



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

**Civil Case 578 of 2006**

**SONALI KUMARI ZACHARIA ..... PLAINTIFF**

**VERSUS**

**BINOY ZACHARIA**

**SARA PREMA ZACHARIA**

**ISMAIL MAWJI**

**RICKSHAW TRAVEL (KENYA) LIMITED**

**FLYING RICKSHAW LIMITED .....DEFENDANTS**

**R U L I N G**

These are two applications by way of Notice of Motion dated 14.11.2006 brought under the provision of Section 3A of the Civil Procedure Act, the Advocates Act, Order III of the Civil Procedure Rules and all enabling provisions and procedures of law. The applications have been lodged by the firm of M/S Kilonzo & Company Advocates on behalf of the 4<sup>th</sup> and the 5<sup>th</sup> defendants. Both applications seek one principal order each that the Memorandum of Appearance filed by M/S ole Kaikai & Company Advocates on behalf of the 4<sup>th</sup> and 5<sup>th</sup> defendants respectively be struck out and expunged from the record.

I heard the applications together and this ruling is in respect of the two applications.

The grounds for the applications are identical and are as follows:-

- 1. That the plaintiff who is the Managing Director of the  
4<sup>th</sup> and 5<sup>th</sup> defendants instituted this suit against  
the 4<sup>th</sup> and 5<sup>th</sup> defendants on 23.10.2006.**
- 2. That the 4<sup>th</sup> and 5<sup>th</sup> defendants' directors, Binoy Zachariah  
Sara Prema Zacharia resolved to appoint the firm of**

**M/S Kilinzo & Co. Advocates to act for the 4<sup>th</sup> and 5<sup>th</sup> defendants on 26.10.2006 in respect of any action filed by the 4<sup>th</sup> and 5<sup>th</sup> defendants against the plaintiff or vice versa.**

- 3. That the plaintiff purportedly as Managing Director appointed the firm of ole Kaikai and Company Advocates on 31.10.2006 to act on behalf of the 4<sup>th</sup> and 5<sup>th</sup> defendants.**
- 4. That the plaintiff's appointment of Advocates to defend the Companies she has sued to retain the position of Managing Director raises a serious conflict of interest, is an abuse of the court process and is to the prejudice of the 4<sup>th</sup> and 5<sup>th</sup> defendants.**
- 5. That it is not in the interest of the 4<sup>th</sup> and 5<sup>th</sup> defendants to be represented by an Advocate appointed by the plaintiff.**
- 6. That the plaintiff as Managing Director is a mere employee of the 4<sup>th</sup> and 5<sup>th</sup> defendants and cannot commit the 4<sup>th</sup> and 5<sup>th</sup> defendants to a firm of Advocates not approved by its directors.**

The applications are supported by affidavits of Binoy Zacharia and Sara Prema Zacharia. They have deponed in the affidavit that on 26.10.2006 they resolved to appoint the firm of M/A Kilonzo and Company Advocates to represent the 4<sup>th</sup> and 5<sup>th</sup> defendants in any suit filed by the plaintiff against the companies or vice versa. A copy of the resolution is annexed as "A" to the affidavits. They have further deponed that the plaintiff purportedly as Managing Director has appointed the firm of Ole Kaikai & Company Advocates to act on behalf of the 4<sup>th</sup> defendant. A copy of the letter from Ole Kaikai & Company Advocates to that effect is exhibited as "B". It is further deponed that the plaintiff has no authority from the Board of Directors to appoint an advocate for the 4<sup>th</sup> and the 5<sup>th</sup> defendants as there would be an obvious conflict of interest for her as plaintiff to appoint an Advocate to defend the 4<sup>th</sup> and 5<sup>th</sup> defendants against her own claim. It is also deponed that the plaintiff appointed the firm of Ole Kaikai & Company Advocates on 31.10.2006 having obtained an ex parte injunction and order for maintenance of the "Status quo" purely for purposes of frustrating the efforts of the 4<sup>th</sup> and 5<sup>th</sup> defendants to discharge those orders and defend the suit and save for filing Memorandum of Appearance the firm of Ole Kaikai & Company Advocates no pleadings have been filed.

The applications are opposed and there are replying affidavits sworn by the plaintiff. She has

deponed that in her capacity as the Chief Executive Officer, she instructed M/S Ole Kaikai & Company Advocates to enter appearance for the 4<sup>th</sup> and 5<sup>th</sup> defendants and further that as director the 1<sup>st</sup> and 2<sup>nd</sup> defendants do not have any greater right to appoint an Advocate for the 4<sup>th</sup> and 5<sup>th</sup> defendants. She has also deponed that as Managing Director of the 4<sup>th</sup> and 5<sup>th</sup> defendants she was vested with the powers of running the day to day affairs of the companies including appointing counsel. She has further deponed that before varying the representation for the 4<sup>th</sup> and 5<sup>th</sup> defendants a full meeting of the Board of Directors has to be convened to pass the necessary resolutions. In the plaintiff's view there is no conflict of interest but the 1<sup>st</sup> and 2<sup>nd</sup> defendant's interests are in conflict with those of the 4<sup>th</sup> and 5<sup>th</sup> defendants.

The application was canvassed before me on 20.11.2006 by Mr. Ochieng who has taken over from M/S Kilonzo and Company Advocates and Mr. Kaikai both of whom claim to have been instructed by the 4<sup>th</sup> and 5<sup>th</sup> defendants. Both counsels elaborated on the averments contained in their respective client's affidavits and urged that orders be made in favour of their respective clients.

