set aside the said orders being two as stated above. They say they dismissed their advocate E.K. Njagi. The applicants object to this process since they say they had not instructed the advocate to enter such orders and would like the orders to be set aside.

The affidavit in reply filed by Edwin Kimunya Njagi, the advocate aforesaid, practicing as E.K. Njagi & Co. Advocates shows that he is aware of the disputes between the plaintiffs and defendants. He swears that they did give him instructions not to oppose the orders proposed and had many consultations but at the last minute on the morning of the hearing of the application, the 1st and 2nd defendants were in consultation and instructed the advocate not to oppose the application and advocate proceeded to record a consent dated 3/3/2009.

That the company is run by defendants who are majority shareholders while the plaintiffs are minority. The money was paid to owner of land, The Fig Tree Hotel Ltd., and not to shareholders. The shareholders must not interfere with the assets of the company, the law being that an incorporated company has independent legal personality and holds its assets in its name, not in the name of shareholders. This is a main principle of law.

Secondly, when parties appoint advocates to advise them, the advocates become agents and what they do as agents is done on behalf of employer. Authority given to an advocate to conduct a suit authorizes him to do all matters concerned with the institution and conduct of the suit. The advocate does what the party can do for himself and there is no question of whether he had authority or not.

Thirdly, matters of agreements/consent become binding on parties just as any agreement signed by both parties. When it is a court order reached by consent, no parties can be permitted to re-open the same without reason. Therefore the consent orders entered into by Mr. E.K. Njagi & Co. Advocates and the defendants' advocates cannot be set aside.

It is clear the advocate for plaintiffs had full authority to enter into the consent complained of. Upon considering all the matters raised, I find no merit to this application and same is dismissed with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 31st day of July, 2009.

JOYCE N. KHAMINWA

JUDGE