



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

INSOLVENCY CAUSE NO. 1 OF 2018

IN THE MATTER OF THE INSOLVENCY ACT (2015)

IN THE MATTER OF SECTIONS 384(1)(A), 423(1)(E) & 425(1)(B) OF THE

INSOLVENCY ACT (2015) OF THE LAWS OF KENYA

UNITED MILLERS LIMITED.....PETITIONER/RESPONDENT

VERSUS

B. N. KOTECHA & SONS LIMITED.....RESPONDENT/APPLICANT

RULING

The court has been moved by an application filed by **B. N. KOTECHA AND SONS LIMITED**.

1. The said application is dated 29th May 2018, and it was filed by the Law Firm of **PROF. TOM OJIENDA AND ASSOCIATES, ADVOCATES**.
2. Through that application, the court has been asked to set aside, discharge or vacate the order issued by Lady Justice T. W. Cherere on 11th April 2018.
3. The order in issue was recorded by consent of the parties.
4. However, the Applicant now contends that it had never authorized any advocate to enter into the consent which was recorded on 11th April 2018.
5. The company intends to persuade the court that the alleged consent was illegal, unlawful, null and void, and was therefore unenforceable against it.
6. There is no dispute about the fact that as at 11th April 2018, the Applicant's advocates in the case were **L.G. MENEZES & COMPANY ADVOCATES**.
7. However, on 31st May 2018, the Law Firm of Prof. Tom Ojienda & Associates, Advocates filed a **NOTICE OF CHANGE OF ADVOCATES**, indicating that the said firm was replacing L.G. Menezes & Company Advocates.
8. When the application came up in court on 12th June 2018, Mr. Makokha advocate informed the court that he was representing the Applicant.
9. Meanwhile, Mr. Menezes advocate said that he was not aware that the Applicant had sacked the Law Firm of L.G. Menezes & Company Advocates.
10. When Mr. Menezes said that he had not even been served with the application, Mr. Makokha tendered his apology, and gave an undertaking to serve him.
11. At that stage, the court allowed the parties, time to discuss how best to move forward the application.
12. When the court sessions resumed later that morning, the Applicant said that Mr. Menezes could be allowed 7 days to respond to the

application.

13. The parties acknowledged that there appeared to be some misunderstanding between the directors of B. N. Kotecha & Sons Limited (*"the Company"*).
14. Whilst one or more directors were of the view that the company had not given instructions to Menezes, there was another director who was of the view that the company had duly instructed Menezes.
15. In the light of the competing positions, which were being expressed by the directors of the company, the parties felt that it would be necessary to have the directors cross-examined.
16. On 20th September 2018, Mr. Makokha advocate told the court that the reason why Mr. Menezes advocate was in court was, that Menezes needed to explain why he had recorded the consent in court, when the company had not made any resolution to do so.
17. It is my understanding that by submitting that Mr. Menezes was required to explain why he had recorded a consent, when the company had not shown him any resolution to do so, Mr. Makokha was beginning from the premise that the company resolution was a legal requirement without which an advocate cannot have been properly instructed by a company.
18. Mr. Menezes responded by reiterating that, as far as his Law Firm was concerned, they still had instructions from the company. He insisted that the company was still being represented by his Law Firm.
19. The foundation of that submission is that L.G. Menezes & Company Advocates were on record, as the advocates for the company, from the outset.
20. In the opinion of Mr. Menezes, the only way that any other Law Firm could have replaced L.G. Menezes & Company Advocates, was either with the consent of L.G. Menezes & Company Advocates, or with the leave of the court.
21. His said reason was on account of the fact that before Prof. Tom Ojienda & Associates Advocates filed a Notice of Change of Advocates, judgment had already been entered by the court.
22. On the other hand, Mr. Makokha advocate submitted that there was as yet no judgment which had been entered in the case.
23. The case in which the company says that there is no judgment yet on record, is **Insolvency Cause No. 1 of 2018**.
24. The company concedes that in **Kisumu HCCC No. 38 of 2015**, there was already a judgment against the company.
25. If the application dated 29th May 2018 was successful, the company says that it would then have its new advocates make an application in **HCCC No. 38 of 2015**, so that they would then replace L.G. Menezes & Company Advocates.
26. For now, the company says that it was only seeking to set aside the consent in this Insolvency Cause.
27. And in so far as there is yet no judgment in this cause, the company submitted that the Law Firm of Prof. Tom Ojienda & Associates Advocates was properly on record.
28. A literal reading of the record of the proceedings in this Insolvency Cause reveals that it is yet to be determined. A determination of the Petition would be by either an order for the liquidation of the company or an order dismissing the Petition.
29. Therefore, in a literal sense, the Law Firm of Prof. Tom Ojienda & Associates, Advocates did not need either the leave of the court or the consent of L.G. Menezes & Company Advocates, to come on the record as the new advocates for the company.
30. But the matter is not that simple. I say so because this Insolvency Cause is premised on the company's alleged breach of the consent judgment in **Kisumu HCCC No. 38 of 2015**.
31. In the company's response to the petition, Hemal Kotecha swore an affidavit in which he deponed that the consent judgment was entered into without a Resolution of the Company.
32. I hold the considered view that the Insolvency Cause is so intertwined with the **Kisumu HCCC No. 38 of 2015**, that it is impossible to separate the two completely. But although the two cases are so intertwined, they are separate from each other.
33. I further find that the consent dated 11th April 2018 was recorded in this Insolvency Cause. The said consent constituted a determination of the matter, as it made it clear that should the company default in the payment of any one of the agreed monthly instalments, the company would be liquidated.
34. To the extent that the company seeks the setting aside of that consent, through a Law Firm that is different from the one which entered into the consent, I find that the new Law Firm is not properly on record.

35. By so holding, the court must not be deemed to be saying that the company cannot choose to engage a new Law Firm to represent it. Every person is entitled to choose an advocate whom he would like as his lawyer in any case.

36. However, after judgment or a determination had been made in a case, any party who was desirous of changing advocates needed to follow the laid down procedure.

37. The Law Firm of Prof. Tom Ojienda and Associates Advocates will need to go through the laid down procedure before it can be deemed to be properly on the record as the advocates for the company, in place of the Law Firm of L.G. Menezes & Company Advocates.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF OCTOBER 2018

FRED A. OCHIENG

JUDGE