

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Winding Up Cause 13 of 2005

IN THE MATTER OF DESBRO ENGINEERING LTD.

AND

IN THE MATTER OF THE COMPANIES ACT

CAP 486 LAWS OF KENYA

RULING

On 22.7.2005 Desbro Engineering Limited (hereinafter called “the Company”) lodged a Chamber Summons seeking one primary order that the Board of Directors of the Company be restrained from making any transfer of shares or altering the status of the membership of the company or interfering in the day to day management of the affairs of the company by the Managing Director Bharadwaz Dronavali or in any other way causing the disposition of the company property without the leave of the court pending the hearing and determination of the Winding Up Petition herein. The primary grounds for the application

are that Suman Kumar Sannik and Ashu Sannik both directors of the company have been bringing prospective customers to the company premises with a view to disposing the assets of the company without the leave of the court and that the said directors are acting unilaterally and are interfering in the day to day management of the affairs of the company with a view to effecting disposition of the assets of the company.

The application is supported by an affidavit sworn by one Bharadwaz Dronavali who is described as the Managing Director of the Company. The application is opposed and the said Suman Kumar Sannik has sworn a replying affidavit in which he also described himself as the Managing Director of the company. Mr. Sannik has also sworn another affidavit in which he has deposed that he is also a Director of a company called Desbro Holdings Kenya Limited which is the majority shareholder in the company Desbro Engineering Limited. He has also deposed that the company has instructed the firm of M/s E. K. Mutua & Co. Advocates to act for it in this matter. Annexed to this affidavit is a copy of the company resolution to that effect. He has also deposed that the company has never instructed M/s Mugambi Imanyara & Co. Advocates to act for it in this matter. There is no response to these averments from Mr. Dronavali Bharadwaz and M/s Mugambi Imanyara & Co. Advocates.

It is therefore not surprising that the company on 10.11.2005 filed a Notice of Preliminary Objection on the grounds that the firm of Mugambi Imanyara & Company Advocates have no instructions and or mandate to act for the company and that the affidavit of Bharadwaz Dronavali was sworn without authority and is therefore incompetent and defective. It is this preliminary objection which was canvassed before me on 23.3.2006.

I have considered the application, the affidavits both for and in opposition to the application, the annexures and the submissions of the learned counsels. Having done so, I take the following view of the matter. A limited liability company is a legal person in law and has separate legal existence. It may act through the medium of men such as the men/women that constitute the Board of Directors. When it does so evidence should be adduced to that effect. In the case at hand, Suman Kumar Sannik has deposed that he is the Managing Director of the company and has exhibited a copy of the company resolution of

22.7.2005 confirming that on the said date Mr. Bharadwaz was removed

as Managing Director of the company. He has also deponed that M/s Mugambi Imanyara & Company Advocates have never been instructed to act for the company in this matter. He has exhibited a copy of a company resolution appointing M/s E. K. Mutua & Co. Advocates to act for the company in this matter.

Faced with this objection, neither M/s Mugambi Imanyara & Company Advocates nor Mr. Bharadwaz responded by exhibiting, contrary instructions. The company's position that Mr. Bharadwaz was not its Managing Director at the time the application dated 22.7.2005 was filed therefore remains unchallenged. Also unchallenged is the company's position that it has never instructed the firm of Mugambi Imanyara & Co. Advocates to act for it in this matter. That being the position, Mr. Bharadwaz Dronavali had no authority of the company to swear the affidavit filed in support of the application under consideration. In my view the said supporting affidavit is clearly incompetent and is struck out. How about the Chamber Summons itself? Apart from the fact that it is now unsupported by affidavit evidence, the primary order sought is for restraining the Board of Directors of the Company from making any transfer of shares or altering the status of the membership of the company or interfering in the day to day management of the affairs of the company by the Managing Director, Bharadwaz Dronavali or in any other way causing the disposition of the company property without the leave of the court. It is now not in dispute that Mr. Bharadwaz Dronavali is not the company Managing Director. It is further not seriously disputed that M/s Mugambi Imanyara & Company Advocates have not been instructed by the company yet the application is purported to have been lodged by M/s Mugambi Imanyara & Company Advocates on behalf of the company and the said Bharadwaz Dronavali.

Under Order XXIX Rules 1, 2 and 3 of the Civil Procedure Rules proof of allegations thereunder is normally by affidavit. Having struck out the supporting affidavit this application would in my view not be maintainable. In any event in so far as the application seeks to preserve the management of the company in Mr. Bharadwaz Dronavali who is no longer the Managing Director, it is incompetent.

In the result the application dated and filed on 22.7.2005 by Mugambi Imanyara & Company Advocates for the Company and Bharadwaz Dronavali is incompetent and is struck out with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4th DAY OF MAY, 2006.

F. AZANGALALA

JUDGE

4.5.2006