



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC MISC. APP. NO. 5 OF 2013

IN THE MATTER OF: THE COMPANIES ACT CAP 486 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: COMPANIES (HIGH COURT) RULES

AND

**IN THE MATTER OF: AN APPLICATION FOR APPOINTMENT OF INSPECTORS BY
COURT UNDER SECTION 165 AND 166 OF THE COMPANIES ACT**

AND

IN THE MATTER OF: NASSAU LIMITED C. 121413

AND

TASMAC LIMITED.....PLAINTIFF

=VERSUS=

1. ROBERTO MACRI

2. RUGGERO SCIOMMERI

3. SHALIN CHITRANJAN GOR

4. NASSAU LIMITED.....RESPONDENTS

AND

LYDIA MORAA ONDIEK.....INTENDED INTERESTED PARTY

R U L I N G

1. What is before me is the Application by the Applicant dated 11th January, 2016 in which the following orders are being sought:

(a) The Consent order dated 16th September 2014 made between advocates for the Applicant and advocates for the Respondents be set aside, varied and/or discharged by this Honourable Court.

(b) Lydia Moraa Ondieki, be enjoined as an interested Party in these proceedings to enable this Honourable Court effectually and completely adjudicate upon and settle all questions involved in the suit.

(c) THAT pending hearing and determination of this suit:-

(i) An order for temporary injunction be issued restraining the Respondents either by themselves or their agents or employees or any person howsoever working under their directions or instructions from refusing the agents representing directors/shareholders entry into the premises or properties of Nassau Limited being Land Portion No. 603 (Original No. M. 6/22) and Portion NO.LR12096C, whereof the applicant is a shareholder especially Blue Marlin resort in Malindi, Apartment Number 8 Block "D" and any other properties howsoever and from locking the agents or directors or representatives of the applicant from accessing the applicants documents, files and properties now locked in the premises and offices of Nassau Limited.

(ii) A temporary injunction be issued against the Respondents either by themselves or their agents, employees or any person howsoever from interfering with the shareholding of the Plaintiff in Nassau Limited.

(iii) A temporary injunction be issued against the Respondents either by themselves or their agents, employees or any person howsoever from interfering with the business of Nassau Limited without the requisite authority of the Plaintiff and other shareholders.

(iv) A temporary injunction be issued against the Respondents either by themselves or their employees, servants, officers, agents restraining them from interfering in anyway whatsoever with the Plaintiffs' possession, control, occupation, right and/or interest in or over all that parcel of land known as Land Portion NO.603 (Original No. M 6/22) and Portion No. LR 12096C and especially Apartment Number 8, Block D situated in Malindi.

2. The Application is supported by the Affidavit of Matheo Botini who has described himself as the Applicant's shareholder.

3. The said shareholder has deponed that on 27th November, 2014, Lydia Moraa, the Interested Party, purported to sell to the 2nd Respondent 480 shares held by the Applicant in Nassau Limited by virtue of a fraudulent Power of Attorney allegedly issued by Giancarlo Bottini who is one of the Applicant's shareholders.

4. According to the Affidavit of Mr. Matteo, Lydia Moraa has had previous genuine powers of attorney with the last one being on 24th March, 2014 which was very specific that she could not sell the shares held by the Applicant in Nassau and that the Power of Attorney of 16th December, 2014 was limited to the 2nd Respondent being given power to represent the Applicant and participate at the condominium meeting to be held at the Blue Marlin Resort on 20th December 2014 or on such other dates as may be convened.

5. Mr. Matteo has deponed that the Power of Attorney dated 20th October, 2014 purporting to allow the Interested Party to proceed and sell shares through the agreement of 27th November, 2014 owned by Mr. Giancarlo Bottini in Tasmac Limited is fraudulent, null and void.

6. It is the Applicant's case that Keaf Invest SA Limited and Giancarlo Verrichio sold their shareholding

to Caledonia Limited, granting the said Caledonia Limited a majority shareholding of 520 shares.

7. According to the Applicant's shareholder, out of interference, threats, minority oppression and dishonour of the agreement of sale of shares by the majority shareholder, the reference that the Applicant had filed in this court was withdrawn without its instructions; that the consent was obtained by fraud and collusion to the detriment of the Applicant and that the Interested Party has proceeded to fraudulently purchase the Applicant's shares in Nassau Limited in collusion with the 2nd Respondent.

8. It is the Applicant's case that the 2nd Respondent has proceeded to appoint directors for Nassau Limited and that Mr. Giancarlo Bottini has since reported the fraudulent and forgery acts by the Interested Party and the 2nd Respondent to the police vide OB NO.47/10/9/2015.

9. In his Grounds of Opposition, the Respondents' advocate averred that no lawful basis has been laid by the Applicant to challenge the consent orders dated 16th September, 2016.

10. In his Replying Affidavit, the 2nd Respondent deponed that the 1st Respondent and himself are directors in the 4th Respondent; that the deponent of the Supporting affidavit lacks the legal capacity to challenge and question the propriety or otherwise of the Power of Attorney and that Mateo Bottini is not a director of the Applicant and cannot legally represent the Applicant.

11. According to the 2nd Respondent, Giancarlo Bottini, after transferring the Applicant's shares to him, revoked the Power of Attorney given to Lydia Moraa and gave to Ibrahim Abdi Athman another Power of Attorney and that the alleged power of Attorney given by Tasmac Limited to Matteo Bottini has not been registered and is therefore illegal.

12. In his Further Affidavit, Mr. Matteo deponed that Giancarlo Bottini is his father and has authorised him to challenge the contents of the Power of Attorney given to Lydia Moraa; that there was no sanction by the Directors of Nassau Limited for the transfer of the Applicant's shares to the 2nd Respondent and that the purported sale is in contravention of Articles 3 to 9 of the Articles of Association by Nassau Limited.

13. The Applicant's advocate submitted that the consent order of 16th September, 2016 was obtained by fraud; that the consent was entered into without the knowledge of the Applicant and that Lydia Moraa fraudulently donated to herself a false Power of Attorney.

14. The Respondents' advocate submitted that there is no evidence to show that the Applicant's advocate did not have instructions to enter into the consent of 16th September, 2014; that no evidence has been tendered to show that the consent order was pursuant to the instructions of the Interested Party and not the Applicant and that the Application has no basis.

15. The Respondents' counsel deponed that the firm of Anjarwalla & Khann Advocates are not properly on record for the Applicant; that the said firm did not obtain the leave of the court to come on record after the entry of judgment and that in any event, Matteo Bottini has no *locus standi* to represent the Applicant.

16. Counsel submitted that there is no evidence that Matteo Bottini is an officer of the Applicant and that the alleged Power of Attorney to Matteo Bottini cannot be received as evidence.

17. Both counsels filed authorities which I have considered.

Analysis and findings:

18. on 10th May, 2013, the Applicant filed this suit alleging that although it owned 48% shares in the 4th Respondent, the Respondents had refused to allow its agents to access the premises, documents and information at Blue Marlin Resort, a resort owned by Nassau Ltd, the 4th Respondent.

19. As at the time of filing the suit, the shareholding in the Applicant's company was not an issue, save that the Applicant held 48% shares in the 4th Respondent.

20. On 16th September, 2014, the advocates for all the parties appeared before me and had the following consent adopted as an order of the court:-

(a) That Tasmac Limited acknowledges and agrees that Caledonian Limited holds 52% of the shares of Nassau Limited whereas Tasmac Limited holds 48% of the shares of Nassau Limited.

(b) That Tasmac Limited acknowledges and agrees that the Directors of Nassau Limited are Roberto Macri and Ruggero Sciommeri.

(c) That this cause be and is hereby marked as settled with no orders as to costs.

21. The Applicant, through Matteo Boltini, now wants the above consent set aside because the same was entered into fraudulently.

22. The Respondents' counsel has urged this court to strike out the Application on the ground that the Applicant's advocates are not properly on record.

23. It is true, as submitted by the Respondents' counsel, that when the consent Judgment was recorded on 16th September, 2014, the same was adopted by the court and therefore became final Judgment.

24. Consequently, the firm of Anjarawalla & Khanna advocates, pursuant to the provisions of Order 9 rule 9 of the Civil Procedure Rules, should have obtained the leave of the court or the consent of the Applicant's previous advocates come on record and prosecute the current Application.

25. Having failed to obtain the leave of the court before filing the current Application, the Application is bad in law and incompetent.

26. I shall however examine the merits of the Application, the above holding notwithstanding.

27. The Applicant's Application to have the consent of 16th September, 2014 set aside is premised on the ground that the then advocates for the Applicant did not have any authority from the Applicant to enter into the consent of 16th September, 2014 and that the consent was entered into fraudulently between the Interested Party and the 2nd Respondent.

28. To show that there was collusion between the Interested Party and the 2nd Respondent, Mr. Matteo has deponed that on 27th November, 2014, the Interested Party fraudulently obtained a Power of Attorney and entered into an agreement for sale of shares purporting to sell the Applicant's shares to the 2nd Respondent.

29. Mr. Matteo Bottini has described himself in the Affidavit as a shareholder of the Applicant. Mr. Matteo has annexed a Share Register showing that he held 1 share, which is equivalent to 10%, in the Applicant's company as at 31st October, 2013. However, Mr. Matteo is neither a Director nor a Secretary of the Applicant.

30. In his Further Affidavit, Mr. Matteo annexed a letter of authority allegedly from the Directors of the Applicant authorising him to swear and execute Affidavits and other court documents pertaining to this suit and to represent the Applicant. The said authority is dated 8th December, 2015.

31. The Applicant also exhibited an unregistered and unstamped power of Attorney signed by "Milton Services Limited" giving Mr. Bottini the authority to represent the Applicant in this matter.

32. Order 9 Rule 2(a) and (b) of the Civil Procedure Rules provides as follows:-

“ Order 9(2) – The recognised agents of parties by whom such appearances, applications and acts may be made or done are:-

(a) Subject to the approval by the court in any particular suit persons holding power of attorney authorising them to make such appearances and applications and to do such acts on behalf of the parties.

(b) -

(c) In respect of a corporation, an officer of the corporation duly authorised under the corporate seal.

33. There is no evidence before the court to show that as at the time of filing the current Application, Mr. Matteo was an officer of the Applicant. Consequently, and in the absence of such evidence, this court finds that Mr. Matteo is not an authorised officer of the Applicant to swear an Affidavit on behalf of the Applicant.

34. Regarding the Power of Attorney that Mr. Matteo is relying on, the same was subject to approval by the court. Such an approval was not sought by the Applicant before the filing of the current Application and cannot pass as a power of attorney contemplated under Order 9 Rule 2 (a) of the Civil Procedure Rules.

35. Further more, the Power of Attorney that Mr. Matteo is relying on to set aside the consent Judgment is neither registered as a document nor stamped.

36. The said Power of Attorney offends the provisions of Section 19(1) and (2) which provides as follows:-

Subject to the provisions of sub-section 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever except-

(a) In criminal proceedings; and

(b) In civil proceedings by a collector of stamp duty, unless it is duly stamped.

2- No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.”

37. The consent order of 16th September, 2014 was entered into by the then Applicant's advocate. By that time, the Interested Party had not been granted the authority to sell the Applicant's shares to the 2nd Respondent.

38. It therefore follows that by the time the former advocate of the Applicant was entering into the said consent, he was acting on the instructions of Giancarlo Bottini considering that it is Mr. Giancarlo Bottini who signed the Affidavit in support of the suit.

39. If indeed Mr. Giancarlo Bottini did not instruct the previous advocate to enter into the consent of 16th September, 2014, nothing would have been easier that for him to swear an Affidavit to that effect.

40. There is nothing before me to show that the previous advocate of the Applicant acted contrary to the express instructions of Mr. Giancarlo Bottini.

41. Indeed, considering the serious allegations raised against the Interested Party viz-a-viz the Power of

Attorney that was allegedly donated to her by Mr. Giancarlo in respect to the sale of Mr. Giancarlo's shares to the 2nd Respondent, it is Mr. Giancarlo who should have sworn all the Affidavits in respect to the current Applicant and not Mr. Matteo.

42. Consequently, I am convinced that the previous advocate of the Applicant had the Applicant's instructions or at least the instructions of Mr. Giancarlo, to enter into the consent of 16th September, 2014.

43. It is for those reasons that I dismiss the Application dated 11th January, 2016 with costs.

Dated, signed and delivered in Malindi this 3rd day of **February**, 2017.

O. A. Angote

Judge