



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1225 OF 2013

IN THE MATTER OF THE ADVOCATES ACT CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN AN ADVOCATE AND CLEINT

MUSYOKA WANBUA & KATIKU ADVOCATES.....APPLICANT

AND

KIHINGO VILLAGE (WARIDI GARDENS) LIMITED.....1ST RESPONDENT

KIHINGO VILLAGE (WARIDI GARDENS)

MANAGEMENT LIMITED.....2ND RESPONDENT

AND

FREDRICK GITAHU GETHENJI.....INTERESTED PARTY

RULING

1. This is a Ruling in respect of a Notice of Motion dated 9th February 2021 which seeks the following orders: -

1. Spent

2. Spent

3. the interested party be granted leave to be enjoined as a party to the taxation proceedings and to proceed with this application as a directive claim on behalf of the 2nd Respondent.

4. The Applicant be ordered to produce the minutes of the meeting and resolutions passed by the 1st and 2nd Respondents appointing and/or instructing the firm of Musyoka Wambua & Katiku Advocates (the applicant) to represent the 1st and 2nd Respondents in ELC No.1225 of 2013 Kifaru Investments and 6 others V J Kihingo Village (Waridi Gardens) Limited and Kihingo Village Waridi Gardens) Management Limited.

5. The Company Secretary of the 1st and 2nd Respondents be summoned, examined and directed to produce the minutes of the meeting and resolutions passed by the 1st and 2nd Respondents appointing and/or instructing the firm of Musyoka Wambua & Katiku Advocates (the applicant) to represent the 1st and 2nd Respondents in ELC No.1225 of 2013 Kifaru Investments and 6 others V J Kihingo Village (Waridi Gardens) Limited and Kihingo Village (Waridi Gardens) management Limited.

6. The costs of this application be borne by the Applicant.

2. The deponent to the supporting affidavit to the application Frederick Gitahi Gethenji is a director and shareholder in both the 1st and 2nd Respondents Companies. He is also the interested party who is seeking to be allowed into the proceedings relating to taxation of a bill of

costs filed by the firm of Musyoka Wambua & Katiku Advocates.

3. The firm of Musyoka Wambua & Katiku Advocates were instructed by Hon.Ndung'u Gethenji to act for the 1st and 2nd Respondents in this matter and in the arbitration proceedings which arose out of this matter. The appointment was vide letter dated 3rd March 2016. Following the appointment, the firm proceeded to file a notice of change of Advocates on 17th October 2016 taking over the conduct of this case from the firm of Hamilton Harrison & Mathews Advocates.

4. In July 2019, it became apparent that there was a dispute between the directors of the 1st Respondent company. The directors of the 1st Respondent are family members. The firm of Musyoka Wambua & Katiku wrote to the directors of the 1st Respondent and intimated to them that they did not wish to continue acting for them in view of the wrangles. The firm asked to be paid its fees. When the firm's fees was not paid, the firm proceeded to file an Advocate/Client bill of costs which was set to be taxed.

5. It is the filing of the bill of costs which prompted the filing of this application. The Respondents in this application contend that the firm of Musyoka Wambua & Katiku Advocates were not appointed pursuant to a resolution of the company and that therefore the firm is not entitled to any fees and therefore the bill of costs filed should not have been filed. The Respondents contend that the appointment of the firm by one director was wrong. It is on this basis that the Respondents want the firm to produce a resolution of the directors appointing it to defend the 1st and 2nd Respondents.

6. The Respondents argue that the interested party is a director and shareholder in both the 1st and 2nd Respondent companies and that since there has been no resolution by the 2nd Respondent to appoint a law firm to represent it in the taxation, he should be allowed to represent the interest of the 2nd Respondent.

7. The Respondents application is opposed through a replying affidavit shown by John Katiku on 17th March 2021. The deponent is the managing partner in the firm of Musyoka Wambua & Katiku . He states that the firm is the Applicant in the taxation arising from this suit. He contends that the Respondents application is an abuse of the process of court and is incompetent as the firm of Kogweno & Bubi Advocates LLP have never filed a proper notice of change of Advocates in this matter.

8. The Applicant contends that the interested party who seeks to be enjoined in the taxation proceedings has not satisfied the grounds for bringing a derivative suit. The Applicant while conceding that there was no resolution appointing his firm to act for the 1st and 2nd Respondents, it was not necessary that such a resolution be in place. The Applicant argues that the firm was properly appointed by a director of both Respondents namely James Ndung'u Gethenji.

9. The Applicant argues that this application is brought out of malice as the Respondents all along knew that the firm was representing the two Respondents bot in this suit and in the arbitration proceedings. The Applicant brought to the attention of the firm of Kogweno & Bubi LLP that his firm did not wish to proceed to act for the two Respondents. The firm of Kogweno & Bubi LLP responded and asked the Applicant to tax their bill. The Applicant therefore argues that it is ironical that the Respondents are now opposing the bill.

10. I have carefully considered the Application by the Respondents and the opposition thereto by the Applicant. I have also considered the submissions by the parties herein. Most of the prayers in the Notice of Motion dated 9th February 2021 have been spent or rendered moot. The Respondents wanted the Applicant to produce minutes of the meetings and resolutions passed by the 1st and 2nd Respondents appointing the Applicant to represent them. They also wanted the company secretary of the 1st and 2nd Respondents to be summoned to come and produce minutes and resolutions passed appointing the Applicant to represent the Respondents.

11. The Applicant has conceded in the replying affidavit that there was no resolution passed appointing the Applicant to represent them. The only issue remaining for determination is whether the interested party should be enjoined in the proceedings in the taxation as a derivative claim on behalf of the 2nd Respondent.

12. Section 238 of the Companies Act states as follows: -

(1) In this Part, "derivative claim" means proceedings by a member of a company —

(a) in respect of a cause of action vested in the company; and

(b) seeking relief on behalf of the company.

(2) A derivative claim may be brought only —

(a) under this Part; or

(b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.

(3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

(4) A derivative claim may be brought against the director or another person, or both.

(5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

(6) For the purposes of this Part-

(a) "director" includes a former director;

(b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

13. In the instant case, the interested party is seeking to be allowed into the proceedings of the taxation. The grounds upon which he seeks to come into the proceedings is that the 2nd Respondent has not passed a resolution to appoint a lawyer. Section 238 of the Companies Act does not envisage a situation where an applicant seeks to come into proceedings where there is no relief being claimed on behalf of the company. The definition of a derivative action is clear and it means proceedings by a member of a company in respect of a cause of action vested in the company which is seeking relief on behalf of the company.

14. The interested party simply wants to be allowed in the taxation proceedings on grounds that the 2nd Respondent has not appointed a lawyer to defend it. The interested party has not disclosed what cause of action is vested in the 2nd Respondents which he will seek relief on behalf of the company. The Applicant is simply seeking to be paid fees for legal services rendered. The application before me is not challenging the taxation. If there is any challenge regarding the pending bill of costs, there are procedures for challenging the bill. I therefore find that the interested party has not adduced any reasons which will make this court to grant him permission. The application dated 9th February 2021 is dismissed with costs to the Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF JUNE 2021.

E.O.OBAGA

JUDGE

In the Virtual Presence of ;-

Mr Maina for Applicant

Court Assistant: Steve

E.O.OBAGA

JUDGE