



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 9 OF 2009**

**BETWEEN**

**AJAY KOTHARI**

**NICETA NJURA**

**GARWALL ABHIMANYU**

**EPHRAIM MURIGO ..... APPLICANTS**

**AND**

**MARSHALLS (EAST AFRICA) LIMITED**

**THE REGISTRAR OF COMPANIES**

**MURIMI MURAGE**

**CHALES WACHIRA NGUNDO**

**KIRTESH PREMCHAND ..... RESPONDENTS**

**(An application for stay of proceedings pending the hearing and  
determination of the applicants intended appeal from the orders pending  
from the High Court of Kenya at Milimani Commercial Courts, Nairobi**

**(Khaminwa, J) dated 23<sup>rd</sup> December, 2008**

**in**

**H.C.C.C. NO. 743 OF 2008)**

## **RULING OF THE COURT**

On 15<sup>th</sup> December, 2008, Marshalls (East Africa) Limited (Company) filed a suit *H.C.C.C. No. 743 of 2008* against the Registrar of Companies and seven other persons including the four applicants herein challenging their appointment as directors of the company in a meeting convened by the Registrar of Companies. The reliefs sought in the plaint included a permanent injunction restraining the six persons from presenting themselves or passing off as directors of the company.

An application for interlocutory injunction was filed together with the plaint and on the same day Joyce Khaminwa, J. granted *ex parte* orders of injunction restraining the seven persons from, among other things, presenting themselves or passing off as directors of the company. On the hearing of the application, *inter partes* on 23<sup>rd</sup> December, 2008, Joyce Khaminwa, J. after dismissing a preliminary objection to the application adjourned the hearing to 5<sup>th</sup> February, 2009 and extended the interim orders. The four applicants filed a notice of appeal signifying an intention to appeal against the ruling of Joyce Khaminwa, J. delivered on 23<sup>rd</sup> December, 2008 overruling the preliminary objections raised against the application for injunctions.

On 22<sup>nd</sup> January, 2009 the four applicants filed the present application based on Rule 5 (2) (b) of the Court of Appeal Rules seeking two main orders, namely, a stay of the order of Joyce Khaminwa, J. given on 23<sup>rd</sup> December, 2008 extending the *ex parte* injunction orders given on 15<sup>th</sup> December, 2008 and a stay of proceedings in H.C.C.C. No. 743 of 2008 until the hearing and determination of the intended appeal.

When the application came for hearing before the Court on 24<sup>th</sup> February, 2009, the court partly heard the application and adjourned it for further hearing. Thereafter, the application was fixed for hearing on several occasions but could not be heard to its conclusion for one reason or another.

On 28<sup>th</sup> August, 2009, the firm of Osoro Mogikoyo & Co. Advocates, filed a notice of change of advocates indicating that the company (Marshalls), the first respondent in the application has appointed the firm in place of M/s. Ochieng, Onyango, Kibet & Ohaga, Advocates. On 23<sup>rd</sup> September, 2009, the parties filed a consent letter dated 22<sup>nd</sup> September, 2009 signed by respective advocates for the parties and asking the Deputy Registrar of the Court to record the consent. The consent was in the following terms:

### **“BY CONSENT**

1. THAT the Board of directors of Marshalls (East Africa) Limited now consisting of:

- (1) James Ogutu Omondi
- (2) Joachum Githinji,
- (3) Fred Okki Amayo,
- (4) Solomon Adede,
- (5) Peter Ndaa,
- (6) Arif Hafiz, and

(7) Manish Nair

as set out in the official search of the Registrar of Companies dated 17<sup>th</sup> August, 2009, to manage the day to day affairs of Marshalls (East Africa) Limited.

2. THAT the above mentioned Board of Directors of Marshalls (East Africa) Limited, the Company and all parties herein, hereby consent that the present Civil Application No. Nai. 9 of 2009 be and is hereby marked as settled with no order as to costs”.

On 23<sup>rd</sup> September, 2009, the Deputy Registrar, T. S. Luvuga, (now retired) recorded the substantive consent order, thus:

“By consent this application be and is hereby marked as settled with no orders as to costs”.

On 15<sup>th</sup> December, 2009, Mr. James Ochieng Oduol of the firm of Ochieng, Onyango, Kibet and Ohaga Advocates filed an affidavit opposing the recording of the consent order on numerous grounds including the ground that, his firm has not been served with any notice of change of advocates and that the three firms of advocates who had executed the consent letter had committed a fraud upon the court.

Quite apart from the fact that the consent order had already been recorded by the Deputy Registrar long before the affidavit was filed, no party has challenged the validity of the notice of change of advocates filed by the firm of Osoro Mogikoyo & Co. Advocates and this Court is bound by the notice of change of advocates until the company disputes the appointment of the firm.

The respective advocates extracted and approved the consent order and forwarded it to the Deputy Registrar for sealing.

Nevertheless, the consent order approved by respective advocates has not been sealed by the Deputy Registrar apparently because it does not conform with the order recorded by the Deputy Registrar.

We have been asked to formally record the consent orders as Orders of the Court by the respective advocates.

In our view, we would be acting in excess of jurisdiction if we were to record the first order in the consent order as that order does not relate to exparte order made by Joyce Khaminwa, J. on 15<sup>th</sup> December, 2008 and extended to 15<sup>th</sup> February, 2009; nor does it relate to the orders sought in the application for stay. Indeed, the exparte order sought, the subject matter of first prayer in the application for stay expired by effluxion of time.

Since the first order in the consent letter partially or wholly resolves the dispute about the management of the company, it should have been filed in the pending suit, namely *H.C.C.C. NO. 743 of 2008*. We return it for filing in the superior court.

In the result, we decline to record the first order in the consent letter as an order of this Court and we confirm and endorse the order recorded by the Deputy Registrar on 23<sup>rd</sup> September, 2009 as the correct order of the Court.

Dated and delivered at Nairobi this 25<sup>th</sup> day of March, 2010.

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**