



REPUBLIC OF KENYA



Tamani Construstion Co. Ltd v Marula Estate Limited & another (Civil Case E009 of 2021) [2024] KEHC 10088 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 10088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL CASE E009 OF 2021
GL NZIOKA, J
JULY 18, 2024**

BETWEEN

TAMANI CONSTRUSTION CO. LTD APPLICANT

AND

MARULA ESTATE LIMITED 1ST RESPONDENT

NATURES CHOICE FRESH PRODUCE EXPORTERS LTD .. 2ND RESPONDENT

RULING

1. By a notice of motion application dated 30th May 2023, brought under the provisions Order 51 Rule (1) and Order 45 Rule 1 of the Civil Procedure Rules, section 1A, 1B and 3A of the [Civil Procedure Act](#), Article 159 of [the Constitution](#) of Kenya 2010 and all other enabling provisions of the Law, the applicant is seeking for the following orders: -
 - a. Spent
 - b. That the firm of Kinyanjui & Njau Advocates be granted leave to come on record for the applicant/2nd defendant in place of M/S Antony Gikaria & Co. Advocates
 - c. That an order of stay of execution of the decree issued on 15th September 2022 and all consequential orders be issued pending the hearing and determination of this application
 - d. That this Honourable court be pleased to review, vary and or set aside the decree issued on the 15th September 2022 with all consequential orders
 - e. That the consent judgment recorded on the 16th May 2022 be set aside and the suit set down for hearing and disposal on merit
 - f. That costs of this application be provided for



2. The application is supported by the grounds thereto and affidavit of even date sworn by Miriam Waruini Kariuki, a director of the applicant's company. She avers that she is the majority shareholder in the applicant's company. That the other director is Daniel Kamau Mburu who is also a director in the 1st respondent's company.
3. That she learnt from the co-director that the firm of B.G Wainaina and Co Advocates had filed a statutory demand notice under Rule 15 of the Insolvency Regulations against the applicant company on the ground that the applicant company had allegedly guaranteed the 2nd respondent in a venture with the 1st respondent, and that the 1st respondent had sued and obtained judgment against the applicant company.
4. That, she had not given authority for the applicant company to guarantee the 2nd respondent and neither did the directors of the company pass any resolution authorising the guarantee agreement nor appointment of the firm of M/s Gikaria & Co Advocates to represent it in the suit. She termed the purported guarantee agreement as fraudulent and misrepresentation.
5. She further averred that, the consent judgement allegedly entered into by the applicant is fraudulent, in that, it was executed by the lawyer of 1st and 2nd respondent on record then and bears the stamp of the 2nd respondent, and not executed by any of the directors of the applicant.
6. Further the applicant agreement does not bear the applicant's company seal. That, the name of her co-director Daniel Mburu is inserted with a pen and the signature adjacent to the name is not Mr. Mburu's signature as evidenced by a letter dated 1st October 2021 from 2nd respondent to the 1st respondent which bears Mr. Mburu's genuine signature, and a cheque signed by Mr. Mburu with a signature that differs from his signature in the contract agreement.
7. That the sole purpose of the imposed signature is intended to mislead the court to believe that, the applicant's director signed the contract agreement and subsequent consent judgment. Further both documents are tainted with misrepresentation, fraud and collusion, propagated by the 1st and 2nd respondents.
8. Furthermore, the applicant was not served with summons to enter appearance, as there is no evidence in the form of an affidavit of service to prove the same. That, as the consent judgment entered into on 30th March 2021 was without knowledge or consent of the applicant, it is fraudulent and so is the decree dated 15th September 2022.
9. That more so, payment made pursuant to the consent judgment was made through coercion, under influence, threats and intimidation that the 1st respondent would move to court and dissolve the applicant company. It is averred that the applicant is desirous of filing a suit or counter claim against the 1st respondent to recover the sums of money involuntarily paid to the 1st respondent.
10. Finally, the deponent averred that, the subject matter of the suit relates to rents and profits from land management between the respondents in respect of undefined land and which falls with the jurisdiction of Environment and Land Court. Hence this court lacks jurisdiction to hear and determine the case. The deponent sought for an order that, the consent judgment and resultant decree be set aside on the ground that, they are void.
11. However, the application was opposed vide a replying affidavit sworn by Benjamin Wainaina, an Advocate of the High Court who has conduct of the matter on behalf of the 1st respondent. He averred that, on 1st July 2021, he was instructed by the 1st respondent to institute a suit for the recovery of a sum of Kshs 62,770,041 from the 2nd respondent and the applicant.



12. That on 4th July 2021, he obtained CR 12 forms which established that the applicant directors were Daniel Kamau Mburu and Mary Waruinu Kariuki while the directors for the 2nd respondent were Charles Kamutu Munyanjua and Daniel Kamau Mburu.
13. That he instituted the suit and served the pleadings and summons to enter appearance upon the applicant via its email address; tamanicLtd@gmail.com. Subsequently, he was served with a statement of defence on behalf of both the applicant and 2nd respondent dated; 5th November 2021 drawn by the law firm of Anthony Gikaria & Company Advocates and that the parties admitted the jurisdiction of the court. Further he had previously seen Mr. Gikaria appearing on behalf of the applicant in the High Court at Machakos and Nairobi.
14. That, the respondent admitted in the defence filed that, the 2nd respondent entered into a management agreement with the 1st respondent and the applicant was incorporated into the management agreement as guarantor and had undertaken to ensure that the 2nd respondent punctually observed all terms, conditions and obligations under the management agreement.
15. That, the averments by Ms. Waruinu that the applicant did not execute the management agreement and that the court lacked jurisdiction to record the consent were moot and inconsistent and contradictory with filed pleadings.
16. Further, the debt of Kshs 62,770,041 was admitted and a proposal was made via a letter dated 1st October 2021 on how to liquidate the same by instalments.
17. That Ms. Waruinu claim that the consent dated 30th March 2022 was executed fraudulently, in collusion of the 1st and 2nd respondents and/or without the knowledge and consent of the applicant was inaccurate and a white lie.
18. That the consent was executed at the 1st respondent's advocates offices situated at Biashara Plaza Naivasha Mr. Wainaina and Mr Gikaria Advocate in Mr. Wainaina's presence and in the presence of Mr. Kamutu and Mr. Mburu as directors of the 2nd respondent and Mr. Mburu in his capacity as a director of the applicant. That Mr. Gikaria as an Advocate had an implied general authority to compromise and execute the consent.
19. It is averred that Mr. Gikaria Advocate had not carried his stamp, and both Mr. Kamutu and Mr. Mburu agreed that Mr. Kamutu should sign and stamp the consent letter with the 2nd respondent's official stamp. Further, there are no legal requirements that parties should sign a consent letter whenever they are represented by counsels.
20. That, the issue as to who authorized Mr. Mburu to bind the applicant is an internal matter between the applicant's directors. Further, under the "Indoor Management Rule " a director has an implied, actual or ostensible authority to make decisions for the company in the ordinary course of business and can bind the company even though the board of directors had not endowed him with actual authority.
21. Furthermore, a person dealing with a company in good faith is not bound to enquire as to any limitation of the powers of the directors to bind the company or authorize others to do so, and is entitled to assume that the company has complied with its internal procedures and formalities and has no obligation to confirm whether the person dealing on behalf of the company has authority to transact on its behalf.
22. That, as Mr Mburu was conducting the affairs of the applicant in a manner which appeared to suggest that he was authorized by his co-director and had implied, apparent, actual or ostensible authority to



- make decisions for the applicant in the ordinary course of business. That Mr. Mburu deposed affidavits dated; 29th September and 4th October 2022 averring that he had the authority of his co-director.
23. Further, he solely signed three (3) cheques dated 30th March, 30th April and 30th May, 2023 in part performance of the consent, which were honoured by the bank upon presentation, and solely transferring funds from the applicant's bank accounts to the 1st respondent.
 24. That, the 1st respondent had no reason to doubt that Mr. Mburu was acting without the consent of his co-director or that he had express authority to bind the company. Further, at no point did the applicant notify or warn the 1st respondent against dealing with Mr. Mburu nor communicated that Mr. Mburu did not have authority to bind the company.
 25. Furthermore, Ms. Waruinu did not attach to her affidavit any documents to demonstrate that only a resolution of the board of directors can bind the applicant company contractually and that Mr Mburu did not have "express authority" like herself to bind the company.
 26. Further the 1st respondent having acted in good faith, it cannot be affected by any irregularities which may have taken place in the internal management of the applicant company and that is not a reason to set aside the consent.
 27. Furthermore, the 1st respondent duly complied with clause 7 of the consent judgment and released six (6) tractors, two (2) buses, three (3) lorries, one (1) pickup, assorted office furniture and equipment, assorted farm equipment's detained as security of the debt due.
 28. That, the application herein is seeking review of the decree so as to avoid payment of interest and merely contrived to defeat the 1st respondent's claim. That it is an abuse the due process of the court and meant to deny the 1st respondent from enjoying the fruits of the judgment lawfully recorded.
 29. That there being a validly recorded consent order made in the presence and with the consent of counsels, setting out the terms of the compromise, the time frames for compliance as well as consequences for noncompliance, the consent is a binding contract between the parties. As such any party seeking to vary or review any part of the consent has to satisfy the threshold for setting aside or varying a contract, that is; it was obtained by fraud or collusion or by an agreement contrary to the policy of the court.
 30. That in the instant case, the applicant has not listed any particulars of fraud, collusion and or misrepresentation committed by the 1st and 2nd respondent nor has Mr Mburu, the applicant's director addressed by way of affidavit the allegations made by Ms. Waruinu regarding the transactions that he was party to.
 31. – ∴... Further, the prayer seeking to review, vary and/or set aside the decree issued on 15th September 2022 is res judicata, a similar application having been heard and determined by the court on 24th April, 2023.
 32. Thus it is in the interest of justice that the 1st respondent should not be denied the fruits of its judgment lawfully obtained and the court should not assist the applicant who is seeking to obstruct or delay the natural course of justice, if only it tried hard enough.
 33. However, Charles Kamutu Munyanjui filed a replying affidavit dated 9th June, 2022, in support of the application in which he conceded that he and Mr. Daniel Kamau Mburu are co-directors of the 2nd respondent whereas, Mr Kamau is also a director of the applicant company which has a distinct legal entity from the 2nd respondent.



34. That, the 2nd respondent entered into two management agreements dated 1st January and 1st April 2018 with the 1st respondent which he executed on behalf of the 2nd respondent and the applicant with the express oral authority of Mr. Kamau.
35. Further, he appointed the law firm of Anthony Gikaria & Company Advocates to act for the 2nd respondent and signed the consent dated 30th March 2022 on behalf of the 2nd respondent with the full knowledge of Mr. Kamau. However, the applicant was not represented during the signing of the consent nor present during the transaction and signing of the agreements with the 1st respondent.
36. In further averment the 1st respondent through its lawyer Mr. B.G Wainaina filed a supplementary replying affidavit on 21st July 2023, and averred that the delay of fourteen (14) months before filing the present application is inordinate, unreasonable and has not been explained.
37. Further, the supporting affidavit dated 30th May 2023, the supplementary Affidavit dated 26th June 2023, sworn by Miriam Waruinu Kariuki and the affidavit of Daniel Kamau Mburu are incurably defective for failing to comply with section 5 of the Oaths and Statutory Decelerations Act as such they should be expunged from the court record.
38. Further, both Mr. Mburu and Mr. Gikaria the Advocate were present during the execution of the consent on behalf of the applicant and therefore the averments by Mr. Kamutu and Mr. Mburu that the applicant was not represented were false misleading, inaccurate and amount to perjury.
39. Furthermore, the allegation by Mr. Kamutu that, the firm of Gikaria & Company Advocates was only representing the 2nd respondent is contrary to the memorandum of appearance, defence, notice of motion dated; 29th September 2022 and the consent dated 30th March 2022 that demonstrates Mr. Gikaria was acting for both the 2nd respondent and the applicant.
40. Further, the averment by Mr. Mburu that he made part payment in performance of the consent out of coercion and undue influence has not been proved by evidence and in any case all payments were done voluntarily before issuance of the statutory demand.
41. However, Mr. Charles Kamutu Munyanjua swore a further affidavit dated 28th August 2023 in which he averred that although the applicant was a proposed guarantor in the two agreements between the 1st and 2nd respondents but the position required to be ratified by the applicant's directors.
42. That, Mr. Kamutu executed both agreements only on behalf of the 2nd respondent and only signed on behalf of the applicant as formality in the presence of the 1st respondent who never objected nor insisted that the agreement be signed by a director of the applicant. Further, the two agreements were irregularly executed thus the consent judgment is illegal and void ab initio as the applicant was not involved nor represented.
43. Furthermore, the consent was signed out of fear as the 1st respondent's Advocate had threatened, intimidated, coerced and unduly threatened with arrest and committal to civil jail and winding up of the companies evidenced by the attached emails marked "CKM1". That the 1st respondent was trying to unjustly enrich itself evidenced by emails from its Advocate produced and marked as CMK2.
44. The application was disposed of vide filing of submissions. The applicant in submissions dated 2nd August, 2023 literally reiterated the averments in the affidavits in support of the application and basically maintained that, it did not execute the contract management agreements dated 1st January and 1st April, 2018 and that the signatures therein do not belong to its directors or anybody authorized by the applicant, and neither was the applicant's seal embedded in the agreements. Further that the



actions of Mr. Kamutu are fraudulent and a forgery, and in the circumstances the consent judgment should be set aside.

45. The applicant further submitted that, the present suit arose from a breach of the management agreements which agreements were based on and related to agricultural activities on the designated parcel of land. That the cause of action having arose from land use, planning, rents and management of land, the suit ought to have been filed in the Environmental and Land Court as per section 13(2) of the Environmental and Land Court [Act No 19 of 2011](#). That in the circumstances, this court lacks jurisdiction to hear and determine the matter thus the consent judgment should be set aside and the matter referred to Environmental and Land Court.
46. That, it was reiterated that the 1st respondent's Advocates threatened to ensure the applicant was dissolved and filed a statutory notice under Rule 15(3) of the [Insolvency Act](#) and subsequently filed High Court Insolvency Petition No. E040 of 2023 at Nairobi seeking dissolution of the applicant.
47. Lastly, the applicant submitted that, the firm of Kinyanjui & Njau and Anthony Gikaria & Co. Advocates entered into a consent to allow change of advocates after judgment in accordance with Order 9 rule 9 of the Civil Procedure Rule, 2010. Further, Order 9 Rule 10 of the Rules allows the filing of an application seeking leave to come on record with other prayers and urged the court to allow prayer (2) of the application.
48. The 2nd respondent in submissions dated 10th August, 2023 reiterated the averments in the replying affidavit of Charles Kamutu Munyanjua, sworn on 29th June 2023 and joined issue with the applicant on the issue of jurisdiction and submitted that, the dispute related to land administration and management and therefore fell in the ambit of the Environment and Land Court
49. However, 1st respondent in submissions dated 6th August, 2023 also reiterated what was deposed in the replying affidavits that, a court of law will not interfere with a consent judgment except where it has been proved to have been obtained by fraud, collusion or an agreement contrary to the policy of the court. Reliance was placed on the case of; *Flora Wasike vs Destimo Wamboko* (1982-1988) KAR 625 where the Court of Appeal stated that a consent judgment has contractual effect and can only be set aside on grounds that would justify setting aside a contract.
50. That in any event, for misrepresentation to the basis of setting aside the consent, such misrepresentation ought to have originated from the 1st respondent but not due to a lack of resolution or knowledge and/or consent of the co-director of the applicant.
51. Further, that in the case of; *Joseph Mwangi Gthua & 3 others vs Mboi-I-Kamiti Farmers Co. Ltd Nairobi HCC No. 542 of 2009* the High Court held that for misrepresentation to form the basis of setting aside a consent judgment, such misrepresentation must come from the adverse party and cannot be attributed to the lack of a resolution.
52. The 1st respondent argued that, the applicant did not adduce any evidence to support the assertions of collusion, coercion and undue influence. That, in any case the last payment made by the applicant was sixty-nine (69) days before issuance of the statutory demand.
53. Further, the assertion that the applicant did not appoint the firm of Anthony Gikaria & Co Advocates is misleading, based on lies and calculated into deceiving the court. That apart from disowning the consent signed by Mr. Gikaria, the applicant has not challenged any other role played by the advocate including drawing the two (2) affidavits signed by Mr. Mburu, neither was it discussed in the applicant's board of directors meeting held on 11th May 2023.



54. That, Mr. Gikaria as An advocate had general authority to comprise the suit on behalf of his client as long as he was acting bona fide and not contrary to instructions and therefore the consent is binding, and relied on the case of; Kenya Commercial Bank Ltd vs Specialised Engineering Company Ltd 1982 KLR 485 where the High Court stated that, a consent order entered by counsel is binding on all parties as a duly instructed advocate has implied general authority to compromise and settle the suit.
55. Further the applicant is approbating and reprobating by claiming that it did not appoint Mr. Gikaria while at the same time relying on affidavits drawn and filed by Mr. Gikaria. Furthermore, the applicant contradicted itself by stating that Mr. Mburu was not present during the execution of the consent but at the same time claimed that Mr. Mburu was present on behalf of the 2nd respondent.
56. That the 1st respondent was dealing with the applicant in good faith assuming that the company complied with its internal procedures and formalities and is therefore not enough to vitiate the contract, the 1st respondent cited section 34 (1) of the *Companies Act* No 17 of 2015 which states that:-
1. In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is free of any is limitation contained in the company's constitution.
57. The case of The Board of Trustees National Social Security Fund vs Michael Mwalo [2015] eKLR was relied on where the Court of Appeal quoted the case of; Mohoney v. East Holyford Mining Co [1875] L.R. 7 HL 869 where Lord Hatherly stated that people dealing with a company externally are not to be affected by any irregularities that take place in the internal management of the company.
58. That the Court of Appeal further cited with approval the case of; Royal British Bank vs Turguard (1856) 6E&B 327 and stated that:
- “Simply put, the rule in Turguard’s case states that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities.”
59. Furthermore, that in the case of Samuel Mureithi Murioki &another; v Kamahuha Limited [2018] eKLR the Court of Appeal held whether or not a company has complied with its internal procedures on execution of contracts is an internal management issue that cannot afford a defence to a third party dealing with the company.
60. That in addition, in the case of; Kuwinda Rurinja Co Ltd vs Kuwinda Holdings Limited & 13 others [2019] eKLR the Court of Appeal stated that, the issue of whether the letter in question was signed by one or more persons was an internal mechanism that could not be blamed on the advocate or parties who genuinely and in good faith relied and benefited from the consequences of the consent.
61. On the issue of jurisdiction, the 1st respondent submitted that the claim before the court was primarily for recovery of a debt of Kshs.62,770,041 as per paragraph 10 of the plaint and not the ownership and/or management of the land, thus squarely placing it in the jurisdiction of the High Court pursuant to Article 163(3) of *the Constitution* of Kenya.
62. The 1st respondent relied on the case of; Civil Case No. 83 of 2016 Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & others where the Court of Appeal stated that, the jurisdiction of the Environment and Land Court is to deal with disputes connected to the use of land and does not include mortgages, charges, collection of dues and rents which falls in the jurisdiction of the High Court.



