



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 393 OF 2017

IN THE MATTER OF SECTION 863 & 864 OF THE COMPANIES ACT NO. 17 OF 2015

-AND-

IN THE MATTER OF THE RECTIFICATION OF THE COMPANY REGISTER OF RADIO FREQUENCY SYSTEMS (E.A) LIMITED

-AND-

IN THE MATTER OF THE COMPANIES (HIGH COURT RULES)

-BETWEEN-

SIMON HORNER.....APPLICANT

-VERSUS-

MICHAEL JOHN MWAURA.....1ST RESPONDENT

EPSILON REGISTRARS.....2ND RESPONDENT

RADIO FREQUENCY SYSTEMS (EA) LIMITED.....3RD RESPONDENT

THE REGISTRAR OF COMPANIES.....4TH RESPONDENT

JUDGMENT

PRELIMINARY

1. The decision to write the judgment in this matter, rather than entertain the applications that were pending for determination, was influenced by what I can only call drama in my court when this matter came up on **8th May 2018**. On that day, after the matter had been adjourned, a lady stood up screaming and saying that she had not been paid by the company in this matter even though she had supplied goods to it. Again, on **5th June 2018**, a number of people were in court including the employees of the 3rd respondent, who alleged that because of the pendency of this case, they had not been paid their dues. In my view, the interest of justice dictated that this matter be concluded sooner rather than later. On reaching that decision, I ordered the parties to make their final submissions.

INTRODUCTION

2. **Simon Horner** (*Horner*) filed this originating notice of motion on **29th September, 2017**. *Horner* sued **Michael John Mwaura** (*Mwaura*) who was his co-director of **Radio Frequency Systems (EA) Limited**, the 3rd respondent (*RFS*). He also sued the 2nd respondent **Epsilon Registrars**. This were the company secretary of the 3rd respondent.

BACKGROUND

3. It is not denied that **RFS** is a private company limited by shares. It was incorporated on **8th June 2003**. At incorporation, its nominal share capital was Ksh 100,000 divided into 100 ordinary shares of Ksh 1000 each. The share holders were, as at the year 2015, **Horner** with 40 ordinary shares; **Mwaura** who held 30 ordinary shares; and the **Estate of Samson Mburu** whose shares were 30 ordinary shares.

HORNERS CASE

4. **Horner** pleaded that in **May 2017**, it came to his attention that there was forged documents relating to RFS's shareholding. On an official search being carried out, it revealed that according to the records, held by the Registrar of Companies, the 4th respondent, there were discrepancies in the share capital and in the share holding of **RFS**. The records revealed that **RFS**, as at **25th May 2017** had nominal share capital of **Ksh 5million** and its share holding was as follows; **Horner** 2,485 ordinary shares; **Mwaura** 2,485 ordinary shares ; and the **Estate of Samson Mburu** 30 ordinary shares. **Horner** annexed to his affidavit a true copy of the search made to the 4th respondent which showed that the above stated shareholding was reflected in the annual return of **RFS** as at **31st December, 2015**. **Horner** also obtained a copy of a return of allotment of shares dated **20th April 2016**.

5. **Horner** stated that the effect of that allotment was to suggest that he and **Mwaura** had a larger number of shares in **RFS** that they actually had. That that allotment was a product of fraud and forged documents. The reason he concluded that those documents were forgeries is as follows:

"a. No directors' or shareholders' meeting was ever convened to discuss the allotment of new shares in the Third Respondent Company.

b. The purported return of allotment bears a signature that is similar to that of the first respondent. The first respondent has not denied knowledge of the return of allotment and he has not denied that the signature on it belongs to him;

c. The purported return of allotment was filed in the fourth respondent's companies registry by the second respondent. The second respondent has not denied knowledge of the said return of allotment;

d. The third respondent's nominal share capital is Ksh 100,000/= divided into 100 ordinary shares of Kenya Shillings 1000/- each. Accordingly, an allotment of shares of the kind represented by the purported return of allotment would have required a prior increase in the share capital of the third respondent company;

e. no directors' or shareholders' meeting was ever convened to discuss an increase in the share capital of the third respondent company;

f. no directors' or shareholders' resolution was ever passed to authorize an increase in the share capital of the third respondent company."

