



**Vaghadia v Plasma Diagnostics Limited & another (Commercial Petition
E064 of 2022) [2023] KEHC 1700 (KLR) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL PETITION E064 OF 2022
DKN MAGARE, J
MARCH 6, 2023**

BETWEEN

NILESH GOPAL VAGHADIA PETITIONER

AND

PLASMA DIAGNOSTICS LIMITED 1ST RESPONDENT

CHE'TNADEVI NILESH VAGHADIA ALSO KNOWN AS CHE'TNADEVI

HIMATLAL MANEK 2ND RESPONDENT

RULING

1. The application dated November 9, 2022 was filed by the petitioner seeking orders, *inter alia*, to bar JW Advocates and Her Law Firm, Partners, associates or agents from being instructed by the 2nd Respondent.
2. The Application was opposed using two affidavits by the respondent and the advocate dated 9.11.2022 and 28.2.028

Petitioner's/applicant's submissions

3. The petitioner posits that the said JW, in her Capacity as company secretary was and or is privy to confidential information, documents and data which are in her custody concerning the internal affairs of the 1st respondent, a matter in issue in this petition.
4. The petition also states that they intend to call her as a witness on what transpired in 2016 to 2017. He relies on rule 9 of the *Advocates (Practice) Rules*.



5. According to the petitioner, there was deadlock since 2019 where there has been no meeting of directors. He relies on the authority of *Carnevali Fausto & another v Gianluigi Cernuschi & 2 others* [2008] eKLR , where the court stated ad doth.

“There is no denial that the firm of Inamdar & Inamdar Advocates attended the Annual General Meeting on 12/4/2006 of the 3rd Defendant on behalf of the 1st plaintiff. The same firm also attended the extra ordinary General meeting of the same company held on 17.4.2007 on behalf of the 1st and 2nd plaintiffs. I have carefully considered the rival submissions made by learned counsels on both sides, I have come to the conclusion that the employees, partners and or associates of the firm of Inamdar & Inamdar who attended the 3rd defendant’s meetings came into possession of material information which they may use to the prejudice of the defendants...”

6. The notice of motion dated 9/11/2022 is said to be brought under the provisions of the *Civil Procedure Act* and rule 9 of the *Advocate (Profile) Rules* and the *Advocates Act*.
7. The application seeks to bar Jacqueline Waihenya from acting as an advocate for the second Respondent in this matter.
8. In the Replying Affidavit dated November 11, 2022, the Respondent stated that Ms Waihenya has never been a company secretary but signed of an annual return.
9. The parties were not candid on the extent of involvement of Ms Waihenya. It is not true that she has never been a company Secretary. She was, is why she signed the returns of 2016/2017 return year. In the ordinary course of business, it is not usual for the company secretary to be involved in private company affairs. They usually file returns and ensure statutory compliance.
10. However, a company secretary in private companies is a formal position comes to life only when returns are being filed. They do not involve themselves in accounting and other financial transactions. that This dispute relates to shares of the 2nd Respondent. No wonder the requirement for company secretaries was done away with for private companies vide the *Companies Act, 2015*.
11. The true dispute is between the petitioner, Nilesh Gopal Vaghadia and Shetna N Vaghadia, who are both directors of the 1st Respondent, Plasma Diagnostics Limited. The dispute relates to the interpretation whether the second Respondent ought to have 50% of the business. The number of shares registered at inception has not changed. However, one party is arguing that the other’s shares were not paid for.
12. From the returns filed there has been no change of directorships during the period under review. As a fact there doesn’t seem to be a change of shares and shareholding structure.
13. It is therefore not enough to allege that she was involved in affairs of the company. There needs to be concrete proof that other than filing returns, and ensuring statutory compliances under the *Companies Act*, she did more.
14. Her evidence, will be worthless as a witness, since the status of Registration did not change. I note that the communication from Ms. Waihenya is from her law firm in Jubilee Insurance building. There is nothing real tying her to the day to day affairs of the company.
15. She filed returns only once and there were no changes. The Returns she filed as public records which can be retrieved from the registrar of companies of their successor, Business Registration Service. There is no useful evidence in the hands of Ms Waihenya.



16. What the applicant appears to be confusing is the accounting aspect and the company returns. When a company goes under, or is run down, the best placed person to deal with are the auditors, accountants and finance directors.
17. It is indeed true that the profile Rules require that one should not act as an advocate, in a matter that they are likely to be witnesses. I note that fear is also in Ms Waihenya, that she may be called by advocates. However, the document that are impugned are public records which do need company secretary to produce.
18. Without the shareholding structure being in dispute, Ms Waihenya cannot be a witness. Further in the pleadings, there is no threat to call her as a witness.
19. I note that the respondent's affidavit was sworn before faith Kakad faith. Her address is the same as the advocates for the respondent. It is sworn before the commissioner who is acting for the party. It is hereby struck out. The respondent's. The only affidavit that that remains is the one by Jacqueline Waihenya.
20. It is crucial that we do away with side shows and proceed to the next of the petition. I find and hold, and rightly so, that there is nothing under the Advocates (Practice) Rules barring Ms Waihenya non acting as an advocates for any of the parties.
21. The question whether she should act, is purely a moral question not a legal one. In the circumstances I find the application dated November 9, 2022 bereft of merit and dismiss the same with costs of 12,500/= payable within 15 days in deficit execution do issue.
22. The matter should proceed to full hearing for the ends of justice to be met.

DATED, ISSUED AND DELIVERED AT MOMBASA VIRTUALLY 6TH MARCH THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.

**HON. MR. JUSTICE DENNIS KIZITO MAGARE
JUDGE OF THE HIGH COURT, MOMBASA**

In the presence of;

Waihenya holding brief for the Respondent

No appearance for the Appellant

Andrew - Court Assistant.

