



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI HIGH COURT
COMMERCIAL AND ADMIRALTY DIVISION
MISC APPL CASE NO 222 OF 2012

FUBECO CHINA LTD PLAINTIFF

VERSUS

NAIPOSHA COMPANY LTD AND OTHERS DEFENDANT

MILESTONE COMPANY LTD1ST INTERSTED PARTY

RULING

1. For determination by the Court is the Plaintiffs’/Applicants’ application dated 16th September 2015 and filed on 18th September 2015. The application was brought pursuant to the provisions of **Order 9 Rule 9,CPR 2010,Section 1A,113,3A CPA ,sect 231companies Act cap 486**. The application seeks the following orders;

1. **That the firm of Kouna& Co. Advocates be granted leave to come on record for the applicant in the suit.**
2. **Costs**

2. The application is premised on the grounds that the defendant /applicant has appointed the named firm of the advocate to represent him in the matter. The matter had been scheduled for hearing on 23/7/2015 thus the firm be allowed to come on record. On the 15/7/2015, Gikonyo J had directed that a formal application to come on record be filed.

3. The application is supported by the affidavit of Caroline Wairimu Wanjihia sworn on 13/7/2015.

4. She depones that she is a director of the Naiposha Co. ltd the defendant and thus in that capacity she appointed Bichire and Co. advocates to act for the company in the instant matter. She accuses the said firm of advocates of misrepresentation in the instant matter and thus by a letter dated 5/3/2015 she terminated the instructions thereof given. She thus appointed Gatuuru and company advocates to act for the defendant in the matter. Mr. Kouna submission is that since she had authority to appoint the firm of Bichires and co advocates, it goes without saying that she had authority to fire the same firm of advocates. Mr. Kouna submits that Mr. Bichere is estopped from denying Caroline Wanjihia authority to hire and fire as he was also appointed by her.

5. Mr. Bichire opposed the application and relied on the affidavit of Martin Kuruga sworn on 28/9/2015 and that of David Njau Nguku. He started by attacking the application for want of form and content. This because it talks of the firm of Kouna being granted leave to represent applicant and that the said firm would represent him in the matter.

6. Further the application alluded to the matter coming for hearing on 23/7/2015. He sought on those grounds to have application to be dismissed. He submitted that the said Caroline Wanjihia ran away with company's (defendant) money and there are court warrants to arrest her thus she cannot be heard by the court. He submits that the defendant has 6 directors and 2 of them have appointed their own advocates namely Wangoo Advocates and so is the three others who have appointed Wanyoike Advocates. The affidavit of David Njau Nguku confirms that the company has not been dissolved to date. He alludes to the content of paragraph 9 of DAVID NJAU NGUKU a director of the defendant which states that there was no resolution by the defendant company authorizing the change of advocates and thus Kouna and co advocates are strangers to them.

7. Mr. Njuguna advocate opposed the motion and submitted that the firm of KOUNA advocate is being appointed by the Caroline wanjihia not the defendant company as there is no resolution to authorize the same.

8. Mr. Otachi advocate supported the application though there was no affidavit from which to draw the facts in support. However he submitted that, the only issue before the court is whether a formal resolution was required in the appointment of the advocate. He submitted that the manner of appointment should apply to all including to the firm of Bichire advocate.

9. Mrs. Mutunga also opposed the application and relied on the grounds filed which are to the effect that, there is no resolution appointing Kouna advocates to come on record for the defendant company. The jurat of the affidavit is not on the same page with the text. The application is thus defective.

10. After going through the materials before me, pleadings, affidavits and the submissions I find two issues for determination namely;

- a. **Whether the application is defective for want of form and content?**
- b. **Whether the firm of KOUNA AND CO. ADVOCATES required a resolution from the defendant company authorizing their appointment to enable court grant sought leave?**

11. On form and content, I find that all parties understood and replied to the substance of the application namely, **whether the firm of Kouna and company advocates had valid instructions to act for the defendant. Order 2 Rule 14 CPR prohibits objections on want of form. Section 1A and 1B CPA and Article 159 of the constitution emphasize on court hearing matters on merit and devoid of undue technicalities.**

The court thus overrules the technical objection raised.

12. On the second issue, the court makes the following findings.

It is not in dispute that the defendant company is registered under Companies Act Cap 486 with six(6) Directors who signed Memorandum of Association on 27/4/2010 vide MM1 annexure attached to Martin Kuruga affidavit.

13. From the beginning let me quote Gikonyo J. holding on issue at hand in a ruling of 18/9/2014;

“Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has power of the board to act on behalf of that company, in this case of Caroline Wairimu Kimemia, ...she is a director of the defendant company and she duly authorized the advocates on record to commence the application. That fact is not denied and am surprised the person laying the objection is the plaintiff and not the defendant company. There is no

material from the other directors denying the authority of Caroline as a director ..”

14. In the case of **East African Safari Air Limited v Anthony Ambaka Kegode & another [2011] eKLR** the court of appeal held;

“If an individual shareholder, without authority to do so, initiates litigation in the name of the company, the normal practice upon a motion to strike out the company’s name is for the court to adjourn, whilst ordering that a meeting of the shareholder’s be held to see if the company supports the litigation. If it does not, the motion will succeed and the solicitor who commenced the proceedings without authority of the company will be personally liable for the defendant’s costs.”

15. In our instant matter the directors are denying Caroline Wanjihia authority to appoint Kouna and company Advocates and oppose the application. This is a different scenario from the one obtaining at the time of Judge Gikonyo ruling on 18/9/2014.

16. In further holding relying on authorities the court of appeal held citing cordery on Law relating to solicitor;

“Proceedings will not be set aside because the solicitor acted without authority, if the party on whose behalf they were taken adopts what has been done, but ratification of an agent’s act can only be effective where, at the time of the act, the principal was himself competent to perform it, or to authorize its performance, and a plaintiff cannot so adopt an action after having apparently repudiated it to the defendant.”

17. Caroline Wanjihia is averring that she appointed the instant firm to act on behalf of the company which authority is denied by other directors.

18. In the case of **East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR** the court held relying on the case of **Bugerere Coffee Growers Ltd vs Sebaduka& Another (supra)**, that;

“In the suit, that when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in the case. The Court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action”

19. In our instant case nowhere has the company resolution and or authority been shown to mandate Kouna and Company advocates to act on behalf of the defendant Company. There is no ratification by the other directors of Caroline’s purported authority to appoint the said firm of Advocates.

20. The submission that since she purportedly appointed Bichire advocate, she as well can appoint Kouna Advocate does not hold water. Bichire advocate appointment is not being impugned herein and thus the court cannot rule on the same.

21. But as law stands now, the purported appointment of Kouna and Co. Advocate by the defendant is not supported by law and fact on record. The firm may as well be appointed by Caroline herself but for the defendant, the law must be followed and in this case it was not followed. The court thus declines to grant the leave sought and thus dismisses the application with orders that costs to be borne by the parties themselves.

Dated, signed and delivered in court at Nairobi this 6th day of October, 2015.

.....

C. KARIUKI

JUDGE