6. **Horner** after setting out those acts of alleged fraud, against **Mwaura**, he alleged that **Mwaura** was also attempting to liquidate the RFS's fixed deposit at **Equity Bank** and was attempting to change the RFS's bank signatories; that he **Horner**, and **RFS** had become victims of fraudulent acts of **Mwaura** and the 2nd respondent.

7. **Horner** also produced CR12 certificate of official search from the 4th respondent dated **28th September 2017** which showed that the annual return dated **31st July 2017** made on behalf of **RFS** had the following share holding structure: **Horner** 2,485, **Mwaura** 2,485, **Kathleen Wanjiku Kihanya (Kathleen)** 2,000 and the **Estate of Samson Mburu** 30 shares. **Horner** termed the appointment of **Kathleen** as fraudulent and without recourse to proper decision making organs of **RFS**.

8. **Horner** denied attending a meeting where the increase in share capital and the increase in shares or appointment of **Kathleen** were discussed. He deponed that his signature in that regard had been forged.

9. Further, that before filing this action, **Horner's** advocate wrote a letter dated **30th May 2017** to **Mwaura** setting out all the illegalities referred to above and clearly alleging that those illegalities had been done by **Mwaura**, and thereof gave **Mwaura** 72 hours to provide detailed explanations of those actions.

10. In his affidavit **Horner** attached a copy of a letter dated **2nd June 2017** written by the firm of **Nduati & Co. Advocates** which was response to the letter dated **30th May, 2017** which letter is reproduced herein under:

“
COMPANY

NDUATI &

ADVOCATES

2nd June, 2017

Your Ref: JPC/so/po/6171365

Our Ref: N/CIV/307/2017

Coulson Harney L.L.P

5th Floor West Wing ICEA Lion Centre

Riverside Park, Chiromo Road

NAIROBI

Attn: Mr Harney, (advance via email: philip.coulson@bowmanslaw.com, sean.omondi@bowmanslaw.com)

Dear sir,

Re: *Fraudulent allotments of shares in Radio Frequency Systems (E.A) Limited and fraudulent transfer of shares in Distribution Communication Systems Limited*

We act for Mr John Michael K. Mwaura and your letter dated 30th instant addressed to him is now in our hands with instructions to respond.

While we will do so shortly, we seek your indulgence while we await receipt of various documents we have requested from Macron Secretaries, Gachoka & Associates and Epsilon Registrars who at various instances were under instructions from our mutual clients and who your client directly accuses of fraud.

Yours faithfully

NDUATI & COMPANY ADVOCATES

Stanley T. Nduati”.

11. **Horner** by his supplementary affidavit deponed that despite his advocate making further written demand by letter of **14th June 2017**, to **Mwaura’s** Advocate, there was no substantive response received either from **Mwaura** or his advocate.

12. Further that **Horner** personally wrote to the 2nd respondent requesting the 2nd respondent as RFS’s company secretary to supply **Horner** at his cost, with copies of special resolutions passed by **RFS** on **31st December 2015**, resolution or agreement passed by members of **RFS** after **31st December 2015** and a copy of up to date statement of capital of **RFS** detailing total number of shares and their nominal value, the number of shares held by each member and the amount of paid up and unpaid on each share. **Horner** deponed that the 2nd respondent did not respond to that request. He therefore summarised that the failure to respond was indicative of the fraud by **Mwaura** and the 2nd respondent.

MWAURA’S AND 2ND RESPONDENT’S CASE

13. **Edward Kihoro**, a manager of the 2nd respondent deponed in his affidavit in reply sworn on **3rd November 2017** that on **30th March 2016**, he was invited by **Mwaura** to attend an urgent board/shareholders meeting of **RFS** which was scheduled for **31st March 2016**. He stated that he was informed that RFS’s shareholders wanted to make urgent changes to the company. He stated that present at the meeting was **Horner** and **Mwaura**. He deponed that he prepared the minutes of that meeting where the following resolution was made:

“the nominal capital of the company be increased from the current Ksh 100,000 by creation of an additional 4,900 ordinary shares of Ksh 1,000 each.”

14. He proceeded to state that the new shares of the company were allotted to reflect that **Horner** had 2,485 ordinary shares of Ksh 1000 each, **Mwaura** had 2,485 ordinary shares of Ksh 1000 each and the **Estate of Samson Mburu** with 30 ordinary shares of Ksh 1000 each.

15. The deponent stated further that on being instructed he prepared the necessary documents and requested **RFS** to pay fees of the 2nd respondent and also statutory payment to facilitate the filing of the documents reflecting those changes in the nominal capital and shareholding of **RFS**.

16. The deponent on behalf of the 2nd respondent however, confirmed that the 2nd respondent was not involved in the subsequent meeting where an additional director/shareholder, **Kathleen**, was appointed as seen in the company’s returns of **31st July 2017**.

17. Through this deponent, the 2nd respondent also deny that it connived with anyone or committed the alleged frauds made by **Horner**.

18. **Mwaura’s** replying affidavit was sworn by him on **7th November 2017**, he confirmed the status of directorship and shareholding as stated by **Horner**, in respect to **RFS**, prior to **31st March 2016**. He deponed that on **30th March 2016**, he summoned an official of the 2nd respondent to attend an urgent meeting of **RFS**. That **Edward Kihoro** attended and so did **Horner**. At that meeting both he and **Horner** passed a resolution of the nominal capital of **RFS** to be increased and that they both signed a resolution to that effect. He further stated that he and **Horner** instructed the 2nd respondent to file necessary returns with the registrar of companies. In this regard he stated that **Horner’s** allegations that he was unaware of the resolution was not only false but misleading.

ANALYSIS AND DETERMINATION

19. I have considered the parties affidavit evidence and their written submissions. It will become clear in my analysis of that evidence that I have steered clear and wholly avoided discussing the parties arguments and counter arguments on who was misusing money belonging to

RFS. That issue of whether the money of **RFS** has been misused or about who is owed or not owed money by **RFS** is not before me in this matter. Such matters should be dealt with by internal mechanism of **RFS**.

20. What will concern this court, however, is determination whether **Horner** has proved fraud. If the answer to that issue is in the positive, the next issue to consider is what orders should the court grant.

21. Before dealing with those two issues, I wish to consider the submission of the 1st and 3rd respondents that the suit by **Horner** fails because **Horner** did not obtain the court's leave to proceed with this derivative action as required under section 238 of the Companies Act. That section defines derivative action to mean:

“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.”

22. In the case of **Moir vs wallesteiner**[1975] **ALL ER 849**, or **p.857**, the court in expounding what a derivative action is stated:

*“it is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interest to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage such is the rule in *foss vs Harbottle* [1843]2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue”.*

23. In our local case **Sultan Hadham Lalji & 4 Others** [2014] **eKLR** the court also stated:

“We have set out the foregoing in extenso to demonstrate that by their own averments in the pleadings, the appellants explicitly concede that the assets in question belonged to the company that would be aggrieved. Not even in a single paragraph of the plaint have the appellants pleaded what loss they have suffered individually or jointly by the alleged fraudulent transfer of the company asserts”.

24. Bearing in mind those decisions above and the provisions of Section 238, can this action which was brought by **Horner** be said to be derivative action.

25. My short answer is no. The reason I give that answer is because my understanding of **Horner's** case, save for the issues of dealings with **RFS's** money, is that **Mwaura** together with the 2nd respondent without following the procedures of calling for directors or shareholders meeting fraudulently increased the nominal capital and the shareholding. **Horner** pleaded that he did not attend the meeting where the alleged resolution of increase of nominal capital and shares was passed. He therefore stated that his signature to that resolution was forged.

26. Those pleadings distinguish his case from what is stated in Section 238. **Horner** seeks for orders to rectify the register of **RFS** after the court makes inquiries and is satisfied that such rectification is merited. **Horner** therefore has **locus standi** to bring this case. That was the holding in the case **Obsidition Investments Limited Vs Attorney General & another** [2015] **eKLR** where **Justice Gikonyo** held:

“also under sections 164, 165 and 166 of the Companies Act, the person who may apply or requisition an investigation or investigation of the company affairs is any member of the company, aggrieved creditor, the company itself or the registrar. Therefore, it is wrong for the respondents to argue that a member or shareholder of a company cannot file suit for purposes of investigation, inspection of the affairs of the company or rectification of members register. The applicant is a shareholder of the company and has locus standi to file this application. Matters which fall under section 118, 164, 165 and 166 do not require a party to commence derivative suit on behalf of the company in order for relief to be granted by court.”

27. I shall proceed to consider the issues identified above.

28. There are alleged, by **Mwaura**, to have been two meetings of **RFS**. One of those meetings, he alleged took place on **31st March 2016**. This meeting is supported by minutes and a resolution. Of importance is that resolution of that day which increase the nominal capital and share holding. It bears the signature of **Horner**. **Horner** denies attending that meeting. The second meeting brought about the changes which allotted shares to **Kathleen** and thereby altering the register of members of **RFS**.

29. The meeting of **31st March 2016** was allegedly convened by **Mwaura** who according to **Edward Kihoro** invited the 2nd respondent to attend.

30. There is no evidence of such an invitation, which I believe could not have been by word of mouth.

31. The resolution passed at that meeting has been denied by **Horner**. Indeed **Horner** has stated that the signature thereon is not his.

32. I have carefully examined the signature of **Horner** appearing on the various affidavits filed in this action. It is clear to me that the signature on the resolution of the alleged meeting of **31st March 2016**, next to the word director, is different from the signatures in **Horner's** various affidavits. There is no doubt in my mind that there is an attempt to immitate **Horner's** signature in that resolution. But that is all it is, an immitation and dare I say it is a forgery. For one, amongst others, the signature in the resolution does not have a clear '**O**' after '**H**'. Whereas in other signatures of **Horner**, in his affidavits, have a clear '**O**' appearing after '**H**'. The one appearing on the resolution, does not also have an '**R**' after the '**O**'. Whereas the other signatures of **Horner** have '**R**'.

33. It has been held that it is the duty of the court to satisfy itself on whether a writing was made by one party and not the other. Such a holding has its force in law under **Section 50 (1) of the Evidence Act Cap 80**. That section provides:

“when the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible.”

34. In a persuasive decision in the case of **Davis vs Magistrates Ofedinburgh 1953 SC 34**, the court in discussing what role a handwriting expert plays stated:

“their duty is to furnish the judge...with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge...to form (his or her) own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge.”

35. In our local case of **Asira vs Republic [1986] KLR 227** the court stated:

“The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by particular person or that the writings are so similar as to be undistinguishable.

***It is the duty of a court to make an examination and satisfy itself whether the handwriting expert's opinion can be accepted and the court cannot blindly accept such an opinion. The failure to demonstrate to the court the features of the so-called disguised handwriting meant that the court did not itself decide the issue.”**(emphasis mine).*

36. Bearing the above in mind, and having examined the signatures of **Horner** appearing in his various affidavit and on the impugned resolutions of **31st March 2016**, I come to a conclusion that the signature appearing in the resolution does not belong to **Horner** and is infact a forgery. It follows that there could not have been such a resolution passed resolving to increase the nominal capital and the shareholding.