I have considered the application and the affidavits together with the annexures. I have also given due consideration to the submissions made to me by the counsels appearing. Having done so I take the following view of this matter. The plaintiff's suit seeks a declaration with regard to notices issued by the 3<sup>rd</sup> defendant for director's meeting of the 4<sup>th</sup> and 5<sup>th</sup> defendants of 25.10.2006. The plaintiff also seeks an order restraining the defendants from holding the said directors' meeting. The plaintiff finally seeks as one of her main prayers a declaration that the 3<sup>rd</sup> defendant be forthwith removed as Company Secretary of the 4<sup>th</sup> and 5<sup>th</sup> defendants.

From the above prayers, it cannot be said that the plaintiff filed this suit for the benefit of the 4<sup>th</sup> and 5<sup>th</sup> defendants. On 28.10.2006 the plaintiff amended her plaint and seeks *inter alia* the following orders:- A declaration that the resolutions passed on 25.10.2006 by the 1<sup>st</sup> three defendants in respect of the 4<sup>th</sup> and 5<sup>th</sup> defendants are null and void and pending the determination of this application the status quo ante 25.10.2006 be maintained, an injunction restraining the defendants from effecting the said resolutions and minutes or proceedings of the said meeting; an injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from sacking, removing or otherwise getting rid of the plaintiff as a director and Managing Director of the 4<sup>th</sup> and 5<sup>th</sup> defendants pursuant to the said resolutions, minutes or proceedings and a declaration that the 3<sup>rd</sup> defendant be forthwith removed as Company Secretary of the 4<sup>th</sup> and 5<sup>th</sup> defendants. **Prima facie**, the plaintiff suit reveals a dispute between the Managing Director and her co-directors over the 4<sup>th</sup> and 5<sup>th</sup> defendants. It is well settled that a company is an artificial person and takes its decisions through the agency of its administrative organs namely the Board of Directors or the general meeting of its shareholders. Either of these organs may authorize the use of the company's name to sue. It may also authorize the retension of counsel in litigation. The decision to act as above should be guided by the Company's Articles of Association in the case of registered companies. The 4<sup>th</sup> and 5<sup>th</sup> defendants are such companies. The plaintiff has deponed that as Managing Director of both the 4<sup>th</sup> and 5<sup>th</sup> defendants she had the power to appoint M/S Kaikai and Company Advocates as the advocates for the companies. I have perused the Articles of Association of both companies. The 4<sup>th</sup> defendant's Articles of Association do not seem to have a provision for a Managing Director while the 5<sup>th</sup> defendant's article 17 reads as follows:-

**“17. The directors may entrust to and confer upon**

**a managing director any of the powers exercisable**

**by them upon such terms and conditions and**

**with such restrictions as they think fit and either**

**collaterally with or to the exclusion of their**

**own powers and may from time to time revoke,**

**withdraw, alter or vary “all or any” of such powers.”**

That article makes it clear that a managing director only exercises powers given him or her by the directors. Article 1 of the same Articles of Association is as follows:-

**“1. Subject as hereinafter provided the Regulations**

**contained in part 1 of Table “A” in the First**

**Schedule to the Companies Act (hereinafter**

**Referred to as Table “A”) shall apply to the**

**Company.”**

That article puts it beyond doubt that the company’s Articles of Association do not contain the complete code of regulations and where deficient, Table “A” applies.

Article 1 of the Articles of Association of the 4<sup>th</sup> defendant save for certain exceptions also adopts the same Table “A”. Article 8 of the 4<sup>th</sup> defendant’s Articles of Association reads as follows:-

**“8. The quorum for transaction of business of the**

**Directors may be fixed by the directors and**

**unless so fixed shall be two.”**

That means plainly that any two director in a meeting lawfully convened would pass resolutions that would bind the company. Article 12 should in my view be read together with article 8 in order to avoid contradiction and absurdity. The plaintiff has not exhibited any authority from the directors that their powers had been donated to her. In my view in the absence of such authority only the Board of Directors have authority to determine who should act for the companies. Annexed to the affidavit in support of the 4<sup>th</sup> defendant’s application is exhibit “B”, which is a resolution signed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants by which M/S Kilonzo and Company Advocates were instructed to institute and defend proceedings by and against the 4<sup>th</sup> defendant. To the supporting affidavit of the 5<sup>th</sup> defendant is annexed a similar resolution marked as exhibit “B”. By that resolution, the same M/S Kilonzo and Company Advocates were instructed by the 5<sup>th</sup> defendant to institute or defend proceedings on behalf of the 5<sup>th</sup> defendant.

This is not a case where the plaintiff has instituted these proceedings for the benefit of the 4<sup>th</sup> and 5<sup>th</sup> defendants in which event the 4<sup>th</sup> and 5<sup>th</sup> defendants would be sued for their own benefit. It is a case to protect the plaintiff’s interest. In my view she would not be entitled to appoint counsel for the 4<sup>th</sup> and 5<sup>th</sup> defendants. The plaintiff in my view does not fully appreciate our company law position with regard to the companies’ separate and distinct legal existence.

The upshot is that the two applications succeed and the Memorandum of Appearance filed by M/S Ole Kaikai and Company Advocates for both 4<sup>th</sup> and 5<sup>th</sup> defendants are struck out and expunged from the record. As the plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are related by marriage and the 4<sup>th</sup> and 5<sup>th</sup> defendants are family concerns. I make no order as to costs.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of November 2006.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:- Ongicho for the plaintiff and Ochieng for the defendants and Kaikai for the 4<sup>th</sup> and 5<sup>th</sup> defendants.

**F. AZANGALALA**

**JUDGE**

**28/11/06**