



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. E021 OF 2021

TIGRIS DEVELOPERS LIMITED.....PLAINTIFF

VERSUS

WILLY KIHARA NJOKI KANYOTU1ST DEFENDANT

SURESH SHAH..... 2ND DEFENDANT

TOPAZ INVESTMENTS LIMITED 3RD DEFENDANT

AND

KANGAITA COFFEE ESTATES LIMITEDINTERESTED PARTY

RULING

By a Plaint dated **18th February 2021**, the Plaintiff herein **Tigris Developers Ltd**, brought this suit against **Willy Kihara Njoki** and **Suresh Shah**, as Defendants. Further **Kangaita Coffee Estates Ltd**, was cited as an Interested Party. A Permanent injunction was sought against the Defendants to restrain them from any dealing over land parcel **No. LR No. 8261 (title I.R No. 9480/1)**. Simultaneously, the Plaintiff filed a Notice of Motion application, even dated and sought for temporary injunction to restrain the Defendants from dealing with the above cited land parcel being **LR No. 8261**.

This matter was first placed before **Lady Justice J. G. Kemei** in **Muranga, Environment and Land Court**, under Certificate of Urgency and an injunctive Order was issued in the first instance. The matter was fixed for interpartes hearing on **9th March 2021**, before **Thika Environment and Land Court**.

However, on **5th March 2021**, **Topaz Investments Ltd**, filed a Notice of Motion Application dated **4th March 2021**, and sought to be enjoined as a 3rd Defendant. It also sought for an order that the Court do **discharge, vary** and/or **set aside** the Exparte temporary Injunctive Orders issued by the Court on **23rd February 2021**. **Topaz Investments Ltd**, alleged that it is the lawful and bonafide owner of all that parcel of land known as **LR. No. 8261 (IR 9480/1)**, the suit property herein which is situate West of Ruiru Township.

The said Notice of Motion dated **4th March 2021**, was slotted for hearing on **13th April 2021**, wherein on this particular date, **Topaz Investments Ltd**, was enjoined as a 3rd Defendant.

Further the Court directed that the two applications, that is the one dated **18th February 2021**, by the Plaintiff and the one dated **4th March 2021**, by the enjoined 3rd Defendant (**Topaz Investments Ltd**) be heard together on **11th May 2021**.

On **7th April 2021**, the Law Firm of **Wahome & Akedi Advocates**, filed a Memo of Appearance dated **26th March 2021**, in respect of the Interested Party, **Kangaita Coffee Estates Ltd**.

The Law Firm of **Ruiru Njoroge & Associates** filed a Notice of

Appointment of Advocates in respect of the 1st Defendant, **Willy Kihara Njoki Kanyotu** on **5th April, 2021**. The 2nd and 3rd Defendants are represented by the Law Firm of **Macharia-Mwangi Njeru & Co Advocates**.

However, on **11th May 2021**, the Law Firm of **Muriu, Mungai & Co Advocates** filed a Notice of Appointment and the said Law Firm indicated that it had been appointed by **Kangaita Coffee Estates Ltd**, the Interested Party herein to act on its behalf.

Ms. Akedi, from the Law Firm of **Wahome & Akedi Advocates** objected to the Notice of Appointment filed by the Law Firm of **Muriu, Mungai & Co. Advocates**. However, **Mr. Munge**, from the Law Firm of **Muriu, Mungai & Co. Advocates**, submitted that though their Law Firm had filed a **Notice of Appointment**, they wished to file a **Notice of Change of Advocates**. The said Notice of Change of Advocates dated **17th May 2021**, was indeed filed by **Muriu, Mungai & Co. Advocates**, for the Interested Party.

There being a conflict on issue of legal representation on behalf of Interested Party – **Kangaita Coffee Estates Ltd**, the Court directed that the said issue should be resolved first; **Ms. Akedi** submitted that **Mr. Munge** of **Muriu, Mungai & Co. Advocates**, had no instructions from the Interested Party to act for it and that since the matter herein involves the estate of **James Kanyotu (deceased)** who was a majority shareholder in **Kangaita Coffee Estates Ltd**, and the Law Firm of **Wahome & Akedi Advocates** has been acting for the said Estate, they should be allowed to act for the Interested Party in this matter as per their Notice of Appointment. She further submitted that **Mr. Munge**, should be barred from filing the Notice of Change of Advocates. The Court further urged the two Law Firms to sort out the issue of legal representation by the next Court appearance which was on **8th June 2021**.

However, by **8th June 2021**, the two Law Firms had not sorted out the issue of representation and the Court directed each one of them to file an affidavit from its instructing client on the issue of representation.

In compliance with the above directives, **Margaret Nyakinyua Murigu**,

Sworn a further affidavit dated **11th June 2021**, and averred that she is one of the Directors of the Interested Party herein **Kangaita Coffee Estates Ltd**, and also an Administrator of the **Estate of James Kanyotu**. She annexed a copy of Letters of Administration dated **23rd June 2010**, as exhibit 1.

She averred that her authority emanates from the mandate given to her by the Court vide **Succession Cause No. 1239 of 2008**, wherein the Court appointed all the three Administrators of the **Estate of James Kanyotu**, as Directors of the Companies where the deceased was the majority shareholder. That the said Order was issued by **Justice Luka Kimaru** on **13th March 2014**, and the said Court order was marked as exhibit 2(a) & 2(b). Further that she has since been confirmed as one of the Administrators of the **Estate of James Kanyotu**, vide Partial Confirmation of grant dated **20th July 2020**. That she has **Authority** and **instructions** from **Kangaita Coffee Estates Ltd**, by way of **Resolution** to sign any pleadings that pertains to the said company.

She reiterated that no instructions have been given to **Mr. Peter Munge Advocate** of the Law Firm of **MMC Asafo Advocates**, to act on behalf of **Kangaita Coffee Estates Ltd**. She urged the Court to dismiss the purported Notice of Change of Advocates, which had been irregularly filed by the Law Firm of **Muriu, Mungai & Company Advocates**, and that the Court should confirm the Law Firm of **Wahome & Akedi Advocates**, as the one that is properly on record for the Interested Party herein – **Kangaita Coffee Estates Ltd**. That **MMC Asafo Advocates**, filed a Notice of Change of Advocates without seeking a **No objection** from the Law Firm of **Wahome & Akedi Advocates**.

Christopher Ngata Kariuki, swore an affidavit dated **4th June 2021**, and averred that he is a Director of the Interested Party; **Kangaita Coffee Estates Ltd**. That the Interested Party was informed of this suit by their advocates on record **Muriu, Mungai & Co Advocates**, who also informed them that another Law Firm of **Wahome & Akedi Advocates**, had filed a Notice of Appointment to act on behalf of the Interested Party. Further that the Interested Party had not given any instructions to the said Law Firm of **Wahome & Akedi Advocates**, to represent it in the present suit. It was his contention that the Interested Party has retained the services of the Law Firm of **Muriu, Mungai & Co Advocates LLP**, to represent it. He annexed copies of the Companies Resolution and CR12 marked as **CK 1**, to confirm the said position. That the Interested Party has instructed the said advocates on record, **Muriu, Mungai & Co advocates LLP**, to protect their interest in this suit as per the said Company's Resolution.

Margaret Nyakinyua Murigu, filed a supplementary affidavit in support of her further affidavit dated **11th June 2021**. She annexed two documents to the said supplementary affidavit being CR 12 dated **8th April 1987**, which depicted the original status of shareholding and Directorship of **Kangaita Coffee Estates Ltd**, and that the late **James Kanyotu**, was the majority shareholder/Director in the said Company. She also annexed an alleged recent search dated **8th October 2020**, confirming the same position of the **CR 12 of 1987**. That there has been no further Orders of the Court in respect of the issue of Directorship of the said Company. Further, that by a Board Resolution dated **29th July 2019**, which was in compliance with the Court Orders, the three Administrators of the estate were appointed as Directors of the Company. The three Administrators are **Mary Wanjiku Kanyotu, Jane Gathoni Muraya and Margaret Nyakinyua Murigu**.

Secondly, that instructions were given to the Law Firm of **Wahome & Akedi Advocates** to act on behalf of the Company (Interested Party herein). She annexed the said Resolution as **exhibit No. 3**. It was her contention that the former Directors of the Company cannot purport to give instructions on its behalf as the same is tantamount to breach of valid Court orders. That the Company further extended its instructions to the Law Firm of **Wahome & Akedi Advocates**, to act on its behalf in all other matters pertaining to **Kangaita Coffee Estates Ltd** and this case is one of them.

After filing the above affidavits, the two Law Firms also filed brief written submissions to support their respective positions.

The Law Firm of **Muriu, Mungai & Co. Advocates**, filed its submissions on **17th June 2021**, and submitted that the Interested Party; **Kangaita Coffee Estates Ltd** is a limited liability Company, which is registered and incorporated under the provisions of the **Companies Act, Cap 486** Laws of Kenya.

Further that after the Plaintiff instituted this suit, and joined the said Company as an Interested Party, the Directors of the said Company held a Board meeting on **4th June 2021**, and passed a Resolution that the Law Firm of **Muriu, Mungai & Co. Advocates**, do represent the

Interested Party in the instant suit. Consequently, the Law Firm of **Muriu, Mungai & Co. Advocates (MMC)** filed a Notice of Change of Advocates on **17th May 2021**.

It was submitted that it is trite law that a Company can only act through its Directors and the said mandate is through Resolutions of the Board of Directors. They relied on the case of *Salomon vs Salomon (1897) AC 78*, where it was held that in law, a Company is a separate person from its members. Reliance was placed in the case of *Victor Mabachi & Another... Vs...Nurtun Bates Ltd, Civil Appeal NO. 247 of 2005 [2013] eKLR*, and *Res Desbro Engineering Ltd (2006) eKLR*, where the Court stated:-

“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.”

It was further submitted that **Margaret Nyakinyua Murigu**, is one of the three(3) Administrators of the Estate of **James Kanyotu (deceased)** and she has not annexed any **authority** from the other **two Administrators**, mandating her to file any pleadings and/or documents on behalf of the estate. Further, that no Resolution of the Board of Directors of the Interested Party authorizing her to sign any pleadings or issue instructions on behalf of the Company was filed. That there was no instructions from the Company instructing the Law Firm of **Wahome & Akedi Advocates**, to represent it in this instant suit being **ELC E021 of 2021** or even file any documents or pleadings thereon. It was also submitted that **Margaret Nyakinyua Murigu**, is not a Director or a members of the Board of the Interested Party. Therefore, her allegations in her affidavits are incorrect and are intended to mislead this Court. It was also their submissions that though the estates of **James Kanyotu** has three Administrators, only one of them being **Margaret Nyakinyua Murigu**, appear to have instructed the Law Firm of **Wahome & Akedi Advocates**, without any authority from the other two (2) Administrators. Thus she is acting on her own behalf and misleading the Court. They relied on **Order 9 Rule 5** of the **Civil Procedure Act** which provides:-

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

Further reliance was made in the case of *Mengich & Co. Advocates & Another vs Sot Tea Growers Savings & Credit Co-op Society Ltd & 6 Others; County Government of Bomet (Interested Party) (2021) eKLR*, where the Court held that:-

“In the matter before the Court, Notice of Change herein dated the 29th November 2019, having been filed in Court on the 21st July 2020, and served upon the Applicant firm, was Notice enough that the 1st and 2nd Defendants had lost professional confidence in his services and as such were at liberty to instruct another lawyer of their choice”

It was their further submissions that the Notice of Change of Advocates dated **17th May 2021**, having been filed in Court on **8th June 2021**, and served upon the Law Firm of **Wahome & Akedi Advocates**, and all other advocates and parties on record, was **Notice** enough that the Interested Party had retained the services of Law Firm of **Muriu, Mungai & Co Advocates LLP** to protect their interests and the Court should hold as such.

On the Part of the Law Firm of **Wahome & Akedi Advocates**, it was submitted that there was no request written or otherwise from **Advocate Munge**, seeking a letter of **no objection** from the Law Firm of **Wahome & Akedi Advocates**, to take over the matter from them. That the same goes to the basic of professional ethics and practice procedure required of an advocate who obtained instructions to take in a matter.

On the issue of purported Appointment/Notice of Change of Advocates, and the affidavit dated **4th June 2021**, sworn by **Christopher Ngata Kariuki Kanyotu**, who claimed to swear the same in his capacity of a Director of the Interested Party, it was submitted that though in the said affidavit, there was a Resolution of the Board meeting dated **4th June 2021**, the same was irregular since on **13th March 2014**, the Court had expressed itself on the issue of interim Administrators and Directorship of the Estate Companies for the Estate of the late **James Kanyotu**. That there are no contrary orders and **Margaret Nyakinyua Murigu, Mary Wanjiku Kanyotu** and **Jane Gathoni Muraya** are still the Administrators of the estate of **James Kanyotu (deceased)**. That in the Ruling of the Court dated **8th November 2013**, all changes that had been made in respect of shareholding of the Companies where the deceased was majority shareholder were cancelled and the shareholding reverted to the position as at **13th February 2008**, when the deceased (James Kanyotu) died. It was therefore submitted that the Board meeting purportedly to have taken place on **4th June, 2021**, was not only irregular, but the signatures appended thereto should be investigated by DCI for authenticity.

Further that in the affidavit of **Margaret Nyakinyua Murigu** dated **16th June 2021**, a Board Resolution minutes dated **29th June 2019**, were attached wherein the three Administrators of the estate of **James Kanyotu** were appointed Directors of the Company. Further the said Resolution gave instructions to the Law Firm of **Wahome & Akedi Advocates**, to act on behalf of the Company in **ELC No. 115 of 2019**, which instructions were extended to include all other litigations that pertains to **Kangaita Coffee Estates Ltd**. It was further submitted that the **Notice of Change of Advocates** by the Law Firm of **MMC** on the strength of a **Board Resolution** and meeting held by the **former Directors** cannot be accepted by this Court as a proper Change of Advocates. Therefore, **Mary Wanjiku Kanyotu** and her children are acting in blatant contempt of the Court Order.

It was further submitted that the Interested Party herein falls among the Companies whereby the Administrators have Directorship/ shareholding over the said Company until when further orders would be agreed upon or issued by this Court. The Court was urged to allow the Interested Party to continue being represented by the Law Firm of **Wahome & Akedi Advocates** which Law Firm had originally been instructed and that no prejudice shall be occasioned against the Interested Party as they shall have legal representation.

The above is the background of this case and the rival positions taken by both Law Firms of **Wahome & Akedi Advocates** and **Muriu, Mungai & Co. Advocates**, on the issue of which of the said Law Firm is the rightful legal representative or advocates for the Interested Party.

The starting point herein is that there is no doubt that every party to a suit or proceedings is entitled to a legal representation of his/her or its own choice. Further, a Court cannot dictate to a party which Law Firm should represent it. However, in choosing such representation, there are rules and procedures that should be adhered to, as provided by the **Civil Procedure Rules** and the **provisions of the Companies Act**, in the event that the party is a Company.

The Interested Party herein is a Limited Liability Company and it is trite law that a company is a separate person from its members or shareholders. In the case of **Assia Pharmaceuticals vs Nairobi Veterinary Centre Ltd HCCC No.391 of 2000, Hewett J. (as he then was)** held as follows:-

“It is settled law that where a suit is to be instituted for and on behalf of a company, there should be a company resolution to that effect..... As regards litigation by an incorporated company, the Directors are as a rule the persons who have authority to act for the company.....”

Further in the case of **Bugerere Coffee Grounds Ltd vs Ssebaduka & another (1978) EA 147** it was held that:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company Board of Directors meeting and recorded in the minutes.”

Therefore, in resolving the conflict herein, the Court will have to determine which of two Law Firms was appointed properly as per the laid down procedure relating to Companies.

As per the above quoted Courts' decisions, it is clear that for a Company to commence any legal proceedings or even appoint a legal representative for a matter in Court, a resolution of the Board must be passed. The Law Firm of **Wahome and Akedi Advocates** came on record on **7th April 2021**, and it has alleged that it was appointed by the Directors vide a Resolution that was passed on **29th July 2019**, wherein **Mary Wanjiku Kanyotu, Margaret Nyakinyua Murigu** and **Jane Gathoni Muraya** were introduced as Directors. Further it is clear that the Law Firm of **Wahome and Akedi Advocates** was appointed to represent the Company in **ELC No. 115 of 2019 (Thika)**.

Though it was submitted that the said Law Firm was further appointed to represent the Company in all other litigations, there was no such Resolution that was annexed to any of the affidavits of **Margaret Nyakinyua Murigu**. This position was emphasized in the case of **East African Portland Cement Ltd vs Capital Authority & Four Others Petition No. 600 of 2013 (2014)** where the Court held:-

“It takes a Companies Resolution or decision of the Board of Directors duly recorded to authorize the commencement of legal proceedings by a Company.”

The Resolution attached to the affidavit of **Margaret Nyakinyua Murigu**, is in respect of **ELC 115 of 2019** and not **ELC E021 of 2021**.

Further **Margaret Nyakinyua Murigu** has averred that she is one of the Directors of the Interested Party and has authority to swear the Affidavit on behalf of the other Directors. Such authority to execute the document and or swear the affidavit on behalf of the other two Administrators or Directors was not attached. The consent of the alleged two other Directors was not attached.

On the part of the Law Firm of **Muriu, Mungai & Co Advocates**, they attached an extract of the Board meeting held on **4th June 2021**, wherein **Mary Wanjiku Kanyotu**, chaired the said meeting. In the said meeting, it was resolved that the Law Firm of **Muriu, Mungai & Co. Advocates LLP (MMC)** were instructed to represent the Interested Party in this case **ELC No. E021 of 2021**, filed by **Tigris Developers Ltd, vs Willy Kihara Njoki & Others**. That appointment is specifically in respect to this case.

Further **Mary Wanjiku Kanyotu** and **Christopher Ngata Kanyotu** were authorised to execute documents or affidavits necessary to defend the interest of the Company. Therefore, **Christopher Ngata Kanyotu** attached Resolutions of the Board.

However, in respect to **Margaret Nyakinyua Murigu**, there is no such authority granted to her to execute any pleadings by any Board Resolution in respect to this case being **ELC E021 of 2021**.

The Court has seen **two CR 12**, filed by rival parties. The **CR12** filed by **Christopher Ngata Kanyotu** shows the list of Directors and some of these Directors were present on **4th June 2021**, when a Resolution was passed. Though the Court is not a document examiner, this **CR 12** has Government Emblem at the top of it.

The Court too has also seen the **CR 12** dated **8th October 2020**, filed by **Margaret N. Murigu**. This **CR 12** has no Government Emblem on top of it and it is just on a plain paper. The Court would hesitate to rely on it given, that the other **CR 12** dated **8th April 1987**, has a Government Emblem at the top of the paper (document).

This Court finds that the Interested Party Board of Directors met on **4th June 2021**, and passed a Resolution that the Law Firm of **Muriu,**

Mungai & Co. Advocates do represent it on this matter.

The said Law Firm of **Muriu, Mungai & Co. Advocates** filed a Notice of Change of Advocates dated **17th May 2021**, as provided by the law. **Order 9 Rule 5** of the **Civil Procedure Rules** provides:-

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

Once the Notice of Change was filed and served upon the outgoing advocate on record, then automatically the said outgoing Law Firm ceased being on record for the said party that had instructed for filing of Change of Advocates.

In this instant suit, the Law Firm of **Muriu, Mungai & Co. Advocates** has filed and served the **Notice of Change of Advocates** to all the parties herein as provided by **Order 9 Rule 6** which states:-

“The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it)”.

Therefore, this Court finds that the Law Firm of **Muriu, Mungai & Co. Advocates** is the one properly on record for the Interested Party herein; **Kangaita Coffee Estates Ltd** as per the Board Resolution of **4th June 2021**. The **Resolution** produced by **Margaret Nyakinyua Murigu** was only in respect of **ELC No. 115 of 2019**, and thus after the **Notice of Change of Advocates**, the Law Firm of **Wahome & Akedi Advocates** ceased being on record for the Interested Party.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF JUNE 2021.

L. GACHERU

JUDGE

24/6/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Mwangi for the 2nd and 3rd Defendants

Mr. Munge for the Interested Party

No appearance for the Plaintiff though served with the Ruling Notice.

Mr. Ruiru for the 1st Defendant appears on the platform but not audible.

L. GACHERU

JUDGE

24/6/2021