37. That finding is bolstered by the fact that the Advocate of **Horner** made a demand to **Mwaura** by their letter dated **2nd June 2017** inquiring how the increase of nominal capital and shareholding was arrived at. As it will be seen above in this judgment **Nduati & Co. Advocates**, respondent to that demand by their letter of the same date promising to respond to those issues in full but in fact to today's date have not responded. Infact it does seem that it was not until **Mwaura** and the 2nd respondent filed their replying affidavits on the **7th and 3rd November 2017** respectively, that there was evidence of an alleged meeting on **31st March 2016** where a resolution was passed. Why was that information not given to **Horner** or his advocate following their demand letter of **2nd June 2017**. That information was also not supplied by the 2nd respondent, **RFS** company secretary despite **Horner** requesting for it at his costs, by his letter of **22nd June 2017**. That reluctance in suppling that information can only lead to a finding that the 2nd respondent was complicit in the illegal actions of **Mwaura**.

38. In respect to the alleged meeting, which led to alteration of RFS's register the second time, whereby **Kathleen** was reflected and a director and shareholder, I make a finding that such a meeting did not take place. **Mwaura** did not even attempt to allude to that meeting. The 2nd respondent through **Edward Kihoro** deponed that it did not attend such a meeting. One can only therefore be left to conclude that no such meeting took place.

39. There is therefore merit in the originating motion of **Horner**. In view of the above discussions, I grant the following orders:

a. The register of members of the 3rd respondent company and all its records and files kept by the 2nd respondent and 4th respondent in relation to the 3rd respondent company be and are hereby ordered to be rectified to reflect the following normalinal share capital, directorship and shareholding of the 3rd respondent company:

(a) Nominal share capital- Kenya Shillings 100,000/- divided into 100 ordinary shares of Kenya Shillings 1,000 each, all of which is issued;

(b) Directorship:

i. Mr. Simon Horner – Director and Chief Executive Officer; and

ii. Mr. John Michael Mwaura – Director

(c) Shareholding:

- i. Mr. Simon Horner – 40 Ordinary shares of Kenya Shillings 1,000 each
- ii. Mr. Michael John Mwaura – 30 ordinary shares of Kenya Shillings 1,000 each
- iii. The estate of the late Samson Mburu – 30 ordinary shares of Kenya shillings 1000/- each.”

b. The following documents relating to the 3rd respondent company are hereby expunged from all files, registers and records held by the 2nd respondent and by the 4th respondent at the company’s registry in respect to the 3rd respondent company:

- “(a) A return of allotment (Form CR 20) dated 20 April 2016 purportedly relating to the second respondent company;
- (b) any document prepared or made pursuant to or on the basis of the return of allotment referred to in paragraph (a) above;
- (c) any document purporting that the Third Respondent Company’s nominal share capital, directorship and shareholding is different from that set out below:

- i. Nominal share capital – Kenya shillings 100,000/- divided into 100 ordinary shares of Kenya shillings 1,000/- each, all of which is issued;
- ii. directorship:
 - Mr. Simon Horner – Director and Chief Executive Officer; and
 - Mr. John Michael Mwaura – Director

iii. Shareholding:

- Mr. Simon Horner – 40 Ordinary shares of Kenya Shillings 1,000 each
- Mr. Michael John Mwaura – 30 ordinary shares of Kenya Shillings 1,000 each
- The estate of the late Samson Mburu – 30 ordinary shares of Kenya shillings 1000/- each.”

c. The Funds in the joint bank account in the names of Coulson Harney LLP and Nduati & Company Advocates shall be transferred into the 3rd respondent’s company account No. 0170296936184 at Equity Bank Limited within 14 days from the date of this Judgment.

d. The costs of this suit are awarded to Simon Horner to be paid jointly and severally by the 1st and 2nd respondents.

e. The Deputy Registrar of this court is hereby directed to supply a copy of this judgment to the Director of Public Prosecution for a decision to be made whether any criminal action should be taken against any of the parties in this matter.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of

Court Assistant.....Sophie
.....for the Respondent
.....for the Applicants

MARY KASANGO

JUDGE