



**Ibacho Trading Company v Ondora & 4 others (Civil Case
13 of 2018) [2024] KEHC 13323 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE 13 OF 2018
TA ODERA, J
OCTOBER 22, 2024**

BETWEEN

IBACHO TRADING COMPANY PLAINTIFF

AND

SAMWEL MONDA NYANGOKI ONDORA 1ST DEFENDANT

WILLIAM ONSONGO MAYAKA 2ND DEFENDANT

WILLIAM OMBOGO MATUNDURA 3RD DEFENDANT

DONALD BARONGO MOCHAMA 4TH DEFENDANT

THE REGISTRAR OF COMPANIES 5TH DEFENDANT

RULING

Introduction

1. Before me are two Applications both dated 6th November, 2023 filed by the two parties both challenging the withdrawal of the matter on 6th November, 2023 through the firm of M/S Nyamurongi and company Advocates by a section of the directors of the plaintiff. The first Application by the Plaintiff seeks the following orders.
 - a. Spent
 - b. Spent
 - c. The notice of change of advocate and notice of withdrawal of the suit dated 31st October, 2023 be expunged from the court record.
 - d. The Exparte order marking the matter as withdrawn made on 1st day November, 2023 be set aside and the suit be reinstated



- e. Cost of the suit be provided for.
2. The Application was supported by the grounds on its face and the supporting Affidavit sworn by John Kenyaga Mochama the chairman of the board of Directors of the Plaintiff. He averred the board of Management engaged the firm of Ombachi & Co. Advocates on 2nd October, 2018 to file and prosecute this matter on its behalf and that the matter has substantially been prosecuted wherein the plaintiff has closed its case and the defendants have only one witness left. The Plaintiff decried that the notice of change of advocate purporting to appoint the firm of M/S Nyamurongi and Company Advocates in the place of Ombachi & Co. Advocates and the subsequent withdrawal of the matter was irregular illegally procured since the board of Management did not sanction the same. He also stated that the firm of Ombachi & Co. Advocates has never been served with a notice of change or notice of withdrawal of the matter.
 3. He stated that the purported notice of change of advocate offended the provisions of Rule 7 of the Advocate's Rules since there could be no proper appointing authority to instruct the firm of M/S Nyamurongi and company Advocates in the view of the pendency of this suit which relates to the leadership and management of the Plaintiff. He also contended that any general meeting has held purportedly to elect new board of directors would be in contempt of the court. He further stated that the appointment also offended the provisions of the Articles of Association which provides it is only the board of Management which is mandated to through elections held in the AGM. He disclosed too that the appointment letter was not under seal.
 4. He went on to challenge the notice of withdraw of the suit as irregular for reasons that it offended the provisions of order 25 rule 2 of the Civil Procedure Rules and the same was filed by an advocate that was not properly on record.
 5. In response to the Application, Plaintiff/Respondent filed a replying affidavit sworn by Abel Mogaka Motende, a director of the plaintiff on 21st November, 2023. Mr. Mogaka averred that the decision to terminate the instant case was made at a meeting which took place on 30th October, 2023. He contended that at the company's registry will disclose that the Company has directors as listed in Form CR12. He averred further that the directors listed therein had full authority to transact the business of the Company. He stated that the suit did not affect the election of directors at a meeting that was held 18th April, 2023 and as such the additional directors named in Form CR12 remain valid and lawful and directors therein named have full authority to represent the members' aspirations in a new dispensation devoid of the opaqueness which has characterized the management of the Company. He contended that the filing of the application has not been sanctioned by the Company. The same ought to be struck out with costs. Further too he averred that the firm of Nyamurongi & Company Advocates was lawfully appointed by the Company. Mr. John Kenyaga Mochama has no authority to unilaterally conduct the business of the Company.
 6. He stated further that Nyamurongi & Company Advocates served notices of change of advocates, withdrawal of suit and the court order herein issued on 2nd November, 2023 upon M/s Ombachi & Company Advocates and M/s Nyagaka S.M. & Company Advocates but that the said advocates declined to acknowledge service. He thus contended that the assertions by Mr. John Kenyaga Mochama of non-service of notice of change of advocates and withdrawal were mere denials merely meant to perpetuate the maladministration of the Company through this suit. The said application constitutes an abuse of due process. He averred equally that the appointment of an advocate is the choice of a party and the Company having made its choice on the advocates to represent it cannot be blackmailed into approving the unilateral acts of Mr. John Kenyaga Mochama. He argued that the



essence of the application was to annul resolutions of the Company validly passed and therefore the same should be dismissed.

7. In response to the averments by Abel Mogaka Motende, John Kenyaga Mochama swore a further affidavit dated 2nd February, 2024 wherein he averred that the CR12 form and minutes attached thereto purporting to be that of the plaintiff were fraudulently obtained. He contended that the directors of the plaintiff could only under the law and its articles of association be elected during the Annual General Meeting (AGM). He contended that there was no notice to convene any Annual General Meeting (AGM) or Special Meeting on 18th April, 2023 as alleged in the minutes attached to the Affidavit. He contended too that the alleged additional directors appointed on 18th April, 2023 are not shareholders of the plaintiff. He reiterated that no meeting took place on 18th April, 2023 because he is always a part of the company events and in touch with all its shareholders. He equally pointed out that the minutes his signature was forged and that the same included persons who were already dead.
8. He claimed that he reported the said forgery to DCI, Kisii who investigated the matter and informed him that they had obtained a confirmation from the business Registration Service that the said CR-12 produced by the respondent does not exist and that on 30th January, 2024 when he conducted a search the same tallied with the investigations of DCI. He contended from his findings that the purported additional directors were not shareholders of the plaintiff in accordance with the law of companies and its Memorandum and Articles of Association. He contended that the said directors did not therefore have locus to appoint the firm of M/S Nyamurongi and company advocates on behalf of the plaintiff.
9. The 1st to 4th Defendants in their Application sought the following orders: -
 - a. Spent
 - b. That, the honorable court be pleased to set aside the orders withdrawing the suit given on 1st November, 2023 and issued on the 2nd November, 2023 and reinstate the suit to be heard to its conclusion.
 - c. That, the honourable court do issue an order prohibiting any persons from transacting and/or using in any manner CR12 fraudulently acquired /issued on the 13/10/2023 in respect to Ibacho Trading Company Limited.
 - d. That costs of the application be provided for.
10. The Application was based on the grounds outlined on its face as well as supporting Affidavits sworn by all the defendants. They averred that the matter was initiated by the Plaintiff way back in the year 2018 against them. They contended that since it was filed all parties have put in substantial resources, energy and time including this court in litigating the issues therein and that only one defense witness was remaining in order for the matter to be concluded. They averred too that in order to curb any wastage of court's time and resources with squabbles, parties resolved for status quo to be maintained in respect to the management of the plaintiff company. They stated too that what is pending is the typing of proceedings so that the court can set the matter for further defense hearing.
11. They claim on 2nd November, 2023 when they went to confirm whether the proceeding had been typed so as to fix the matter for further defense hearing they were caught by surprise to discover a notice dated 31st October, 2023 had been filed by the firm of Nyamurongi and Company advocates. A further scrutiny they discovered that the notice had been endorsed by this court. When they made a courtesy call to the firm of Ombachi and company advocates who were on record for the plaintiff he stated that the plaintiff was a stranger to the said notice of withdrawal of the suit and had no intentions to



- withdraw a suit that was almost finalized. They deposed too that neither their advocates nor those of the plaintiff had been served with the notice of change advocate nor the notice of withdrawal of the suit.
12. Further too they upon receiving the said information they proceeded to carry out a search at the company's registry wherein they surprisingly discovered that persons with no locus standi to the company had fraudulently acquired a CR12 including them as new directors of the company which CR12 they had used to deceive the court into endorsing a notice of withdrawal of suit. They averred further that the persons purporting to be the new directors were not registered members of the company a mandatory requirement as per the articles of Association of the company.
 13. The defendants equally pointed out that the meeting that was alleged to have resulted into their appointment as directors were signed by deceased persons. They attached copies of death certificates of persons who purportedly signed minutes of the meeting that led to the appointment of the meeting.
 14. They stated equally that the persons armed with a fraudulent CR12 with clear intentions to defraud went ahead and made attempts to access the Company's funds at Equity bank account No 051029XXXXXX prompting the Bank to freeze the account for suspecting fraudulent activities which act has now financially paralyzed the operations of Ibacho Trading Company Limited.
 15. They decried that the aforementioned fraudulent CR12 has caused havoc and unless the Honourable court urgently issues prohibitory orders against their use and operation, they will ground the company.
 16. It is important to note the defendant's Application was not opposed by the firm of Nyamurongi and company advocate.
 17. The court directed that the two Applications be disposed of by way of written submissions. The plaintiffs and defendants were thus directed to file and serve their written submission for consideration. From the Record it is only the defendants who filed their submissions.

Issues Of Determination

18. Having considered the Applications, the documents attached to the supporting affidavits, the replying affidavit filed by Nyamurongi & company Affidavit in support of the withdrawal as well as the written submissions filed by the defendants, I find the following as the issues for determination: -
 - a. Whether the respondents had capacity to withdrawal the suit.
 - b. Whether the respondents invoked the right procedure to withdraw the suit.
 - c. Whether the firm of Nyamurongi and company advocates were properly on record as counsel for the Plaintiff.
 - d. Who is to bear the cost of the applications

Analysis And Determination

Whether the respondents had capacity to withdrawal the suit

19. The defendants claim that the persons who caused the suit to be withdrawn did not have locus to withdraw the suit for reasons that they were not validly appointed as directors to the company and that the CR12 that purportedly gave them the credence to withdraw the matter was fraudulently obtained. To substantiate their claim, they averred that;



- a. The persons who appointed as the new directors of the company were never shareholders and thus according to the company's Articles of Association, they were not qualified to be appointed as directors.
 - b. The minutes of the meeting that culminated into appointing the said persons as new directors were signed by dead members.
20. In support of the above position held by the plaintiff Mr. John Kenyanga Mochama the Chairman of the Board of Directors of the Plaintiff who pointed out that;
- a. The directors of the plaintiff could only under the law and its articles of association be elected during the Annual General Meeting (AGM).
 - b. There was no notice to convene any Annual General Meeting (AGM) or Special Meeting on 18th April, 2023.
 - c. The alleged additional directors appointed on 18th April, 2023 are not shareholders of the plaintiff.
 - d. No meeting took place on 18th April, 2023 because he is always a part of the company events and in touch with all its shareholders.
 - e. His signature was forged since he did not attend the said meeting or sign the minutes of the said meeting.
 - f. The minutes included members who were already dead
21. While Abel Mogaka Motende in support of the withdrawal of the suit claimed that the Appointment of Nyamurongi and company advocate and the withdrawal of the suit was legally sanctioned by directors who were duly appointed by members in a meeting that was held on 18th April, 2023. He did not swear any further affidavit to challenge the averments outlined hereinabove. For instance, the revelation that there was no notice to convene the meeting to appoint new directors nor did he controvert the common claim that the new directors who were appointed were not shareholders of the company. Further he did not controvert the damning revelation that the minutes were signed on behalf of some members who were already dead by the time they were allegedly signed. The death certificates of the said directors were annexed to the affidavit by the defendants / applicants but the respondents did not respond to the said application. The said allegations were thus not controverted and so this court can safely infer that all the allegations in the said affidavit were true. From the forgoing therefore it is outright that the CR12 that was fraudulently generated and so it has no legal effect. It is therefore my finding suit was withdrawn by persons who did not have capacity to do so.

Whether the respondents invoked the right procedure in seeking the withdrawal of the suit.

22. The suit was already at defence stage when the respondents filed the notice of withdrawal of suit.
23. The applicants submitted that once a suit is a part heard, it can be discontinued by consent of the parties, or by filing of an application to be served upon all partes and determined by the court and not by a notice of withdrawal as done by the respondents herein.

Order 25 of the *Civil Procedure Rules* provide that: -

- (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.



- (2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.
- (3) The provisions of this rule and rule 1 shall apply to counterclaims.

In the cited case of *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* [2015] eKLR the court of appeal held that; “The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the plaintiff is at liberty, at any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the plaintiff is to give notice in writing to that effect and serve it upon the all the parties. In that scenario, the plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case, the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent. In this scenario, the right of the plaintiff is circumscribed by the requirement that he must obtain the written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the plaintiff’s right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality’.”

I agree with the position espoused by the applicants that this being partly heard matter; it could only be discontinued by consent or with leave of the court under order 25 of the *Civil Procedure Rules*. The plaintiff and defendant oppose the discontinuation of the suit. I therefore proceed to review the orders allowing withdrawal of the suit issued on 1.11.23 and proceed to reinstate the suit for defence hearing and determination.

Whether the firm of Nyamurongi and company advocates is properly on record as counsel for the Plaintiff.

24. Having observed that the new directors were not legally appointed and that the resultant CR12 was fraudulently generated, it goes without saying that the subsequent appointment of the firm of Nyamurongi & Company advocates to represent the plaintiff in the suit had no legal basis as they were appointed by strangers. The said law firm is therefore not properly on record and I proceed to strike out the notice of change of advocates on record dated 21.10. 23.

On who should bear the costs of this suit,

25. On the issue of costs, counsel for the defendants asked this court to condemn M/s Nyamurongi and company advocates and Mr. Abel Mogaka Motende to pay costs of this applications for the illegal and unprofessional acts. Counsel for plaintiff also sought costs of the suit. It is trite law that costs follow event. The applications have succeeded and it has emerged that the respondent obtained the withdrawal orders using a fraudulent CR12 document. M/s Nyamurongi and Co. Advocates was instructed by the said Mr. Abel Mogaka Motende. The said Mr. Motende should therefore should bear the costs of both applications herein. I assess the costs of the applications at Kshs 100,000/= for plaintiff and a similar amount to the defendant. The costs to be paid before the next mention date.



Conclusion

26 From the forgoing I proceed to make the following orders: -

- a. Both applications dated 6.11.23 filed by defendants and Plaintiffs are allowed.
- b. The orders dated 1.11.23 allowing withdrawal of the suit are hereby vacated and the matter is reinstated for defence hearing and determination on merit.
- c. The firm of M/S Nyamurongi and Co. Advocates are not properly on record and thus the Notice of change of advocates dated 21.10.23 filed herein is hereby struck out of record.
- d. I award costs of each applications in the sum of Kshs 100,000/= to plaintiff and a similar amount to defendants. The costs be paid before the next mention date.
- e. Abel Mogaka Motende will bear the said costs.
- f. The CR12 purportedly issued on 13.10.23 and filed herein by the respondent is declared to be fraudulent and thus of no legal effect.
- g. Mention on 21.11.24 to confirm the status of typing of proceedings.
- h. It is so ordered.

T.A ODERA

JUDGE

22.10.24

Delivered Virtually via teams platform in the presence of -

Mr. Ombachi for plaintiff /applicant

Okiemba hold brief for Nyagaka for 1st to 4th defendants /applicants

N/A for Respondent

Oigo – Court Assistant

