



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, KOOME & G.B.M. KARIUKI, J.J.A)**

**CIVIL APPLICATION NO. NAI 244 OF 2015 (UR 203/2015)**

**BETWEEN**

TATU CITY LIMITED.....1<sup>ST</sup> APPLICANT

KOFINAF COMPANY LIMITED.....2<sup>ND</sup> APPLICANT

NAHASHON NGIGE NYAGAH.....3<sup>RD</sup> APPLICANT

VIMALKUMAR BHIMJI DEPAR SHAH.....4<sup>TH</sup> APPLICANT

**VERSUS**

STEPHEN JENNINGS.....1<sup>ST</sup> RESPONDENT

FRANCES HOLLIDAY.....2<sup>ND</sup> RESPONDENT

HANS JOCHUM HORN.....3<sup>RD</sup> RESPONDENT

PIUS MBUGUA NGUGI.....4<sup>TH</sup> RESPONDENT

FRANK MOSIER.....5<sup>TH</sup> RESPONDENT

ANTHONY NJOROGE.....6<sup>TH</sup> RESPONDENT

CHRISTOPHER BARRON.....7<sup>TH</sup> RESPONDENT

*(Application for injunction pending the determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (E.K.O. Ogola, J.) dated the 28<sup>th</sup> April, 2015*

*in*

*H. C. C. No. 46 of 2015)*

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**RULING OF THE COURT**

This is an informal application by the first and second applicants under Rule 52, Court of Appeal Rules 2010 for leave to withdraw the notice of motion dated 24<sup>th</sup> September 2015.

The notice of motion was filed by the firm of **Havi & Company Advocates** on behalf of the four applicants. On 1<sup>st</sup> October 2010 the firm of **Ahmednasir Abdikadir & Company Advocates** filed a notice of change of advocates indicating that the firm of advocates has been instructed by the 1<sup>st</sup> and 2<sup>nd</sup> applicants to act for them in place of M/s Havi & Company Advocates.

On 5<sup>th</sup> February 2015, the four applicants filed Nairobi High Court Case No. 46 of 2015 at the Commercial and Admiralty Division, through the firm of Havi & Company Advocates. The basis of the suit, are resolutions of the Board of Directors of the 1<sup>st</sup> applicant at a meeting held on 5<sup>th</sup> February 2015. It is averred in the plaint that those resolutions purported, amongst other things, to revoke the appointment of the 3<sup>rd</sup> applicant as Chairman of the Board of Directors of 1<sup>st</sup> applicant and appoint the 4<sup>th</sup> respondent as the Chairman; appoint 4<sup>th</sup> and 5<sup>th</sup> respondents as directors of 1<sup>st</sup> applicant; revoke the employment of certain employees of 1<sup>st</sup> applicant and remove the 3<sup>rd</sup> applicant and two others as signatories to 1<sup>st</sup> applicant's bank accounts and replace them with 6<sup>th</sup> and 7<sup>th</sup> respondents.

It is further averred in the plaint that the resolutions in respect of the 2<sup>nd</sup> applicant purported to appoint the 4<sup>th</sup> and 5<sup>th</sup> respondents as directors of 2<sup>nd</sup> applicant, revoke the appointment of the 3<sup>rd</sup> applicant as Chairman of Board of Directors of the 2<sup>nd</sup> applicant and appoint 4<sup>th</sup> respondent as Chairman of the Board of Directors of the 2<sup>nd</sup> applicant.

It was alleged in the plaint that the two resolutions had not been the subject matter of any meetings of shareholders or of the Board of Directors of the 1<sup>st</sup> and 2<sup>nd</sup> applicants, and were thus unlawful and *ultra vires* the memorandum and articles of Association of the 1<sup>st</sup> and 2<sup>nd</sup> applicants. It is further averred in the plaint that the actions of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were intended to give them exclusive control over the affairs of the 1<sup>st</sup> and 2<sup>nd</sup> applicants in order that they may continue pilfering the capital and income of 1<sup>st</sup> and 2<sup>nd</sup> applicants and stripping of the assets of the 1<sup>st</sup> and 2<sup>nd</sup> applicants.

The reliefs sought in the plaint were for judgment that the resolutions made in respect of the 1<sup>st</sup> applicant and 2<sup>nd</sup> applicant be declared null and void and various permanent injunctions, all intended to restore the status quo. The plaint was accompanied by an application for interlocutory injunction to restrain various actions arising from the resolutions.

On 28<sup>th</sup> April 2015 the High Court (**Ogola, J.**) made various interlocutory orders including an order that the unilateral resolutions made on 5<sup>th</sup> February, 2015 were *prima facie* unlawful, that the 3<sup>rd</sup> and 4<sup>th</sup> applicants should resume their positions in the 1<sup>st</sup> and 2<sup>nd</sup> applicants companies except that the 3<sup>rd</sup> applicant should not execute his bank accounts signatory powers, and that 4<sup>th</sup> to 7<sup>th</sup> respondents should remain in their current positions except that the 4<sup>th</sup> respondent should not chair the Boards of the 1<sup>st</sup> and 2<sup>nd</sup> applicants.

The applicants being dissatisfied with the decision of the High Court filed a notice of appeal and the present notice of motion in which the applicants seek various injunctions pending the determination of the intended appeal to restore the status quo before the impugned resolutions of 5<sup>th</sup> February 2015.

The application is supported by the affidavit of **Nahashon Ngige Nyagah** (4<sup>th</sup> applicant) a chairman of the Board of Directors of 1<sup>st</sup> and 2<sup>nd</sup> applicants. There is a replying affidavit sworn by **Stephen Armstrong Jennings** – a director of the 1<sup>st</sup> and 2<sup>nd</sup> applicants who claims to have been authorized by the majority of Board of Directors of the 1<sup>st</sup> and 2<sup>nd</sup> applicants to swear the affidavit. In short, Armstrong Jennings claims that the 3<sup>rd</sup> applicant had no authority of the Board of Directors to file the application; that Board of Directors of the 1<sup>st</sup> and 2<sup>nd</sup> applicants have resolved that the firm of Havi & Co. Advocates

had no authority to represent the 1<sup>st</sup> and 2<sup>nd</sup> applicants in any matter relating to their affairs; that the two companies have no reason to sue their directors who are the respondents; that the Board of Directors of the two companies have authorised their current lawyers to withdraw the application and that the two companies have lodged complaints of fraud against Mr. Havi and Mr. Nyaga.

The oral application for leave to withdraw the application is opposed by the 3<sup>rd</sup> and 4<sup>th</sup> applicants but is supported by the respondents. Mr. Havi contended, *inter alia*, that the application to withdraw the notice of motion is an abuse of the process of the court and the Court should not exercise its discretion in favour of the applicants; that the suit in the High Court was filed with instructions from the two companies; that this is a case of a contest between two groups of directors where the majority are using their might to undermine the minority. Rule 52 of the Court of Appeal Rules authorizes an applicant to apply to the Court for leave to withdraw the application and stipulates that such an application may be made informally.

The extracts of the resolutions of the Board of Directors of the 1<sup>st</sup> and 2<sup>nd</sup> applicants passed at a meeting of 16<sup>th</sup> September 2015 are annexed. The extracts show that seven directors were privy to the resolutions namely Nahashon Ngige Nyaga as Chairman, Vimalkumar Shah (4<sup>th</sup> applicant), Pius Mbogua Ngugi (4<sup>th</sup> respondent), Stephen Jennings (1<sup>st</sup> respondent) Hans Jochum Horn (3<sup>rd</sup> respondent), Frances Holliday (2<sup>nd</sup> respondent) and Frank Mosier (5<sup>th</sup> respondent).

The Board of Directors of the 1<sup>st</sup> and 2<sup>nd</sup> applicants confirmed that Havi & Co. Advocates had not been instructed by the Board or shareholders of the two companies to file HCCC No. 46 of 2015 on behalf of the companies and that the firm had no authority to act on behalf of the companies. The extracts also show that the Board of Directors of the two companies appointed **Mr. Ahmednasir Abdullahi** of **M/s Abdikadir & Co. Advocates** to act on behalf of the two companies and also authorised him to manage the law suits on behalf of the companies and take any appropriate legal action under the direction and supervision of Stephen Jennings.

The notice of motion sought to be withdrawn was dated 24<sup>th</sup> September, 2015 and was filed on 25<sup>th</sup> September, 2015. On 22<sup>nd</sup> October, 2015 the advocates now on record for the 1<sup>st</sup> and 2<sup>nd</sup> applicants, filed a notice in the High Court, Civil Case No. 46 of 2015 withdrawing all claims against the defendants. The notice of withdrawal was acted upon by the Deputy Registrar of the High Court on the same day and an order was made accordingly. However, at the time of hearing of the oral application we were informed that the 3<sup>rd</sup> and 4<sup>th</sup> defendants (3<sup>rd</sup> and 4<sup>th</sup> respondents herein) have instituted proceedings for restoration of the entire suit to hearing.

In this oral application, the Court is not concerned with whether or not the firm of Havi & Co. Advocates had instructions of the companies to file the suit in the High Court. That issue is being litigated in the High Court and it would embarrass the High Court if we were to express a view on it. Furthermore, the disputes amongst the directors of the two companies are not directly relevant. Those disputes would have been relevant if the Court was determining the pending notice of motion.

The notice of motion is filed by Havi & Co. Advocates, who the 1<sup>st</sup> and 2<sup>nd</sup> applicants had resolved had no instructions to institute the suit in the High Court. The notice of motion was filed about a week after the Board of Directors of the 1<sup>st</sup> and 2<sup>nd</sup> applicants had appointed Ahmednasir M. Abdullahi, SC to manage the suits and take an appropriate legal action.

At the hearing of the oral application no question was raised by Mr. Havi about the resolutions of 16<sup>th</sup> September, 2015 of the Board of Directors of the two companies. The 3<sup>rd</sup> and 4<sup>th</sup> applicants participated in the Board meetings and the extracts of the solution show that the resolutions were passed by all the seven directors.

Mr. Havi has not also raised any issue about the appointment of the current advocates. In the premises, M/s Havi & Co. advocates had no instructions from the 1<sup>st</sup> and 2<sup>nd</sup> applicants to file the notice of motion

dated 24<sup>th</sup> September, 2015.

Furthermore, the notice of motion is a joint application by the four applicants. Nahashon Ngige Nyaga depones in the supporting affidavit that he was duly authorised to swear the affidavit on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> applicants and on his own behalf. It is apparent that the suit in the High Court and the present notice of motion are brought for the benefit of the two companies – to address a wrong done to the two companies.

The suit in the High Court, the application determined by the High Court and the pending notice of motion, principally relate to the affairs of the two companies - that is the appointment of additional directors, the removal and replacement of the chairman of the Board of Directors of the two companies and the change of signatories of the bank accounts of the two companies. Apparently, the suit and the applications do not concern any personal claim by the 3<sup>rd</sup> and 4<sup>th</sup> applicants for any wrongs personally done to them by the two companies. So although the 3<sup>rd</sup> and 4<sup>th</sup> applicants are named as parties to the notice of motion, they are in reality litigating on behalf of the two companies. They have no separate applications apart from that of the two companies and the application is not therefore severable.

In conclusion, the notice of motion was brought on behalf of the two companies by the firm of advocates which had no instructions as from 16<sup>th</sup> September, 2015 to represent the two companies. The notice of motion is in reality brought by the 3<sup>rd</sup> applicants on behalf of the two companies who are among the directors, who appointed the 1<sup>st</sup> and 2<sup>nd</sup> applicants' current advocates by a resolution of the Board of Directors passed on 16<sup>th</sup> September, 2015. Thus the notice of motion is brought in contravention of the resolution of the Boards of the two companies.

In the premises, leave should be given for the withdrawal of the entire application. For the foregoing reasons, the oral application is allowed. The notice of motion dated 24<sup>th</sup> September, 2015 and filed on 25<sup>th</sup> September, 2015 is withdrawn under rule 52 with no orders as to costs.

***Dated and delivered at Nairobi this 11<sup>th</sup> day of December, 2015.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

***M. K. KOOME***

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***JUDGE OF APPEAL***

***G.B.M. KARIUKI***

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***JUDGE OF APPEAL***

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**