63. Further, jurisdiction of the court does not constitute a ground for review or setting aside a consent judgment and where the applicant is aggrieved on the issue of jurisdiction, the only remedy available is to appeal as was held by the Court of Appeal in CA No. 148 of 2018 Julius Ochieng Oloo & Another vs Lilian Wanjiku Gitonga, and Manjula Dhirajlal Soni vs Dukes Investment International Limited & 2 others [2018] eKLR.
64. Finally, the 1st respondent submitted that the prayer seeking the court to review, vary and/or set aside the decree issued on 15th September, 2022 was res judicata having being considered by the court in its ruling delivered on 24th April, 2023. The 1st respondent urged the court to dismiss the application with costs to itself.
65. At the conclusion of the arguments by the parties I find that, first and foremost, all the prayers in the subject application herein are spent except prayer 5 and 6. The 2nd prayer was spent by a letter dated 9th May 2023 written by the firm of Gikaria and Co. Advocates authorising the firm of Kinyanjui & Company Advocates to take over the conduct of this matter, and the subsequent consent dated; 11th May 2023 filed in court to that effect. The 1st respondent too conceded to the same.
66. Similarly, the 1st and 3rd prayers were spent as they were seeking for orders pending the hearing and determination of the application. Finally the 4th prayer is res judicata having been the subject of the application dated 20th September 2022, determined vide a ruling delivered on 24th April 2023. In that case, the same was not brought in good faith and is not tenable.
67. Be that as it may, to revert back to the matter herein I find that, the main issue to determine is whether the applicant has met the threshold of setting aside a consent judgment.
68. In that regard, the law is settled, that a consent judgment has the effect of a contract between the parties, and therefore it can only be set aside on the ground that would justify the setting aside of a contract. In that regard some of the common law grounds for setting aside a contract include; duress, undue influence, misrepresentation, mistake and non est factum. Further the onus in such a case is on the person alleging the contract is invalid to prove his or her case.
69. In the case of; Flora N. Wasike -vs Destino Wamboko (1982-88) 1KAR 625 Court of Appeal quoting Hirani v Kassam (1952) 19 EACA 131 stated as follows: -
- “Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud and collusion or by an agreement contrary to policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”
70. Furthermore, in the case of Brooke Bond Liebig Ltd -vs- Mallya (1975) EA 266, Law Ag P stated that a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. (See also KCB Ltd -vs- Specialised Engineering Company Limited 1982 KLR 485)
71. To revert back to the matter herein, the borne of contention is whether the counsel who represented the applicant in execution of the subject consent judgment was authorised by the applicant to execute the consent agreement.



72. From the material placed before the court there is no evidence in whatever form that the subject learned counsel Mr Gikaria and/or his law firm was given instructions by the applicant to represent it and/or enter into the consent on its behalf.
73. The applicant argues that, it is a limited liability company and therefore the appointment of the counsel to act for it required to be supported by a board of director's resolution. That no such resolution was passed by the applicant and that, the counsel relied on a resolution given by the 2nd respondent, which is a different and distinct legal entity from the applicant.
74. It suffices to note that a company is distinguishable from other business models, due to its unique features of, separate legal entity, perpetual succession ability to sue and be sued in its name. Thus at the point of initiation of proceedings, the legal requirement of "authorization" of a person by a company to represent itself in dispute resolution is critical. The genesis and requirement of board resolution in legal proceedings by a corporation is Order 9 Rule 2 (c) of Civil Procedure Rules, 2010 which states that: -

The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

- (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

75. As regards a company, the legal requirement of a board resolution to initiate a suit was illustrated in the case of M/S Hari Shree Enterprises -vs M/S Vikas Housing Ltd where it was held that, a managing director of a company could not sue on behalf of the company merely by virtue of his office, as a company does not sue as part of its day to day affairs. The company being a juristic person only acts through a resolution and the power of the company can be given only by the company resolving to sue through a board resolution.
76. Thus unless the power to institute a suit is specifically conferred on a particular director through a board of directors resolution as a director has no authority to institute a suit on behalf of the company. The risk of not passing a board resolution before initiating litigation was demonstrated by the case of Sush Arya -vs Palmview Investment Comm. Arbitration Petition (L) No. 25249 of 2022 Bombay High Court, wherein lack of proper board resolution rendered the invocation of the arbitration clause infructuous.
77. Furthermore in the case of; Kabale Housing Estate Tenants Association -vs- Kabele Municipal Local Government Council [2013] UGSC 19 (18 December 2013) Hon. Justice Kitumba held that, a suit brought without instructions was incompetent. That the counsel must appear in court with full instructions and authority from his client and that failure to do so, an advocate will be acting on his own and will not be entitled to costs. The Hon. Justice quoted the case of Danish Mercantile Company Limited -vs Beaumont & another [1951] CH. C.A. 680 where Jenkins L.J at page 687 stated that:

"I think that the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority so to do, or under an erroneous assumption of authority does so at his own peril, and that, so long as the matter rests there, the action is not properly constituted. In that sense, it is a nullity and can be stayed at any time,..."

That the thumb of rule is that no advocate can act for a client without receiving instructions from the client.



78. Be that as it may, the law is settled that where the indoor management rule is invoked then the counsel dealing with the company need not inquire whether the company directors (s) who gave him instructions were actually permitted by the company memorandum of association to do so. Section 34(2)(b)(i) of the *Companies Act* (Cap 486) Laws of Kenya states that a party is not bound to enquire as to any limitation on powers of the directors to bind the company where the party is dealing with the company in good faith.
79. It therefore follows that if counsel acts for a company in good faith on instructions given to him/her by any of the co-directors, any argument to the effect that counsel was not instructed to act for the company can be overpowered if the counsel invokes the indoor management rule.
80. In *CTM Uganda Limited & 2 Others v Allmuss Properties Uganda Limited & 3 Others* (Civil Appeal 267 of 2018) [2021] UGCA 204 (22 February 2021) the Court of Appeal of Uganda observed that
- “It would make business difficult if persons dealing with the company in good faith would always have to ascertain for themselves that the internal procedures of the company have been complied with before they conclude a transaction.”
81. However, the indoor management rule is a double-edged sword. For it to apply it must be proved the director who gave instruction was competent.
82. In the instant matter there is no board of directors’ resolution passed by the applicant appointing the firm of Gikaria & Co advocates to initiate the suit herein or represent the applicant in the matter or even, act for it herein. To the contrary Charles Kamutu Munyanjua in the replying affidavit dated 9th June 2023, states at paragraph 9 thereof that;
- “I do confirm that I am the one who appointed the law firm of Antony Gikaria & Co. Advocates to act for Natures Choice Fresh Produce Exporters Limited and that Tamani Construction Company Limited 2nd defendant, the applicant was not represented during the signing of the consent, neither was it represented during our transactions or the signing of the agreement with Marula Estate Ltd the plaintiff herein”
83. In further averments vide replying affidavit dated 28th August 2023, Mr. Munyanjua states at paragraph 8 as follows
- “That the signature purported to have been signed by Tamani Construction company limited was just for formality and that I am the one who signed the same in the presence of the plaintiff who never objected or insisted the same be signed by the directors of Tamani Construction company limited”
84. Pursuant to the aforesaid it is clear that at no time did the applicant instruct the firm of Gikaria & Co. Advocate to act for it and/or enter into the subject consent judgment herein. Therefore the consent cannot be binding against the applicant. It was entered into by the counsel without authority and therefore cannot be ratified.
85. As such the rule of internal management cannot work in favour of the 1st respondent, as it could need only ride on the shoulders of that subject counsel once it is proved that he/she had express, implied or even ostensible authority to act on behalf of the applied. As the person who would be relying on the rule would be the law firm that acted allegedly without authority.



86. However, even then the law firm would have to prove that it received instruction in any other manner than board of directors' resolution e.g. a letter, or power of attorney or an oral instruction from a competent director and acted in good faith. However, that is not the case herein.
87. Consequently, the consent judgment as it relates to the applicant is set aside but as it relates to the 2nd respondent, it is valid. The suit will then be set down for hearing as it relates to the applicant per se. All other issues raised in this matter regarding the validity of the contract guarantee or otherwise and/or the recovery of the funds paid or release of the assets produced were not available for consideration herein and can only be canvassed in the main suit. Therefore, prayer (5) is allowed and it is directed that the costs of the application abide the hearing and determination of the main suit.
88. It is so ordered

DATED, DELIVERED AND SIGNED THIS 18TH DAY OF JULY 2024.

GRACE L. NZIOKA

JUDGE

In the presence of

Mr. B. G. Wainaina for the plaintiff

Mr. Kinyanjui for the defendant

Ms. Ogutu: court assistant

