

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
AT NAIROBI

PETITION(APPLICATION) NO.6 OF 2016

*(Coram: Maraga, CJ & President; Ibrahim; Wanjala; Njoki; and
Lenaola, SCJJ)*

MANCHESTER OUTFITTERS (SUING DIVISION) LIMITED
KNOWN AS KING WOOLLEN MILLS LIMITED.....1ST PETITIONER
GALOT INDUSTRIES LIMITED.....2ND PETITIONER

AND

STANDARD CHARTERED FINANCIAL
SERVICES LIMITED.....1ST RESPONDENT
A.D GREGORY.....2ND RESPONDENT
C.D CAHILL.....3RD RESPONDENT

(Being an application for review of the decision and order of a single judge of the Supreme Court dated 13th June, 2017)

RULING

A. INTRODUCTION

[1] Before the Court is an application raised in respect of Petition No. 6 of 2016.. It seeks to determine the issue of representation by an advocate.

Interlocutory Proceedings in the Supreme Court

a. Notice of Motion Application dated 28th September, 2016

[2] On 16th September, 2016, when this matter came up for mention before the Deputy Registrar, it emerged that there was lack of clarity and a dispute as

regards the bona-fide legal representatives of the 2nd Respondent, Galot Industries Ltd, between the firms of M/S **Havi and Company Advocates** and M/S **Gikera & Vadgama Advocates**. The Deputy Registrar, directed the two law firms to file a formal application to enable the Court determine the issue.

[3] M/S Gikera&Vadgama Advocates duly filed a Notice of Motion Application dated 28th September, 2016 as directed. The main prayers in the application were:

(2) THAT the Honorable Court do affirm that the firm of Gikera & Vadgama Advocates is duly instructed to act and on behalf of the 2nd Petitioner herein,

(3) THAT the Honorable Court does find that the firm of Havi & Co Advocates is not duly instructed by the 2nd Petitioner to represent it in the proceedings herein.

[4] Subsequently, the application was heard by a single Judge of the Court, *Ojwang, SCJ*, on 16th February 2017. M/s Gikera & Vadgama Advocate's main argument was that it had been designated to represent the 2nd Respondent via a *Company Board Resolution* passed by several members including Pravin Galot, Rajesh Galot and Pavan Galot (with Mohat Galot absent). M/S Havi & Co. Advocates on their part argued that they had been duly instructed by Mohan Galot, on behalf of the Petitioners to act as their legal representatives.

[5] In a Ruling delivered on **13th June 2017**, the Learned Judge framed the single issue for determination as: *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?*

[6] The Learned Judge first found that he had jurisdiction to determine the matter before Court pursuant to Rule 4(3) of the Court Rules, on the roles of a single Judge. On the substantive issue, the Court observed that the application

“though lodged in the Supreme Court for the first time, contains certain conflicting claims of facts, 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?”

[7] These issues, the Learned Judge found, were factual matters for determination at the first instance in another forum and could not be first dealt with by the Supreme Court when it was exercising its appellate jurisdiction. Since both firms were in agreement that the representation dispute was pending before the High Court, its **Civil Cause No. 430 of 2012**, the single Judge dismissed the application making the following orders:

- (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 signaled in Order (b) hereof, and shall on that basis abide the disposal of the main cause.*

[8] These orders of the Single judge aggrieved M/S Gikera & Vadgama Advocates necessitating the filing of the Notice of Motion Application dated 3rd July, 2017 (which is the subject of this Ruling).

b. Notice of Motion Application Dated 3rd July, 2017

[9] The application was filed on 5th July 2017. It seeks the following main Relief:

(1)

(2) *THAT this Honourable Court be pleased to review the Orders issued on 13th June, 2017 by Honourable Justice J. B. Ojwang sitting as a single Judge.*

[10] The application is based on the following **Grounds**:

- a) *THAT the Order issued by the single Judge is going to lock the Applicant out of this case yet the Applicant had participated in all the proceedings in the Court of Appeal.*
- b) *THAT the Order of the Single Judge, if not reviewed, will affect other cases which are still pending in the Superior Court and Court of Appeal.*
- c) *THAT the issue of representation is in dispute in the Superior Court hence should be allowed to be determined on merit.*
- d) *THAT the issue of representation is a serious matter which touches on the capacity hence should be handled cautiously.*
- e) *THAT there is no good reasons why a party should be locked out at this stage having participated in the proceedings in the Courts below.*

[11] The application is supported by an affidavit sworn by Pravin Galot, who deposes as being the Managing Director of Galot Industries Limited. It is opposed by a Replying Affidavit sworn by Mohan Galot on 10th July, 2018 on behalf of the 1st and 2nd Petitioners.

[12] The Respondent opposes the application on the grounds that: -

- a) *The Notice of Change of advocates as well as the current application as filed by Mr. Odera Were, Advocate in place of Messrs Gikera & Vadgma Advocates is null and void;*
- b) *The court lacks jurisdiction to review the orders of Justice Ojwang, SCJ pursuant to section 24(1) and (2);*
- c) *The applicant has not demonstrated that its instructing client discovered new and important matter or evidence which after due exercise of due diligence ,was not within his knowledge or could not be produced by him at the time when the order was made, neither has he demonstrated that there is a mistake or error apparent on the face of the record nor shown any other sufficient reason for grant of review orders as sought;*
- d) *An exercise of discretion by a court cannot be reviewed and that the same can only be challenged through an appeal and cites the case of **Michael Muriuki Ngibuim v East African Building Society Limited [2015] eKLR.***
- e) *There is no nexus between legal representations in this case and the alleged malicious criminal charges against one of the directors.*
- f) *The shareholding and/or directorship of the 2nd Petitioner is still in dispute and has not been resolved yet.*

[13] We note that on 2nd June, 2017, the firm of M/S Prof. Tom Ojienda & Associates filed a Notice of Change of Advocates to act on behalf of the 1st and 2nd Petitioners instead of M/S Havi & Company Advocates. Consequently, as at the time of filing this application, the firm of M/S Havi & Company Advocates were not on record for the 2nd Petitioner.

[14] Further, at the time of drafting this Ruling, neither the Applicants nor the Respondents had filed their written submissions despite a direction by the Deputy Registrar on 6th July, 2018 that the same be filed by 10th July, 2018.

C. ANALYSIS

[15] Before going into the merits of the Application, we need first to determine whether this Court has jurisdiction to entertain this application.

[16] In that regard, we note that the Applicant moved this Court under Section 24(1) and (2) of the Supreme Court Act No. 7 of 2011. The said provisions provide as follows; -

“ (1) In any proceedings before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge thinks fit, other than an order or direction that determines the proceedings or disposes of a question or issue before the court in the proceedings.

(2) Any person dissatisfied with the decision of one judge in the exercise of a power under subsection (1) is entitled to have the matter determined by a bench of five judges.”

[17] We further note, that at paragraph 4 of the Applicants’ supporting affidavit, the Applicants have admitted ***that the issue of the 2nd Appellant’s representation is a matter which is being handled by the Superior Court and has not been determined.***

[18] The Applicant have not challenged the fact that the question of representation is pending before the High Court, in Civil Cause No. 430 of 2012 and while deciding this Application, we need to address the question whether the 2nd Appellant’s legal representation is being been canvassed in other superior courts, and is yet to progress through the normal appellate mechanism so as to reach this Court by way of appeal. It is our finding that this is indeed the case.

[19] In the above context, in ***Peter Oduor Ngoge v Hon. Francis Ole Kaparo Petition No. 2 of 2012***, we stated thus:

“In the petitioner’s whole argument, we think, he has not rationalized the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court.”

[20] Additionally, in the *Ngoge case*, this Court stated that:

“.....the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court”
[emphasis added].

[21] Accordingly, we agree with our brother J.B. Ojwang, SCJ, that since the question of the 2nd Appellant’s legal representation still lies at the High Court, this court lacks jurisdiction to entertain the present Application and we therefore see no reason to review the orders of the Honourable Judge issued on 13th June, 2017.

ORDERS

- 1. *The application dated 3rd July, 2017 is hereby dismissed;***
- 2. *The Applicants shall bear the costs thereof as costs follow the event.***

Dated and Delivered on 6th this day February 2019

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D.K MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. WANJALA
JUSTICE OF THE SUPREME COURT

.....
N. S. NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA

