



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 248 OF 2006

CHEVRON KENYA LIMITED.....PLAINTIFF

(Formerly CALTEX OIL KENYA LIMITED)

-VERSUS-

MUVIR HOLDINGS LIMITED.....1ST DEFENDANT/APPLICANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

1) The firm of Kimandu & Ndegwa Co. Advocates on behalf of Muvir Holdings Limited, the 1st defendant filed the motion dated 19.10.2018 in which they sought for the following orders:

- i. THAT this application be certified as extremely urgent to be heard instantly its service notwithstanding.*
- ii. THAT the law firm of Kimandu & Ndegwa Co. Advocates be granted leave to immediately come on record for Muvir Holdings Limited (the 1st defendant herein) in place of the law firm of C. N. Kihara & Co. Advocates.*
- iii. THAT the law firm of Kimandu & Ndegwa Advocates be granted leave to immediately come on record for Muvir Holdings Limited (the 1st defendant herein) in place of the law firm of Kinyanjui & Njau Associates.*
- iv. That upon grant of prayers 2 and 3 above, the draft notice of change of advocates annexed as 'BMM1 and 2' in the supporting affidavit hereof be deemed as duly filed upon payment of the requisite fees.*
- v. That the law firm of Kinyanjui & Njau Advocates be ordered to immediately deposit in court any sum of money it is holding pursuant to the judgment and decree in this matter purportedly being held on behalf of Muvir Holdings Limited (the 1st defendant herein) to prevent the ends of justice from being defeated.*
- vi. THAT the 1st defendant be at liberty to pursue any unpaid balance of the decretal sum from the judgment debtor.*
- vii. THAT the law firm of C. N. Kihara & Co. Advocates and Kinyanjui & Njau Advocates be at liberty to apply for costs if need be.*
- viii. That costs of this application be provided for.*

2) The motion is supported by the affidavit, further affidavit and 2nd and 3rd further affidavits of Bethel Maina Muhuhi.

3) When served with the application, the firm of Kinyanjui & Njau Advocates filed the replying affidavit of F. M. Kinyanjui to resist the motion. James Irura Kagwamba a shareholder/director of the 1st defendant filed through the firm of C. N. Kihara & Co. advocates a replying and a further replying affidavit to oppose the motion. Reuben Wanjiha Mwihi also filed a replying affidavit to oppose the application. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order

to have the motion disposed of by written submissions.

4) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also taken into account the rival submissions and the authorities cited.

5) It is the submission of the applicant that the firm of C. N. Kihara & Co. advocates and that of Kinyanjui & Njau Advocates were retained by fake and dubious persons purporting to be shareholders and directors of Muvir Holdings Ltd. The applicant named James Irura Kagwamba and Reuben Wanjiha Mwhaki as the persons referred to as fake and dubious.

6) The applicant further stated that they are the legitimate and living persons legally capable to appoint legal representation for Muvir Holdings Ltd since they are shareholders and directors of the aforesaid company.

7) The applicant pointed out that they have demonstrated that James Irura Kagwamba is a fake director and shareholder who is instrumental in illegally retaining the firm of C. N. Kihara & Co. Advocates and that of Kinyanjui & Njau Advocates together with Reuben Gacheru. They attached to the further supporting affidavit of Bethel Maina Muhuhi a copy of a forensic document examination report dated 9.11.2018 indicating that James Irura Kagwamba had forged the signatures of genuine shareholders namely: James Nyarunda Ombati, Victor Wachira Muriuki, J. F. Richard Olang', Caroline Muthoni Mutuanjau, Duncan Amos Ndegwa and Bethel Maina Muhuhi.

8) They also annexed to the further affidavit of Bethel Maina Muhuhi the official searches. The applicants further submitted that James Irura Kagwamba was removed as a shareholder and director of the 1st defendant vide a letter dated 7.11.2019. The applicants also argued that judgment in this matter was entered on 17.12.2015 while the law firm of C. N. Kihara & Co. Advocates and that of Kinyanjui & Njau Advocates were on record hence the need to file the current motion as required by Order 9 rules 9 and 10 of the Civil Procedure Rules.

9) It is argued that the two law firms have not given tangible reasons as to why they should not be replaced. The applicants also annexed to the affidavit of Bethel Maina Muhuhi minutes of the extra ordinary general meeting which effected changes in the management of Muvir Holdings Limited.

10) The two law firms opposed the motion. It is the submission of the law firm of C. N. Kihara & Co. Advocates that it acted for the best interest of the 1st defendant as the pleadings filed demonstrate.

11) This court was urged to strike out the applicant's motion for the following reasons:

First, it is an abuse of the court Process as the application is substantially identical with another application dated 19th November 2018 filed in Nairobi H.C.C.C no. 593 of 2014, therefore the motion is rejudicata.

Secondly, the applicant has invoked the wrong provision of law therefore there is no foundation which the application can stand on.

12) It was pointed out that the applicants invoked Sections 63(c) and (e) of the Civil Procedure Act whereas the prayers in the application all seek for permanent and final orders contrary to the provisions of the cited empowering provisions.

13) The respondent also pointed out that the applicants cited Order 40 rules 1 and 2 of the Civil Procedure Rules which provisions are in respect of orders of temporary injunctive orders granted pending the hearing and determination of a suit or further orders of the court.

14) It is also stated that Section 100 of the Civil Procedure Act which the applicants premised their application is in respect of the general power to amend but the section does empower the court to grant the reliefs sought in the application.

15) It is also argued that the suit which was based on trespass against title was heard and dismissed with costs. It is pointed out that party and party costs have been taxed and a certificate of costs issued in favour of the firm of C. N. Kihara & Co. Advocates being the law firm which rendered the legal services, therefore

such fees cannot now be paid to a law firm that did not render the services.

16) The respondent also stated that all affidavits and witness statements in defence of the 1st defendant company were sworn by Mr. Francis Mburu Kimani, now deceased. It is further averred that the further amended 1st defendant's defence and amended counter-claim were filed pursuant to the authority under the seal dated 14th October 2014 and filed in court on 29.10.2018 which were signed for authorization by the late Francis Mburu Kimani and James Irura Kagwamba.

17) Mr. C. N. Kihara is of the submission that there is some disagreements as to who are the legitimate shareholders and directors of Muvir Holdings Ltd and that such dispute ought to be resolved through the medium of the provisions of the Companies Act as has been invoked by the plaintiffs in Commercial Case H.C.C.C no. 593 of 2014 and not through these proceedings which are at execution stage.

18) The learned advocate for the 1st defendant pointed out that the returns filed together with minutes show contradictions and material omissions on the shares allotted, the value of those shares and the consideration paid.

19) The firm of Kinyanjui & Njau Advocates which also represents the 1st defendant opposed the application filed by the firm of Kimandu & Ndegwa Co. Advocates and pointed out that the allegations that the clients who gave the law firm instructions are not bonafide directors of the 1st defendant are matters which are before this court in H.C.C.C no. 593 of 2014 hence are res subjudice.

20) Having considered the material placed before this court plus the rival submission the main question which has been left to this court to determine is whether this court should grant leave to the firm of Kimandu & Ndegwa Advocates to come on record in place of the two law firms namely C. N. Kihara & Co. Advocates and that of Kinyanjui & Njau Advocates to appear for Muvir Holdings Ltd, the 1st defendant herein.

21) I have already considered the submissions of each party. The basis of the applicant's application is that the two law firms i.e C. N. Kihara & Co. Advocates and that of Kinyanjui & Njau advocate had been instructed by fake and dubious persons purporting to be shareholders/directors of Muvir Holdings Ltd.

22) The applicant submitted various affidavit evidence with a view of discrediting the persons who instructed the aforesaid law firm to represent the aforesaid company in this suit. The respondent law firms have argued that the application is an abuse of the court process since the applicant filed a substantially identical application dated 19th November 2018 in Commercial case H.C.C.C. no. 593 of 2014 therefore the instant application is res subjudice.

23) It is not in dispute that all the affidavits and witness statements in defence of the 1st defendant company were sworn to and signed by Francis Mburu Kimani, now deceased, who was also the founder and director of Muvir Holdings Ltd. If this court was to take the applicant's argument to its logical end, then Muvir Holdings Ltd would be deemed not to have offered a valid defence to the case and the counter-claim would have also been rendered invalid and the award as null and void.

24) With respect, I am persuaded by the submission of the firm of C. N. Kihara & Co. Advocates, that the application is dependent on the determination of the question as to who are the legitimate shareholders and directors of Muvir Holdings Ltd.

25) I am also persuaded by the respondent's argument that the aforesaid issue can only be determined through the mechanism provided for under the Companies Act and not through these proceedings.

26) In my view this application is unique and is not the type envisaged under Order 9 rules 9 and 10 of the Civil Procedure Rules. In the instant application, the court is required to first inquire and establish who are the legitimate shareholders and directors of Muvir Holdings Ltd through the mechanism prescribed under the Companies Act.

27) It is apparent that as of now, the court is not certain as to who between the disagreeing parties is the legitimate shareholder and or director of Muvir Holdings Ltd. Consequently, the law firm of Kimandu & Ndegwa

Advocates cannot be allowed to come on record in place of the law firms of C. N. Kihara & Co. Advocates and that of Kinyanjui & Njau Advocates until their instructing clients establish their legitimacy as shareholders and or directors of the 1st defendant.

28) In the end, the motion dated 19.10.2018 is found to be without merit. The same is dismissed. In the circumstances of this case a fair order on costs is to order which I hereby do that each party meets its own costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 1st day of December, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent