



**Lake View Development Limited v Belgo Holdings Limited & another (Environment & Land Case E064 of 2020) [2024] KEELC 3960 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3960 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E064 OF 2020**

**JO MBOYA, J  
MAY 21, 2024**

**BETWEEN**

**LAKE VIEW DEVELOPMENT LIMITED ..... PLAINTIFF**

**AND**

**BELGO HOLDINGS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The dispute beforehand touches on and concerns the propriety and/or validity of the Notice of Change of Advocate dated the 25<sup>th</sup> September 2023; as well as the Notice of Withdrawal of Suit of even date, [the latter], which were thereafter adopted and endorsed as an order of the court on the 27<sup>th</sup> September 2023.
2. Notably, upon the adoption of the Notice of Withdrawal of Suit, [ details in terms of the preceding paragraph], the entire suit beforehand was duly marked as withdrawn. However, an application was thereafter filed by and on behalf of [sic] the Plaintiff and in respect of which [sic] Plaintiff contended that same [Plaintiff] did not authorize the withdrawal of the suit beforehand.
3. Vide the application dated the 26<sup>th</sup> September 2023 [sic] the Plaintiff has sought for the following reliefs [verbatim]:
  - i. That for reasons adduced, this application be certified as urgent, service be dispensed with and the same be heard ex parte in the first instance for purposes of prayers 2 hereof;
  - ii. That court be pleased to issue a hearing date and/ or direction as pertains to the hearing on priority of this Application on account of fraud committed upon the court;
  - iii. That the order made on 27th September 2023 accepting and adopting the notice of withdrawal of the suit pursuant to a Notice of Withdrawal of Suit dated 25th September 2023 be set aside;



- iv. That the court be pleased to issue an Order expunging from record the Notice of Change of Advocates dated 25th September 2023;
  - v. That the court be pleased to issue an Order expunging from record the Notice of Withdrawal of suit dated 25th September 2023.
  - vi. That the Honourable Court be pleased to issue any other further orders it deems just and equitable;
  - vii. The costs of the Application be borne by the law firm of M/s Hamilton Harrison and Mathews Advocates and Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya.
4. The instant application which is [sic] contended to be made by and on behalf of the Plaintiff is premised on various grounds which are enumerated in the body thereof. Furthermore, the application beforehand is supported by the affidavit of Gad Zeevi sworn on the 26<sup>th</sup> September 2023; and a further affidavit sworn on the 27<sup>th</sup> February 2024, to which the Deponent has attached various annexures.
  5. Upon being served with the subject application, Learned Counsel Mr. Kiragu Kimani [Sc] who contends to have been retained and instructed by the Plaintiff herein filed a Replying affidavit sworn on the 6<sup>th</sup> February 2024.
  6. Pertinently, it is worth pointing out that there is a dispute as pertains to whether or not the subject application has been filed and/or mounted by and on behalf of the Plaintiff or, same [application] has been filed by one Gad Zeevi, albeit without the requisite authority of the Plaintiff.
  7. Other than the foregoing, the 1<sup>st</sup> Defendant responded to the application vide Replying affidavit sworn by one Mr. Akber Essmail and in respect of which same [deponent] has contended that the Plaintiff company held an Annual General Meeting[ AGM] on the 9<sup>th</sup> December 2022 and in respect of which several decisions were made by and on behalf of the Plaintiff company. For good measure, the Replying affidavit by Mr. Akber Essmail is sworn on 4<sup>th</sup> October 2023.
  8. Suffice it to point out that though the instant application was filed under certificate of urgency and thereafter same was duly certified as urgent by the court, the hearing of the application delayed because of a number of reasons, including but not limited to a plethora of preliminary objection[s] that were undertaken by and on behalf of [sic] the Plaintiff and the 1<sup>st</sup> Defendant herein.
  9. Be that as it may, the various preliminary objections [details in terms of the preceding paragraph] were disposed vide the ruling of the court rendered on the 21<sup>st</sup> November 2023; and whereupon various aspects of the preliminary objections were declined.
  10. Following the delivery of the ruling under reference, the court proceeded to and issued further directions pertaining to and concerning the hearing and disposal of the application beforehand. For good measure, the court ordered and directed that the application beforehand be canvassed and disposed of by way of written submissions.
  11. Suffice it to point out that thereafter the parties proceeded to and filed their respective submissions. For coherence, learned counsel for the Applicant, who is the originator of the application beforehand filed the written submissions dated the 27<sup>th</sup> February 2024 whereas [sic] the Plaintiff filed written submissions dated the 8<sup>th</sup> May 2024.
  12. Moreover, the 1<sup>st</sup> Defendant/Respondent filed written submissions dated the 2<sup>nd</sup> February 2024. Notably, all the written submissions [details in terms of the instant paragraph as well as the preceding paragraph] form part of the record of the court.



## - Parties' Submissions:

### a. Applicant's Submissions:

13. The Applicant herein filed written submissions dated the 27<sup>th</sup> February 2024 and in respect of which same [Applicant] has adopted the grounds contained at the foot of the application and reiterated the averments contained in the body of the various supporting affidavits attached to the application beforehand.
14. Furthermore, learned counsel for the Applicant has thereafter isolated, highlighted and canvassed three [3] salient issues for consideration and determination by the Honourable court.
15. Firstly, learned counsel for the Applicant herein has contended that Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya, respectively, were not validly appointed as director[s] of the Plaintiff company or at all. In this regard, learned counsel for the Applicant has submitted that the meeting which was convened by Mr. Akber Essmail and which culminated into the appointment of the said persons as directors of the Plaintiff company was irregular, unlawful and illegal insofar as same [meeting] was convened in contravention of the provisions of the *Companies Act*, Chapter 486, Laws of Kenya [now repealed] and which continues to apply to the affairs of the Plaintiff company by dint of the Sixth Schedule of the *Companies Act* No. 17 of 2015.
16. It was the further submissions by learned counsel for the Applicant that Regulations 54 of table A of the *Companies Act*, Chapter 486, Laws of Kenya [now repealed] as read together with Regulation 56 and 95 of the *Companies Act*, did not authorize and/or mandate Mr. Akber Essmail to convene the impugned meeting that culminated into the appointment[s] of Trophimus Kiplimo and Ms. Victoria Nthenya Muya, respectively, as directors of the Plaintiff company.
17. Owing to the fact that Mr. Akber Essmail was neither mandated nor authorized to convene the impugned meeting, learned counsel for the Applicant has contended that whatever decisions and/or resolutions that arose from the impugned meeting were thus a nullity and incapable of birthing any legitimate appointment or at all.
18. In any event, learned counsel for the Applicant has submitted that an annual general meeting of a company, the Plaintiff company not excepted, can only be convened by and on behalf of the company pursuant to the requisite resolution of the company in accordance with the Company's Memorandum and articles of association and not otherwise.
19. To this end, learned counsel for the Applicant has cited and relied on inter-alia, the case of *Philomena Ndanga Karanja & 2 Others vs Edward Kamau Maina* [2015]eKLR, *Post Bank Credit Ltd vs Nyamangu Holdings Ltd* [2015]eKLR and *East African Portland Cement vs Capital Markets Authority & 4 Others* [2014]eKLR, respectively.
20. Secondly, learned counsel for the Applicant has submitted that insofar as Trophimus Kiplimo and Victoria Nthenya Muya, respectively, were not duly appointed as directors of the Plaintiff company, same [Trophimus Kiplimo and Ms. Victoria Nthenya Muya] could not therefore purport to instruct and retain the firm of M/s Hamilton, Harrison & Mathews Advocates to [sic] act for the Plaintiff herein.
21. Arising from the foregoing, learned counsel for the Applicant has thus submitted that the actions by and on behalf of the Trophimus Kiplimo and Ms. Victoria Nthenya Muya, including the purported appointment of M/s Hamilton, Harrison & Mathews Advocates were therefore illegal and a nullity ab initio.



22. Additionally, learned counsel for the Applicant has contended that where an act is birthed out of an illegality, such act is void and cannot anchor any proceedings or at all. To this end, learned counsel for the Applicant has invited the court to take cognizance of the decision in Benjamin Leonard Mcfoy vs United Africa Company Ltd [1961] 3ALL 1169 and Makula International Ltd vs His Eminence Cardinal Nsumbuga & Another [1982] HCB 11, respectively.
23. Thirdly, learned counsel for the Applicant has submitted that insofar as the offensive activities culminating into the impugned withdrawal of the suit, was precipitated by Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya, respectively, same [Trophimus Kiplimo and Ms. Victoria Nthenya Muya] ought to be condemned to bear the costs of the instant application.
24. In support of the submissions that the named persons [ sic Directors] ought to bear the costs of the instant application, learned counsel has cited and quoted inter-alia the case of Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others [2013]eKLR; Morgan Air Cargo Ltd vs Everest Enterprises Ltd [2014]eKLR and East Africa Portland Cement Ltd vs Capital Market Authority & 4 Others [2014]eKLR, respectively.
25. In a nutshell, learned counsel for the Applicant has contended that the Applicant herein has established and/or that the Notice of Change of Advocate; as well as the Notice of Withdrawal of Suit dated the 25<sup>th</sup> September 2023 and which were drawn by the firm of M/s Hamilton, Harrison & Mathews Advocate [sic] on behalf of the Plaintiff, were neither authorized nor sanctioned by the Plaintiff.
26. Consequently and in the premises, learned counsel for the Applicant has invited the court to find and hold that the application beforehand is meritorious and thus ought to be allowed.

**b. Plaintiff's Submissions:**

27. The Plaintiff herein filed written submissions dated the 8<sup>th</sup> May 2024 and in respect of which same [Plaintiff] has reiterated the averments contained in the body of the Replying affidavit sworn by Mr. Kiragu Kimani [SC] on the 6<sup>th</sup> February 2024.
28. Furthermore, learned counsel for the Plaintiff has thereafter raised, highlighted and canvassed three [3] salient issues for due consideration and determination by the court.
29. First and foremost, learned counsel for the Plaintiff has submitted that the application beforehand has neither been sanctioned nor authorized by the Plaintiff company. In any event, learned counsel has contended that one Mr. Gad Zeevi, who has sworn the affidavit in support of the current application does not have the authority and/or mandate of the Plaintiff company or at all.
30. Additionally, learned counsel for the Plaintiff has submitted that Mr. Gad Zeevi ceased to be a director of the Plaintiff company on the 8<sup>th</sup> December 2023 when the annual general meeting of the Plaintiff company was held.
31. For good measure, it is instructive to reproduce the contents of paragraph 7 of the written submissions filed on behalf of the Plaintiff. Same are reproduced as hereunder;

From the papers filed by the 1<sup>st</sup> Defendant, Gad Zeevi ceased to be a director of the Plaintiff on the 8<sup>th</sup> December 2023 when the Plaintiff's annual general meeting was convened. He therefore lacked the requisite locus standi to institute proceedings on its behalf.

32. Arising from the foregoing submissions, learned counsel for the Plaintiff has therefore submitted that the subject application has been mounted and/or originated by a person devoid and divested of the requisite locus standi.



33. Secondly, learned counsel for the Plaintiff has submitted that the Replying affidavit which has been sworn by same [learned counsel for the Plaintiff] is lawful and legitimate. For coherence, learned counsel has submitted that the facts alluded to in the body of the said Replying affidavit are facts which are within the knowledge of counsel and in any event, same relate to accusations which are directed at the law firm of M/s Hamilton, Harrison & Mathews Advocates, wherein learned counsel is a senior partner.
34. Furthermore, learned counsel for the Plaintiff has submitted that the provisions of Rule 9 of the Advocates Practice Rules prohibits and/or bars an advocate from swearing an affidavit as pertains to contentious issues of which he/she [advocate] has no knowledge of and not otherwise.
35. Nevertheless, learned counsel has contended that in respect of the subject matter, the issues at the foot of the Replying affidavit are well within his knowledge and hence same [advocate] was competent and authorized to deposed to same.
36. In support of the foregoing submissions, learned counsel for the Plaintiff has cited and relied on the holding in the case of *Salama Beach Ltd vs Mario Rossi* Civil Appeal No. 10 of 2015 [UR] and *Turea Ltd T/a Dr. Mattress vs Mohammed* [Civil Application No. E030 of 2022] [2022] KECA 21 [KLR], respectively.
37. In view of the foregoing, learned counsel for the Plaintiff has submitted that the Replying affidavit sworn by himself [counsel] is therefore lawful and does not contravene the provisions of Rule 9 of the Advocates Practice Rules, either as contended or at all.
38. Thirdly, learned counsel for the Plaintiff has submitted that Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya, respectively, were lawfully and legally constituted as the directors of the company following the convention and holding of the annual general meeting of the Plaintiff company which was held on the 9<sup>th</sup> December 2022.
39. Furthermore, learned counsel for the Plaintiff has submitted that Mr. Gad Zeevi attempted to injunct and/or restrain the holding of the annual general meeting of the company which was scheduled for the 9<sup>th</sup> December 2022 by filing civil proceedings vide Milimani HCCCOM No. E488 of 2022, but wherein the learned Judge of the High court declined to grant an order of injunction either in the manner sought or at all.
40. To the extent that the annual general meeting scheduled for the 9<sup>th</sup> December 2022 was neither prohibited nor restrained by the learned Judge of the High Court, learned counsel for the Plaintiff has submitted that the said annual general meeting therefore proceeded and the resolution[s] therefrom are thus lawful.
41. On the other hand, learned counsel for the Plaintiff has submitted that the question as to the legality or otherwise of the annual general meeting which was convened and held on the 9<sup>th</sup> December 2022 and which gave rise to the appointment of Trophimus Kimplimo and Ms. Victoria Nthenya Muya, respectively, as directors; can only be resolved in the High court case touching on the said subject matter.
42. In view of the foregoing, learned counsel for the Plaintiff has therefore invited the court to find and hold that the appointment of Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya, respectively as directors on the face of it, is lawful and legitimate and thus same had the requisite authority to appoint and/or retain the law firm of M/s Hamilton, Harrison & Mathews Advocate to act on behalf of the Plaintiff company.



43. Based on the foregoing, learned counsel for the Plaintiff has therefore contended that the application beforehand, which essentially seeks to impugn the appointment of M/s Hamilton, Harrison & Mathews Advocates as well as the withdrawal of suit, is thus misconceived and legally untenable.
44. Consequent to and in view of the foregoing, learned counsel [ Kiragu Kimani Sc], for the Plaintiff has thus invited the court to dismiss the application beforehand and to award costs on indemnity basis as against the Applicant.
45. As pertains to the prayer for award of costs on indemnity basis, learned counsel for the Plaintiff has cited and relied on the case of Dina Management Ltd vs The County Government of Mombasa & 5 Others Petition No. 8 [E010 of 2021] and Victor Kermit Kiam [ii] vs M G N Ltd [2002] 2 ALL 242, respectively.

**c. 1<sup>ST</sup> Defendant's Submissions:**

46. The 1<sup>st</sup> Defendant herein filed written submissions dated the 2<sup>nd</sup> May 2024 and in respect of which same [1<sup>st</sup> Defendant] has reiterated the averments contained at the foot of the Replying affidavit sworn on the 4<sup>th</sup> October 2023 and thereafter highlighted three [3] pertinent issues for consideration and determination by the court.
47. First and foremost, learned counsel for the 1<sup>st</sup> Defendant has submitted that the application beforehand and which is supported by the affidavit of Mr. Gad Zeevi is incompetent insofar as the said Gad Zeevi ceased to be a director of the Plaintiff company on the 9<sup>th</sup> December 2022. In this regard, learned counsel for the 1<sup>st</sup> Defendant has thus contended that having ceased to be a director of the Plaintiff company, the said Gad Zeevi cannot now purport to agitate a position for and on behalf of the Plaintiff company or at all.
48. Furthermore, learned counsel for the 1<sup>st</sup> Defendant has submitted that the Plaintiff company called and convened an annual general meeting on the 9<sup>th</sup> December 2022 and which annual general meeting one Mr. Gad Zeevi attempted to prohibit, injunct and/or restrain vide court proceedings in terms of Milimani HCCCOM No. E488 of 2022.
49. Nevertheless, learned counsel for the 1<sup>st</sup> Defendant has submitted that the application for Order[s] of temporary and mandatory injunction which were sought by and on behalf of Mr. Gad Zeevi were declined by the learned Judge of the High court.
50. Notably, learned counsel for the 1<sup>st</sup> Defendant has proceeded to and invited the court to take cognizance of the ruling of Hon. Justice Majanja, J, which was rendered on the 26<sup>th</sup> July 2023. In particular, counsel has cited paragraph[s] 22, 23 and 25 of the said ruling.
51. Based on the foregoing, learned counsel for the 1<sup>st</sup> Defendant has therefore implored the court to find and hold that Mr. Gad Zeevi is not seized of the requisite authority and/or mandate to speak for and on behalf of the Plaintiff company.
52. Secondly, learned counsel for the 1<sup>st</sup> Defendant has also submitted that the Plaintiff company proceeded to and held an annual general meeting on the 9<sup>th</sup> December 2022, which meeting culminated into various board resolutions a copy of which has been exhibited at the foot of the Replying affidavit sworn by Mr. Kiragu Kimani [SC] on the 6<sup>th</sup> February 2024.
53. Arising from the resolutions emanating from the annual general meeting, learned counsel for the 1<sup>st</sup> Defendant has therefore submitted that the actions that were carried out under the authority of the



said board resolutions, inter-alia, the appointment of the firm of M/s Hamilton, Harrison & Mathews Advocate, are there lawful and legitimate.

54. Finally, learned counsel for the 1<sup>st</sup> Defendant has submitted that the contention that the annual general meeting of the Plaintiff company which was held on the 9<sup>th</sup> December 2022 contravene various provisions of the Companies Act, can only be agitated and ventilated before the High court and not otherwise.
55. Be that as it may, learned counsel for the 1<sup>st</sup> Defendant has contended that the impugned meeting was lawful and legitimate and furthermore complied with various provisions of the Companies Act, Chapter 486 Laws of Kenya [now repealed].
56. Arising from the foregoing, learned counsel for the 1<sup>st</sup> Defendant has therefore submitted that the application beforehand is therefore misconceived and thus ought to be dismissed with costs. Furthermore, learned counsel has invited the court to decree that the costs be borne by Mr. Gad Zeevi.

#### **d. 2<sup>ND</sup> Defendant's Submissions:**

57. Though duly served with the subject application, the 2<sup>nd</sup> Defendant/ Respondent neither filed any Response nor written submissions.
58. Further and in any event, learned counsel for the 2<sup>nd</sup> Defendant intimated to the court that same would not be opposing the application. Consequently and in this respect, learned counsel for the 2<sup>nd</sup> Defendant left the matter to be determined by the Court, one way or the other.

#### **Issue[s] For Determination:**

59. Having reviewed the application beforehand and the responses thereto and upon consideration of the written submissions filed by and on behalf of the respective parties, the following issues do arise [crystallize] and are thus germane of determination;
  - i. Whether Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya had the lawful authority and mandate to act for and on behalf of the Plaintiff company or otherwise.
  - ii. Whether the Notice of Change of Advocate and the consequential Notice of Withdrawal of Suit drawn by the firm of M/s Hamilton, Harrison & Mathews Advocates were lawful or otherwise.
  - iii. What orders, if any; ought to be made.

#### **Analysis And Determination**

##### **Issue Number 1 - Whether Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya had the lawful authority and mandate to act for and on behalf of the Plaintiff company or otherwise.**

60. The instant suit was filed and/or mounted by the Plaintiff herein and in respect of which the Plaintiff sought to challenge the transactions touching on and concerning ownership of the suit property otherwise known as L.R No. 28586 I.R No. 124735 (formerly L.R No. 3859) and L.R No. 28587 I.R No. 124736 (formerly L.R No. 3860).
61. Even though the suit was filed by the Plaintiff, certain events arose and/or transpired. In particular, on the 25<sup>th</sup> September 2023, a Notice of Change of Advocates was filed by the firm of M/s Hamilton, Harrison & Mathews Advocates on behalf of the Plaintiff company.



62. On the other hand, the said firm of advocate,[ namely, M/s Hamilton, Harrison and Mathews Advocates] proceeded to and filed a Notice of Withdrawal of Suit and wherein same sought to mark the entire suit as withdrawn.
63. Pursuant to and on the basis of the Notice of Withdrawal of Suit, this court proceeded to and endorsed the Notice of Withdrawal of Suit and thereafter marked the suit as withdrawn.
64. Be that as it may, the withdrawal of the suit herein precipitated the filing of the application dated the 26<sup>th</sup> September 2023, which is the subject of the current ruling. For good measure, the Applicant contended that the notice of withdrawal of suit was mounted by a law firm without the requisite authority and mandate of the Plaintiff.
65. Arising from the foregoing, the Applicant has thus implored the court to find and hold that both the impugned notice of change of advocate and the notice of withdrawal of suit, were irregular, unlawful and thus void for all intents and purposes.
66. Furthermore, the Applicant has ventured forward and invited the court to expunge the impugned documents [details in terms of the preceding paragraph] and thereafter to review the orders made on the 27<sup>th</sup> September 2023 pertaining to the withdrawal of the suit.
67. On the other hand, learned counsel for the Plaintiff has submitted that the Plaintiff herein held an annual general meeting on the 9<sup>th</sup> December 2022 and wherein various resolutions [ Board Resolutions] were arrived at and/or made by and on behalf of the Plaintiff company.
68. Additionally, learned counsel for the Plaintiff has submitted that arising from the annual general meeting of the Plaintiff company that was held on the 9<sup>th</sup> December 2022, it was resolved that Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya, respectively, be appointed as directors of the Plaintiff. In this regard, learned counsel for the Plaintiff submitted that the said persons thus became directors of the Plaintiff company with effect from the 9<sup>th</sup> December 2022.
69. Other than the foregoing, learned counsel for the Plaintiff has submitted that one Mr. Gad Zeevi filed proceedings vide Milimani HCCCOM No. E488 of 2022 and in respect of which same [Mr. Gad Zeevi] sought to procure temporary and mandatory injunction in respect of the intended annual general meeting which was scheduled for the 9<sup>th</sup> December 2022.
70. Nevertheless, learned counsel ventured forward and submitted that the application for inter-alia temporary injunction was heard and disposed of vide ruling rendered by the Judge [ Judge of the High Court] and in respect of which the application for temporary injunction was dismissed.
71. Having taken into account the rival submissions by and on behalf of the parties, I beg to take the following position. Firstly, there is no gainsaying that an annual general meeting of the Plaintiff company was scheduled to be held and it was indeed held on the 9<sup>th</sup> December 2022 and whereupon certain board resolutions were made and/or arrived at.
72. Notably, one of the resolutions [ Board Resolutions] that was arrived at touched on and/or concerned the appointment of Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya, respectively as directors of the Plaintiff company.
73. Secondly, it is not lost on this court that one Mr. Gad Zeevi knew of the intended annual general meeting which was scheduled to be held on the 9<sup>th</sup> December 2022 and thereafter sought to procure orders of temporary injunction to restrain the convention and holding of the said general meetings on various reasons.



74. Nevertheless, there is no gainsaying that the application which was mounted by and on behalf of Mr. Gad Zeevi vide Milimani HCCCOM No. E488 of 2022 was declined by the Learned Judge; and thus the convened annual general meeting proceeded in the manner in which it was scheduled.
75. To my mind, the attempt by Mr. Gad Zeevi to stop the convention of the annual general meeting which was scheduled for the 9<sup>th</sup> December 2022, having failed, the said meeting proceeded and thereafter birthed various resolutions. Notably, one of the resolutions culminated to the appointment of Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya, respectively.
76. To the extent that the two persons were appointed to be directors during the annual general meeting which was convened and held on the 9<sup>th</sup> December 2022, it suffices to state and underscore that their appointments as directors of the Plaintiff company would thus suffice and continue to be lawful until and unless same [appointment] is quashed by the High court in terms of the suit that was filed by Mr. Gad Zeevi, namely Milimani HCCCOM No. E488 of 2022.
77. Suffice it to point out that this court is only concerned with the status of the directorship of the Plaintiff company as it stands and not the validity of the process leading to the appointment. For good measure, the validity or otherwise of the process leading to the appointment of the two directors can only be interrogated by the High court which is the designated court in terms of the definition Section of the [Companies Act](#), 2015.
78. In any event, it is worth recalling that there is already a suit, namely, Milimani HCCCOM No. E488 of 2022, which has been filed by Mr. Gad Zeevi and in respect of which same [Gad Zeevi] seeks inter-alia orders to impugn the annual general meeting held on the 9<sup>th</sup> December 2022 together with the consequential resolutions flowing therefrom.
79. In view of the foregoing, it is my finding and holding that the status of directorship of the Plaintiff company changed on the 9<sup>th</sup> December 2022, following the convention of the annual general meeting of the said Plaintiff company and henceforth, the new directors namely, [Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya] became seized of the requisite authority and mandate to act and transact business on behalf of the Plaintiff company.
80. Instructively, one of the actions that the said directors were mandated to undertake and transact for and on behalf of the Plaintiff company included the appointment of a firm of advocate to act for and on behalf of the Plaintiff company.
81. Pertinently, the said directors [Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya], proceeded to and appointed the law firm of Hamilton, Harrison & Mathews to take over the conduct of the instant suit from the previous counsel, namely, M/s Echesa & Bwire LLP Advocates.
82. Furthermore, following the appointment of the firm of M/s Hamilton, Harrison & Mathews Advocates, which appointment is premised on the basis of the Notice of Change of Advocate, the said directors also ventured forward and instructed the said law firm [Hamilton, Harrison & Mathews Advocates] to proceed and withdraw the suit.
83. For good measure, the resolution pertaining to the appointment of the firm of M/s Hamilton, Harrison & Mathews Advocates and the consequential instructions to withdraw the suit have been duly exhibited.
84. In my humble view, even though there are several allegations touching on and concerning the validity and propriety of the resolution[s] arising from the annual general meeting held on the 9<sup>th</sup> December



- 2022, it suffices to point out that the said allegations and/or reservations which have been ventilated by the Applicant must await determination before the appropriate forum and not otherwise.
85. Finally, it is imperative to underscore that the concern of this court [Environment and Land Court] relates to who are the current directors of the Plaintiff company and thereafter to proceed and discern whether there are subsisting resolutions to underpin the actions taken. Notably, this court has been shown the resolutions emanating from the annual general meeting held on the 9<sup>th</sup> December 2022.
86. For as long as the said resolutions which were made on the 9<sup>th</sup> December 2022 have neither been impeached and/or quashed in accordance with the law, same [resolutions] shall remain valid and binding and thus reflective of the authoritative position on behalf of the Plaintiff company.
87. To this end, I beg to cite and take cognizance of the holding of the Supreme Court [ the Apex Court] in the case of *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment), where the court held and stated as hereunder;
120. An additional reason as to why the two superior courts below ought to have accorded little weight to the letter from JP Hulme is that it is not clear whether the said JP Hulme had the sanction, competence or authority of Lonrho Agribusiness, a registered limited liability company to bind the company. In our view, there was insufficient evidence to support the claim that Lonrho Agribusiness intended to surrender the suit properties for the allocation to Sirikwa. This is a serious question that the two superior courts below did not address their minds to. It is elementary principle of company law that a company as a distinct legal entity from its promoters, directors or employees can only act through its organs and make decisions by resolutions. No resolution of the company's board supporting the purported purpose for the surrender was presented in evidence.
88. Furthermore, the significance of board resolutions of a company to support a position taken by and on behalf of company was also highlighted by the Court in the case of *East African Portland Cement Ltd vs Capital Market Authority & 4 Others* [2014]eKLR, where the court stated and held thus;
- In *Affordable Homes Africa Limited vs Ian Henderson & 2 Others* HCCC No 524 of 2004, Njagi J observed that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers (see the decision of the Court in *Automatic Self-Cleansing Filter Syndicate v. Cuninghame* [1906] Ch.34, CA.);
89. In a nutshell, it is my finding and holding that as pertains to the instant matter the only board resolution that have been availed and/or exhibited relates to the resolution emanating from the meeting held on the 9<sup>th</sup> December 2022, which inter-alia underpin the appointment of Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya as the directors of the Plaintiff company.
90. In view of the foregoing, there is no gainsaying that until and unless the appointment of the said directors is quashed,[ vide a Decision of the High Court], same are therefore lawful directors and are thus duly constituted as recognized agents of the Plaintiff company in accordance with the law.
91. At any rate, the appointment of the two directors is conceded by learned counsel for the Applicant in terms of paragraphs 36, 37, 39 and 44 of the written submissions, save for the fact that learned counsel for the Applicant challenges the validity and propriety of the appointment; which however, must await determination at the appropriate forum.



**Issue Number 2 Whether the Notice of Change of Advocate and the consequential Notice of Withdrawal of Suit drawn by the firm of M/s Hamilton, Harrison & Mathews Advocates were lawful or otherwise.**

92. Having found and held that Trophimus Kiplimo and Ms. Victoria Nthenya Muya, respectively, are directors of the Plaintiff company, until and unless their appointment is impeached by the High court; the next question that needs to be addressed is; the extent and scope of their powers as such directors.
93. Learned counsel for the Applicant has submitted that after what is termed to be the unlawful appointment of the said directors, same [Trophimus Kiplimo and Victoria Nthenya Muya] proceeded and held an unlawful meeting held on the 8<sup>th</sup> September 2023 and wherein same [Trophimus Kiplimo and Victoria Nthenya Muya] passed a resolution to appoint the firm of M/s Hamilton, Harrison & Mathews Advocates. [See paragraph 44 of the Applicant's written submissions].
94. To my mind, Mr. Trophimus Kiplimo and Victoria Nthenya Muya had the requisite capacity to hold and convene [sic] the meeting held on the 8<sup>th</sup> September 2023 and to pass a resolution appointing the firm of M/s Hamilton, Harrison & Mathews Advocates.
95. First forward, there is no gainsaying that as the duly constituted and recognized agents of the Plaintiff company, same [Trophimus Kiplimo and Victoria Nthenya Muya] were thus mandated to issue the instructions inter-alia pertaining to the change of advocate and the withdrawal of the suit.
96. From the foregoing, it is therefore my finding and holding that both the Notice of Change of Advocate and the Notice of Withdrawal of Suit dated the 25<sup>th</sup> September 2023, respectively were lawfully crafted and filed.
97. Furthermore, having found and held that the said documents [details in terms of the preceding paragraph] were lawfully crafted and prepared upon the requisite instructions by the Plaintiff, the consequential actions and/or proceedings arising therefrom were therefore lawful.
98. In a nutshell, it suffices to find and hold that indeed the suit beforehand was withdrawn by and on instruction[s] by the Plaintiff company and not otherwise.
99. In view of the foregoing, I am unable to agree with the submissions by learned counsel for the Applicant that the impugned documents and the consequential proceedings were a nullity, either as contended or at all. Instructively, the dictum in the case of *Macfoy Vs United Africa Ltd (1961) 3 All F.R. 1169*; is irrelevant and in applicable in the obtaining circumstances.

**Issue Number 3 What orders if any, ought to be granted**

100. The Applicant herein had sought for a plethora of reliefs at the foot of the current application. However, whilst dealing with issue number one [1] and two [2] herein above, the court has found and held that the impugned notice of change of advocate and the consequential notice of withdrawal of suit were indeed prepared pursuant to and on the basis of instructions emanating from the recognized agents of the Plaintiff company. [See Order 9 Rule 2(c) of the Civil Procedure Rules 2010].
101. To the extent that the impugned documents were lawfully and legitimately crafted on behalf of the Plaintiff company, it thus follows that the reliefs that were being sought for at the foot of the instant application cannot issue and/or be granted.
102. At any rate, it is not lost on this court that the applicants herein had also sought that the costs arising from and/or attendant to the subject application be borne by the law firm of M/s Hamilton, Harrison & Mathews Advocates; Mr. Trophimus Kiplimo and Ms. Victoria Nthenya Muya, respectively.



103. However, it is common ground that the said persons against whom costs was being sought were never joined and/or impleaded in the instant matter either as necessary or interested parties. Furthermore, the said persons were neither called upon to respond to the subject application in their personal capacities.
104. To my mind, where a party seeks to procure and/or obtain an adverse order against another person who has not been joined in the proceedings, then it behooves the claimant to procure and obtain an order for joinder before same [claimant] can seek for an adverse order against such person.
105. In this respect, the application for costs to be borne by the law firm of M/s Hamilton, Harrison & Mathews Advocates; was being made in vacuum. In short, such an order cannot issue, lest such persons be condemned unheard contrary to the dictates of fair hearing; due process and the doctrine of Natural Justice. [See Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR].
106. Additionally, the legal position that an adverse order cannot issue against a party who has not been joined was also highlighted and elaborated upon by the Court of Appeal in the case of Jared Odhiambo Opiyo & 5 others vs Migori County Assembly & 6 Others Civil Appeal No. E1774 of 2023 [UNREPORTED], [Judgment delivered on the 14/05/2024], where the court stated thus;
- 61 ..... However, we would further agree with the learned judge that it would have been improper to have cited the alleged contemnors yet they were not part of the original suit; and before they had been formally enjoined. The rules of natural justice and fair trial would require otherwise”.
107. Whereas the learned Judges of the Court of Appeal were dealing with a scenario pertaining to the intended citation of [sic] the contemnors prior to and before their joinder in the original suit, the legal position which was being expounded by the court relates to the impropriety of making any precipitate orders as against a party who has not been formally enjoined in a matter.
108. Simply put, the prayer by the Applicant seeking to have the costs of the application borne by persons who had not been formally joined into the proceedings, was certainly misconceived and otherwise legally untenable.
109. Other than the foregoing, the learned counsel for the Plaintiff and the 1<sup>st</sup> Defendant have also sought for costs of the application to be borne by one Mr. Gad Zeevi, [the Deponent of the Supportinfg Affidavit] on what is called indemnity basis. However, two [2] things do arise and merit a short discussion.
110. Firstly, it is important to recall that there is still a pending dispute pertaining to the validity and or propriety of the annual general meeting that was held on the 9<sup>th</sup> December 2022 before the High Court. For good measure, the proceedings vide Milimani HCCCOM NO. E488 of 2022 is pending.
111. Secondly, it is also worthy to underscore that Mr. Gad Zeevi is similarly not a party to the instant suit. Consequently, just like the other persons could not be condemned to bear costs without having been formally enjoined, so does the request against Gad Zeevi.
112. In a nutshell, I am not minded to decree that costs of the current application be borne Mr. Gad Zeevi in his personal capacity.

**Final Disposition:**

113. From the foregoing analysis [ details in terms of the preceding paragraphs], it must have become evident and apparent that the application dated the 26<sup>th</sup> September 2023; is devoid and bereft of merits. In this regard, same is thus a candidate for dismissal.



114. In a nutshell, the application beforehand be and is hereby dismissed albeit with no orders as to costs.
115. For the avoidance of doubt, the suit beforehand remains withdrawn and the orders of the court made on the 27<sup>th</sup> September 2023; be and are hereby re-affirmed.
116. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MAY, 2024.**

**OGUTTU MBOYA,**

**JUDGE.**

In the presence of:

Benson – Court Assistant

Mr. Mukuha h/b for Mr. Miller Bwire for the Applicant

Mr. Kimani Kiragu SC for the Plaintiff/Respondent

Mr. Kivindyo Munyao h/b for Mr. James Ochieng Oduol for the 1<sup>st</sup> Defendant/Respondent

Mr. Allan Kamau for the 2<sup>nd</sup> Defendant/Respondent

