

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: *Ojwang, SCJ*)

PETITION NO. 6 OF 2016

–BETWEEN–

1. MANCHESTER OUTFITTERS
(SUITING DIVISION) LIMITED (Now known as
KING WOOLLEN MILLS LIMITED) }PETITIONERS

2. GALOT INDUSTRIES LIMITED

–AND–

1. STANDARD CHARTERED FINANCIAL
SERVICES LIMITED }RESPONDENTS

2. A.D. GREGORY

3. C.D. CAHILL

*(Appeal from the Ruling of the Court of Appeal at Nairobi in Civil Application
No. 224 of 2006, dated 8 April 2016)*

RULING

A. INTRODUCTION

[1] This is an application by way of Notice of Motion, dated 28 September 2016. The applicant is a firm of Advocates, namely Gikera & Vadgama Advocates, which is seeking a determination of the status of representation by counsel in a cause pending in Court. The proceedings at this stage, therefore, are concerned only

with the *preliminary question of representation*, rather than with the main cause.

[2] The Firm of M/s. Gikera & Vadgama Advocates sought affirmation that it is indeed the firm duly instructed to act for and on behalf of the 2nd petitioner, Galot Industries Limited. This firm of Advocates was seeking an affirmation that the firm of M/s. Havi & Company Advocates is not the firm duly instructed by Galot Industries Limited (2nd petitioner) to represent it in the substantive petition cause pending in Court.

[3] What grounds are relied on by the applicant, M/s. Gikera & Vadgama Advocates? The following grounds were laid before this Court:

(i) the 2nd petitioner had placed before the Court of Appeal the terms of a resolution of the extraordinary general meeting of that petitioner, of 27 January 2014, and of the company's board meeting of the same date, by which M/s. Gikera and Vadgama Advocates had been duly appointed to represent the 2nd petitioner in the proceedings;

(ii) on 11 May 2016, a decision had been taken by the 2nd petitioner's directors and by its company secretary, through a board resolution, that M/s. Gikera & Vadgama Advocates (the applicant) would represent the 2nd petitioner;

(iii) eight days later (19 May 2016), the firm of Havi & Company Advocates went contrary to the said resolution, by filing petition in the name of *both* 1st petitioner and 2nd petitioner (Galot Industries Limited) – the same being accompanied by an affidavit by *Mohan Galot* (of Galot Industries Limited, 2nd petitioner), who made a deposition averring that he is authorized (by Galot Industries Limited) to swear the affidavit;

(iv) Mohan Galot in his depositions, annexed no board resolution validating his claim that he was a deponent authorized by Galot Industries Limited (2nd petitioner);

(v) the firm of Havi & Company Advocates has brought forth no proof that it holds due instructions to represent the 2nd petitioner.

B. BACKGROUND DETAIL

[4] On 5 April 1982, the 1st petitioner issued a debenture. Pursuant to that debenture, the 1st respondent appointed the 2nd and 3rd respondents as receivers and managers of the 1st and 2nd petitioners.

[5] On 28 September 1990, the 1st and 2nd petitioners filed High Court Civil Case No. 5002 of 1990: they were contesting the validity of the 1st respondent's appointment of the 2nd and 3rd respondents as receivers and managers of their assets.

[6] Running in parallel with the 1st and 2nd petitioners' cause in the High Court, was the *1st and 2nd respondents' counterclaim*: they were seeking a declaration that the debenture issued by the 1st petitioner on 5 April 1982, was in all respects, valid.

[7] The High Court in its Judgment of *30 July 1999*, dismissed the petitioner's suit, and allowed the respondents' counterclaim – *upholding the validity of the 1st petitioner's debenture issuance of 5 April 1982*.

[8] The *1st and 2nd petitioners* contested the High Court's decision in the Court of Appeal (*Civil Appeal No. 88 of 2000*) – an appeal that was upheld in a Judgment of *4 October 2002*.

[9] The 1st and 2nd respondents, on *18 August 2006*, filed an application seeking a re-opening and re-examination of the Judgement of the Court of Appeal. And on *8 April 2016* the Court of Appeal vacated its Judgment of *4 October 2002*, and *ordered fresh hearing* in that very Court. On that occasion, the Court of Appeal permitted M/s. Gikera and Vadgama to appear in the matter, and directed that this firm be duly served with relevant documents.

[10] On *18 May 2016*, the firm of M/s. Havi & Company Advocates filed a petition of appeal (dated 17 May 2016) in the Supreme Court – on behalf of both the *1st and 2nd petitioners*. This sparked the *difference between two firms of*

Advocates. On 28 September 2016, Gikera & Vadgama Advocates filed the instant application, contesting the proposed representation of the 2nd petitioner (Galot Industries Limited) by M/s. Havi & Company Advocates.

[11] Counsel for the two law firms appeared before the Deputy Registrar, who directed that the matter be placed before a *single Judge*.

C. SUBMISSIONS OF COUNSEL

[12] Learned counsel Mr. Gikera, for 2nd petitioner, submitted that the instant application was unusual: as counsel for a limited liability company would derive their instruction from *special resolution passed by the board of directors of the company*. Counsel submitted that the exception in this instance has arisen because of *competing claims to the directorship of the 2nd petitioner* (Galot Industries Limited).

[13] Learned counsel submitted that the relevant authorization to Advocates, by corporate resolution, was duly expressed on 27 January 2014 when, by an extraordinary resolution, the firm of M/s. Gikera and Vadgama Advocates was designated to represent the 2nd petitioner in Court of Appeal Civil Case No. 224 of 2016. The said authorization, counsel urged, was further embodied in a company board resolution, having the presence of several members including one *Pravin Galot*, one *Rajesh Galot*, and one *Pavan Galot*. (It is apparent that *Mohan Galot*

(the maker of the depositions supporting the stand of the firm of M/s. Havi & Company Advocates) was not present).

[14] Learned counsel indicated that in another board of directors meeting that took place on *11 May 2016*, and which considered the question of the petition before the Supreme Court, *Pravin Galot, Pavan Galot* and *Mwangi Wahome* (Company secretary of 2nd petitioner) were present: and there, it was resolved that M/s. Gikera & Vadgama Advocates would represent the 2nd petitioner (Galot Industries Limited).

[15] On the basis of such authorization, M/s. Gikera & Vadgama Advocates proceeded to file in the Supreme Court, the *Notice of Appointment of Advocates*.

[16] Learned counsel relied on case law (*East Africa Portland Cement Ltd. v. Capital Markets Authority & Four Others*, High Ct. Pet. No. 600 of 2013; [2014] eKLR; *Bugerere Coffee Growers Ltd. v. Seraduka & Another* [1970] E.A. 147) for the proposition that it takes a *company resolution, or a decision of the board of directors duly recorded*, to authorize the commencement of legal proceedings by a company.

[17] Counsel urged that a board of directors meeting had been duly held on 11 May 2016, which appointed the applicant as the duly-authorized advocates. He

invoked Article 9 of the 2nd petitioner's Articles of Association, which set at two, the quorum of directors authorized to conduct company business.

[18] Counsel submitted that the documentations of the respondent in this matter disclosed no authorization to represent the 2nd petitioner – there being no letter by the 2nd petitioner authorizing the chairman of the 1st petitioner (*Mohan Galot*) to swear an affidavit on the 2nd petitioner's behalf.

[19] Learned counsel painted a picture of intricate manoeuvres in the leadership positions and directorships in the two petitioner-companies. He averred that *Mohan Galot*, who depones to having instructed the respondent advocates herein, had at one time filed a notification of change of directors and secretaries or their particulars (Form 203A) with the Registrar of Companies, signifying that both *Pravin Galot* and *Rajesh Galot* had resigned, but he had failed to render to the Registrar of Companies the letters announcing such resignation.

[20] In such a scenario of *intra-company strife*, numbers of conflicting positions have repeatedly come up, with occasional legal suits involving directors: *High Court Civil Case No. 298 of 2009; High Court Civil Case No. 430 of 2012; High Court Civil suit No.55 of 2012.*

[21] Learned counsel urged that there is in all the circumstances, a real maze of divergent claims and interests: a context in which this Court should protect the interests of all the legitimate directors and shareholders, as officially confirmed by the Companies Registry on 16 March 2016. He urged, in such a cause, that the applicant firm of Advocates be allowed to remain on record for Galot Industries Limited.

[22] A quite contrary stand was taken by learned counsel, Mr. Havi, who submitted that M/s. Gikera & Vadgama Advocates had no valid appointment to represent the second petitioner (Galot Industries Limited). The basis for this argument was that *as a fact*, throughout the several stages of litigation, it is precisely *Mohan Galot* who had given instructions, on behalf of *both* petitioners. Learned counsel urged it to be no less relevant, that in the High Court case leading to the Judgment of *30 July 1999*, only *Mohan Galot* had been a witness. It was, too, *Mohan Galot* who had instructed M/s. Havi & Company Advocates to represent the *2nd petitioner* at the Court of Appeal. So, as Mr. Havi urged, it was hardly surprising that upon the delivery of the Court of Appeal's decision on 8 April 2016 (setting aside the High Court's Judgment), it was *Mohan Galot* who issued instructions for the filing of Petition No. 6 of 2016 on 18 May 2016, in the Supreme Court.

[23] Learned counsel doubted whether the Court, as constituted, had jurisdiction to determine the questions raised in this preliminary matter: first, on

account of the single-Judge Bench; and secondly, on the basis that the issue as to who the directors of the 2nd petitioner (Galot Industries Limited) are, and the issue as to the proper representation of 2nd petitioner – fall outside the Supreme Court’s remit. Counsel submitted that *the question as to the true directorship of Galot Industries Limited, is currently pending in the High Court.*

[24] Mr. Havi maintained that the application must fail, on yet other grounds: firstly, that those who gave instructions to the applicant-Advocates, were not competent directors of the 2nd petitioner-company. Counsel presented different letters from the Registrar of Companies, showing *conflicting sets of directors.*

[25] Secondly, counsel submitted that there were several Orders from the High Court and Court of Appeal, which restrained both *Pravin Galot* and *Rajesh Galot* from appointing Advocates to act for the 2nd petitioner [such as in Civil Appeal No. 47 of 2011 (para.23)].

[26] Learned counsel, thirdly, submitted that all the records before the Court of Appeal indicate that Havi & Company Advocates had conducted their case without any participation or contribution from the firm of Gikera & Vadgama Advocates.

[27] Fourthly, counsel urged that the restraint against *Pravin Galot* and *Rajesh Galot* as directors, was in force as at 27 January 2014 and 11 May 2016, at the time of the resolutions being relied upon by the applicant herein.

[28] Learned counsel submitted, fifthly, that there had been no valid change of representation from M/s. Havi & Company Advocates to M/s. Gikera & Vadgama Advocates in terms of the Supreme Court Rules – *there not having been a notice of change of advocates.*

[29] Counsel submitted that both *Pravin Galot* and *Rajesh Galot* ought to pursue

their entitlement to directorship by way of *High Court Civil Case No. 430 of 2012*. He asked that the application be dismissed with costs to the petitioners.

D. ISSUES BEFORE THE COURT

[30] From the oral as well as written submissions of the parties herein, one crisp issue falls for determination: *Who is the proper legal representative of the second petitioner (Galot Industries Limited)?* Is it M/s. Gikera & Vadgama Advocates, or M/s. Havi & Co. Advocates?

E. ANALYSIS

[31] Firstly, does this Court have jurisdiction to determine the question as to the legal representation of the 2nd petitioner (Galot Industries Limited)?

[32] Learned counsel, Mr. Havi has urged that this matter falls outside the Supreme Court's jurisdiction as defined under Article 163 of the Constitution. Learned counsel Mr. Gikera, by contrast, urged that the Deputy Registrar had quite properly directed that the matter be placed before a *single Judge*, for disposal.

[33] The proper role of the single Judge is regulated under Rule 4(3) of the Supreme Court (Amendment) Rules, 2016 (L.N. No.14), Rule 4(3), which thus provides:

“(3) Without prejudice to the provisions of sub-rule (1) or sub-rule(2), a single Judge of the Court may hear the applications and make orders with regard to –

- (a) change of representation;***
- (b) admission of consents;***
- (c) consolidation of matters;***
- (d) dismissal of a matter for want of prosecution;***
- (e) correction of errors on the face of the record;***
- (f) withdrawal of documents;***
- (g) review of the decision of the Registrar;***

- (h) leave to file additional documents;**
- (i) admission of documents for filing in the Registry; or**
- (j) substitution of service.”**

[34] From the terms of Rule 4(3) above, it is clear that *the single Judge is entrusted with the determination of preliminary questions, so as to set the stage for the hearing and determination of the main cause, before a full Bench as prescribed under the Constitution.*

[35] In the instant case, the applicant firm of Advocates is asking to be recognized as the legal representative of the 2nd petitioner, even as the respondent firm of Advocates contends that the matter does not fall under Rule 12 of the Supreme Court (Amendment) Rules, 2016, as the applicant did not file a “*notice of change of representation*” [Rule 12(6)].

[36] It is, indeed, the case, that the applicant has not filed a notice of change of representation, as specified in the Rules. The applicant gives an explanation: while it (the applicant) is *the duly-appointed advocate* for the second petitioner, M/s. Havi & Company Advocates have filed the petition in the Supreme Court *while purporting to act on behalf of the 2nd petitioner*; and so there is no basis in law and in fact, for the applicant-Advocates to file a “notice of change of representation.” *This contention touches on the nub of the instant application: which of the two firms of Advocates represents the 2nd petitioner?*

[37] Resolving such a question, it is clear, falls squarely within the remit of a *single Judge*, as it would have a bearing on the representation of a party before the Court, as contemplated under Rule 12(6) aforementioned.

[38] Such is the jurisdictional basis whereupon this matter is to be resolved.

[39] Judges, in some cases, are limited to the professional task of *interpreting the law*, and guiding the parties by objective application of the same. In other cases, the first task falling to a Court is that of *eliciting and appraising evidentiary fact*, so as to *lay the groundwork for the application of the law*, and for the just settlement of the claims in hand.

[40] By the mandate of the Supreme Court, as defined in Article 163(4) of the Constitution, its jurisdiction is *mostly* one of appraisals, interpretations and applications of *the law*, rather than of finding, assessing and collating the *evidence* – a task that essentially devolves to the trial Courts.

[41] Is the matter embodied in this preliminary issue between two firms of Advocates, one that merits resolution by way of the Supreme Court's interpretive charge? Or is it a question calling for the *taking of evidence*, and the *ascertainment of relevant facts*?

[42] A reading of the application herein, as well as the written submissions, and the parties' depositions, indicates that the matter, though lodged in the Supreme Court for the first time, contains certain conflicting *claims of fact*, such as: (i) who are the valid directors of Galot Industries Limited (2nd petitioner)? (ii) which of the two resolutions had the approval of a valid company-board meeting? (iii) have some of the directors lost their positions as directors – and who are these? (iv) what is the standing of one *Mohan Galot*, as a director; and what control powers does he have over other directors? (v) which directors have the competence to designate Advocates to conduct the company's legal undertakings?

[43] The applicant firm of Advocates states that, on 11 May 2016, *Pravin Galot* and *Rajesh Galot*, together with a Company Secretary, passed a resolution as required under Article 9 of the company's Articles of Association; but this is contradicted by the respondent firm of Advocates, which states that *Mohan Galot*, as “governing director and chair of the 2nd petitioner's board of directors”, had passed a resolution acting with *two other directors and a company secretary* on 17 May 2016, *authorizing M/s. Havi & Company Advocates to file the petition of appeal in the Supreme Court.*

[44] It is a pre-eminent task facing the Court, to proceed from an *ascertained factual position*, in view of the terms of the law (Rule 12(1) of the Supreme Court

(Amendment) Rules, 2016). By Rule 12(2)(b), a party is required to file *the board resolution that authorizes representation by a particular firm of Advocates*.

[45] Two resolutions have been placed before this Court: and these are resolutions by *different boards of directors*, designating different firms of Advocates to represent Galot Industries Limited (2nd petitioner).

[46] It means there is a contestation on a *basic question of evidence: the directorship of Galot Industries Limited* (2nd petitioner).

[47] This question, in other relevant causes, has featured in both the High Court and the Court of appeal. In ***Mohan Galot v. Kenya National Capital Corporation Ltd.***, Civ. Appeal No. 47 of 2011, the Court of Appeal considered the reasoning of the High Court Judge, who had taken the decision that two *law firms* would jointly represent the 5th and 6th plaintiffs. The High Court's position was thus stated:

As regards the 5th and 6th plaintiffs, it is clear that there is a dispute in regard to which set of directors and shareholders [is] actually in control of the affairs of the two companies. I was neither persuaded by the applicant nor the respondent that their respective clients had control of the management of the two companies. In the circumstances, I will direct that the two firms, that is Meshack Odero & Company Advocates and

Miller & Company Advocates...appear jointly on record, on behalf of the 5th and 6th plaintiffs. That position will hold until determination is made either by the parties themselves or by the Court, as to who between the two sets of directors is entitled to manage the affairs of the 5th and 6th plaintiffs and therefore appoint an Advocate on behalf of the two companies.”

[48] The High Court’s decision was overturned by the Court of Appeal, which thus rendered itself (para.23):

“In the instant appeal there are many issues for determination, inter alia: who, between the appellant, the 1st, 2nd, 3rd, 4th and 5th respondents, are bona fide shareholders and directors of the 5th and 6th respondents? Who is entitled to the judgment sum? who is the duly-appointed Company Secretary of the 5th and 6th respondent? Accordingly, two firms appointed by the disputing parties may act at cross-purposes. We, therefore, find that the learned Judge erred in holding that the firm of Miller & Company Advocates should act jointly with the firm of Meshack Odero & Company Advocates, to represent the 5th and 6th respondents. The appellant urged the Court that the firm of Havi & Company Advocates who are now on record for the

appellant should represent the appellant and the 5th and 6th respondents....”

[49] The Appellate Court has had yet another occasion to formulate guiding principles on the question of different Advocates representing a party simultaneously, in ***Kenya Commercial Bank Ltd. v. John Benjamin Wanyama***, Civil Appeal No. 97 of 1999; [2007] eKLR. The following passage in the Judgment is pertinent (*Kariuki, J.A.*):

“There is no provision in the Rules for two firms of Advocates to be on record contemporaneously or concurrently. And this is for good reason. It would be chaotic if there was on record more than one firm. From which firm would pleadings be expected; who would be served; who would take responsibility, or be held responsible for actions or omissions of the party represented by such firms? ...The rationale for requiring an Advocate, or one firm of Advocates to act for a party and sign pleadings and receive service on behalf of such party is designed to ensure that such Advocate or firm, does take responsibility for the matter and is accountable to Court and the client he or it represents. The law does not bar a party utilizing the services of more than one Advocate or more than one firm of Advocates in a matter but where this is done, it is

the Advocate or firm of Advocates on record who engage a senior counsel to lead. The rules of practice recognize that in complex matters a senior counsel may be hired to lead, and it is for this reason that costs are sometimes enhanced, and a certificate for two counsel given by Court.”

[50] In the instant case, two different legal-practice firms are contesting the role of representing a party – Galot Industries Limited. These firms make conflicting averments on a *vital, basic fact*. They present differing director-lists – each claiming its origin to be the State’s designated custodial office, the office of the Attorney-General. Both advocates’ firms, however, are in agreement that the representation dispute is now *pending before the High Court*, in Civil Cause No.430 of 2012: and thus, that the *High Court will determine the valid names of directors and shareholders of the second petitioner* (Galot Industries Limited).

[51] In this ultimate appellate Court, the task devolves *not*, in the first instance and in general, to resolve trial *facts and matters of evidence*. It follows that the task now rests with the High Court, to ascertain the status of directorships at Galot Industries Limited. It is not for this Court to establish the names of the directors who made the two divergent board resolutions now being cited.

[52] This Court must take into account such *practical questions* as a functional judicial edict ought to incorporate: and in this respect I would take due account of

the Appellate Court decision in *Kenya Commercial Bank Ltd. v. John Benjamin Wanyama*, Civil Appeal No. 97 of 1999; [2007] eKLR. If the two firms were to receive conflicting instructions, what would be the effect, in terms of the due conduct of advocacy? This Court's obligation is to provide ultimate resolution to contested questions brought before it; and it is not behoved to sustain or confound open-ended claims.

F. DETERMINATION

[53] The foregoing account and analysis, leads to a determination of the contention between the two firms of Advocates as follows:

(a) I disallow the application by M/s. Gikera and Vadgama Advocates.

(b) I allow the firm of Havi & Company Advocates to represent the 2nd petitioner, subject to the High Court determining – and until the High Court determines – the valid directors of Galot Industries Limited (2nd petitioner).

(c) The costs of this application shall abide the determination by the High Court as signalled in Order (b) hereof, and shall on that basis abide the disposal of the main cause.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 13th day of June, 2017.

J.B. OJWANG
JUSTICE OF THE SUPREME COURT

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

REGISTRAR, SUPREME COURT