



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
JUDICIAL REVIEW NO. 69 OF 2011

PAUL KAMAU NJOROGEAPPLICANT

versus

THE BOARD OF DIRECTORS NJUNU TEA FACTORY LTD.....1ST RESPONDENT

SOLOMON GICHINA MWANGI.....2ND RESPONDENT

RULING

1. By a notice of motion under section 1A, 1B, 3A & 63 of the Civil Procedure Act Article 159 sub Article 2 2(d)(e) of the Constitution of Kenya 2010, the applicant moved the court for the following orders:

a. The Honourable court be pleased to stay all proceedings herein pending the determination of the application.

b. That this honourable court be pleased to review and set aside the consent dated 9th January 2012 and adopted as an order of the court dated 9th January 2012.

c. An order do issue declaring as null and void any affidavits, pleadings and or documents howsoever drawn signed and filed by the firm of Mukunya & Co. Advocates in so far as the same purport to be filed on behalf of the Respondent and the same be expunged from the record.

1. The application was supported by an affidavit of DANIEL MWANGI KIBICHO in which he deponed that on 3rd January 2012 the Board of Directors of 1st Respondent passed a resolution compelling the firm of J.K. Kibicho & co. advocates to represent the 1st and 2nd respondents applicants in these proceedings and entered appearance on 4th January 2012.
2. In fulfilling the said instructions the firm of J.K. Kibicho filed a preliminary Objection and its list of authorities and attended the hearing on 9th January 2012 when neither the exparte applicant nor his advocates attended. On 7th May 2012 when he perused the court file he discovered that the firm of Mukunya & Co Advocates had purportedly filed notice of appointment on 9th January 2012 and a consent of the same date making the suit as withdrawn with costs to be born by the applicants which consent order was adopted as an order of the court.
3. From the said consent order a bill was filed by the exparte applicant for the sum of Ksh. 717,655/= on 23rd February 2012. That Kenya Tea Development Authority had not instructed the said firm of Mukunya & co. Advocates and therefore the applicant will suffer prejudice should the bill of

- cost be taxed.
4. In response to the said application Benson Mugo Mukunya filed a replying affidavit on 14th June 2012 in which he deponed that his firm was properly and lawfully instructed to act on behalf of the first respondent (applicant) by the chairman of Njunu Tea Factory Limited Mr Charles Kamune Kamau on 31st December 2011 immediately upon being served and on 6th January 2012 Mr. Erastus Karanja Gakinya who is a senior Director of the 1st Respondent company and also a director of KTDA representing Zone Two called him at Thika town and personally confirmed the instructions to proceed to have the matter settled before the AGM scheduled for 11th January 2012.
 5. That on 11th November 2012 at a Board meeting held at Njunu Tea Factory and before the start of the Annual General Meeting he informed the board of directors of the consent order entered herein from which the Director of KTDA paid him Ksh. Ten thousand from his own pocket as deposit of his professional fee.

SUBMISSIONS

6. Direction were given that the applicants herein be determined by way of written submissions which have now been filed. On behalf of the applicant it was submitted that an incompetency company acts through the resolution passed by its Board of Directors and that where legal proceedings were commenced contrary to resolution then the proceedings are liable to be struck out with costs being borne by the advocate concerned see TAVULI CLEARING & FORWARDING LTD v J CHARLES KALUJEE LWANGA NAIROBI HCCC NO. 585 OF 2004.
7. It was submitted that the consent order herein is tainted with fraud and improper motive hence null and void which should therefore be set aside by court see FLORA N WASIKE v DESTINO WABOKO (1982 -88)/KAR 25 and KENYA COMMERCIAL BANK LTD v SPECIALISCO ENGINEERING CO LTD (1982)KLR p 488.
8. Reliance was also placed on the cases of EAST AFRICA SAFARI AIR LTD v ANTHONY AMBAKA KEGODE & ANOTHER NAIROBI HCCA COURT CIVIL CASE NO. 3451 OF 2004 where it was stated among other things that where the authority of an agent is challenged it behoves the corporation to show such authority and where an advocate is however instructed to file a suit particularly against current or sitting directors or immediate former directors of a company special care is required on the part of the advocate or his firm that necessary authorization by way of a clear resolution of the Board have been taken to institute suit (emphasis added).
9. On behalf of M/S Mukunya & Co. Advocates it was submitted that under order 9 of CPR a party may sue or defend by an advocate or advocates and therefore there is no limit on the number of Advocates who can be appointed. It was further submitted that the applicants have not challenged the appointment of Mukunya & Advocates.
10. From the proceedings herein there are only two issues for determination
 - a) ***How can a limited liability company appoint an agent to act for him?***
 - b) ***On what basis can a consent order so recorded be set aside.***
 - c) ***Can a consent order recorded without a resolution of the Board of Directors be binding upon a company.***
 - d) ***Was the firm of Mukunya & co. Advocates properly appointed.***
1. A Limited Liability Company is governed by its Memorandum and Articles of Association and a Limited Liability company is a separate legal entity separate from its members and directors and can only Act through its organs and the recognized means by which it operates is by way of resolutions. From the affidavit of Mr. Benson Mugo Mukunya he is specific that he was appointed by the chairman of the first respondent/applicant personally and nowhere does he say that he was appointed by the applicant through a resolution of the board.

2. From the aforesaid it therefore follows that the firm of Mukunya & co. Advocates was not legally appointed to act for it and therefore his purported action unless rectified by the Board through a resolution which is not the case herein was not lawful and therefore not binding on the applicant. It therefore follows that the consent order purportedly entered into by the said firm of Mukunya and co advocates is not binding of the applicants herein
3. Conditions upon which a consent order may be set aside were stated in the case of FLORA N WASIKE v DESTINO WABOKO supra where the Court of Appeal held that it can only be set aside on the same grounds as court justify the setting aside of a contract for example fraud mistake or misrepresentation. In the above case Hon.Cx J A quoted H IRAN V KASSAM (1952) 19 EACA 131 this

“Prima facie order made in the presence and with the consent is binding on all parties tot he proceedings or action and on those claiming under them.. and cannot be raised or discharged unless obtained by fraud, or collusion or by an agreement writing to the policy of the court or if the consent was given without sufficient material fact or in misapprehension or ignorance of material facts or in general reason which would enable the court to set aside an agreement.”

4. The appointment of M/S Mukunya & Co Advocates by the chairman of the 1st applicant without the Board resolution was not valid further there has not been any resolution produced by Mr. Mukunya to show that he was authorised to enter into consent withdrawing the suit and therefore there was misrepresentation in entering the said consent. I am therefore satisfied that the applicant has placed enough reason to enable me set aside the consent order purportedly entered herein which I hereby do.
5. Having acted without the authority of applicant I order that Ms Mukunya & Co advocates who quoting from Justice Emukule in EAST AFRICA SAFARI AIR LTD supra should have taken special care that necessary authorization by way of clear resolution of the board have been taken before entering consent judgment and on obtaining satisfaction of the same upon being entered would personally pay the cost of this application

dated, signed and delivered at Nyeri this 15th day of October 2014.

J. WAKIAGA

JUDGE

Court: Ruling read in open court in the presence of Miss Mwai for Mr. Gachugi for respondent and in the absence of the applicant.

J. WAKIAGA

JUDGE