



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

Winding Up Cause 30 of 2003

JOHNSON MBUGUA MUGO1ST PETITIONER

JAMES KAGWE MUGO.....2ND PETITIONER

STEPHEN KIANIA MUGO3RD PETITIONER

VERSUS

DOMINIC KINUTHIA MUGO.....RESPONDENT

DANIEL WAGACHA GICHURAINTERESTED PARTY

RULING

Before the hearing of the application dated 25th October 2004 the interested party raised a preliminary objection.

Although the interested party had raised 4 points of objection counsel only submitted in support one. The objection was: -

“That the Notice of Appointment of advocates dated 12th August 2004 and all subsequent pleadings are not properly before the court as the same were filed without the sanctions of the court. The same should be expunged from the court record.”

The advocates Wamahius Kimeria & Co. Advocates had filed a Notice of Appointment dated 12th August 2004 on behalf of the company in receivership. Subsequently by a Notice of Motion dated 25th October 2004 the self same advocate sought 7 substantive prayers one of them being a prayer seeking the sanction of this court of the appointment of the said advocate as advocates for the joint receivers/liquidators in these proceedings

The afore said Notice of Appointment and the Notice of Motion are the subject of the Preliminary Objection.

Mr. Mbugua advocate in support of the Preliminary Objection submitted that it was clear from Section 241 of the Companies Act that the Power of a Liquidator/Receiver had to be exercised with the sanction of the court and one of those powers was the appointment of an advocate. He said the Notice of Appointment was filed before the court sanctioned the said appointment and in that regard he was of the view that sanction could not be given in retrospect. He relied on the case of **RE ASSOCIATED TRAVEL LEISURE AND SERVICES LTD (1978) 2 ALLER 272**. Here was a case where a solicitor

was appointed without sanction and he proceeded to act and thereafter in an attempt to recover his costs the taxing master refused to tax on the basis that his appointment had not been sanctioned. On review the court held that *“the court had power, either under Section 246 (3) or under its inherent jurisdiction to give retrospective sanction...”*

The aforesaid case is distinguishable from the present one in that other than filing a Notice of Appointment the advocate for the company has not actually participated in a hearing.

The two authorities relied upon by the interested party are also distinguishable as correctly stated by Mrs. Mbanya, that the parties had failed to obtain sanction in the High Court. Indeed Court is defined in the Companies Act as the High Court.

Mr. Njiha counsel for the Respondent associated himself with the submissions on behalf of the interested party and added that Section 241 of the Companies Act was in mandatory terms and of necessity-invalidated document filed without sanction.

Mrs. Mbanya for the Petitioner disassociated herself with the objection and drew the attention of the court to the distinction of authorities relied upon by the interested party. She pointed out that the Liquidator had made an application dated 25th October 2004, particularly prayer No. 2, seeking the court’s sanction to be represented by counsel. This she said the court had jurisdiction to entertain.

Counsel for the Liquidator argued that the Liquidator needed to come to court to get orders to enable him to manage the property in accordance with the ruling of Mohamed Ibrahim J. Consequently, counsel argued, he filed the Notice of Appointment in order to have right of audience. He argued that Section 241 empowered the court to sanction such a notice and in any case the court could invoke its inherent power to so sanction.

Section 241 (1) of the Companies Act provides: -

“ The Liquidator in a Winding Up by the court shall have power, with the sanction either of the court or of the Committee of inspection –

- (a)
- (b)
- (c) **To appoint an advocate to assist him in the performance of his duties.”**

It follows from close reading of the said section that counsel for the Liquidator was wrong to have filed the Notice of appointment before sanction of the court. For that reason I do hereby strike out the Notice of Appointment filed on 12th August 2004.

I do not agree with submissions of the interested party that the application dated 25th October 2004 has contravened Section 241. The said application amongst its prayer is a prayer seeking the sanction for the appointment of counsel. I think it is unfortunate that counsel did not first seek the sanction and once sanction was granted then file the application for other prayer. I am of view that even combining of all those prayers is not prejudicial and is not fatal to the application but it may be prudent to first deal with prayer No. 2 and once that prayer is granted the Liquidator can proceed with the other prayers.

The orders of this court are as follows: -

- (a) **That the Notice of Appointment dated 12th August 2004 is hereby struck out and the court does grant leave to the Liquidator to file another Notice of Appointment if and when sanction is granted to appoint counsel.**

(b) The Liquidator will in the first instance proceed to argue Prayer No 2 of the application dated 25th October 2004.

(c) The costs of the Preliminary Objection will be in the cause.

Dated and delivered this 9th December 2004

MARY KASANGO

JUDGE