



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI, MILIMANI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 49 OF 2014**

**QUICK HANDLING AVIATION SERVICES LTD.....PLAINTIFF**

**Versus**

**ADAN NOOR ADAN.....DEFENDANT**

**RULING**

1. A Notice of withdrawal of suit dated 18<sup>th</sup> December 2015 (but which seemed to have been filed a day earlier on 17<sup>th</sup> December 2015) is under challenge. Also under question is the consequent order withdrawing the suit.

2. The Notice of withdrawal of suit was filed by Wesonga, Mutembei & Kigen Advocates who claim to be the true Advocates of Quick Handling Aviation Services Ltd (the Plaintiff or the Company). The firm of Jackson Omwenga & Co. who brought these proceedings on behalf of the Company from inception have filed a Notice of Motion dated 29<sup>th</sup> March, 2016. It is the Notice under consideration and seek the following two prayers:-

**2. THAT the Order marking the suit as withdrawn be set aside in the first instance.**

**3. THAT Adan Noor Adan the Defendant herein be committed to civil jail for a period of six (6) months for disobeying the Court order granted on 9<sup>th</sup> July, 2014.**

At the hearing it became apparent that prayer (3) of the application was only argued as an alternative to prayer (2).

3. These entire proceedings are about the control and management of the Company. In a Plaint presented to Court on 20<sup>th</sup> November 2013 the Company complains about misconduct of Adan Noor Adan (the Defendant) at the time he was running the affairs of the Company. The details are not necessary for now. The Company also avers that by an Ordinary General Meeting held on 22<sup>nd</sup> October 2013, it revoked the Directorship of Adan. The Company seeks the following prayers:-

**(a) A declaration that the Defendant is no longer a director of the Plaintiff and a permanent injunction restraining the Defendant whether by himself, agents, servants or howsoever otherwise from holding himself out as a director of the Plaintiff.**

**(b) An order against the Defendant for general damages and for breach of Director's duties.**

**(c) Interest at Court rates**

**(d) Costs of the suit.**

4. On his part Adan denies the claims and insists that he is still a Director of the Company. He also takes the position that the suit was never brought by proper authority of the Company.

5. In response to the Motion before Court, Counsel Geoffrey Erric Wesonga depones that the authority of his firm to act in this matter on behalf of the Company and to withdraw the suit stems from two Board Resolutions of 12<sup>th</sup> March 2015 and 10<sup>th</sup> December 2015 respectively. In both Board meetings the following are said to have attended:-

**(i) Abdullahi Yusuf Robleh**

(ii) Ebla Abdi Osman

(iii) Mustafa Haji Ahmed Dahir

(iv) Zainab Abdi Osman

6. It has turned out that whether or not the instructions of the firm of Wesonga, Mutembei & Kigen Advocates to act and the Notice to withdraw are valid depends on the legality of the two Board Resolutions. On this crucial aspect of the case, parties agreed that two people be cross-examined on the affidavits filed in support and against the application before Court. One is Ebla Abdi Osman who is the wife of Adan and is said to have attended the Board meetings. The other is Abdikadir Ali Duale who claims to be a current Director of the Company.

7. Having considered the application, affidavits filed herein, testimony of the two and arguments by Counsel, the Court proposes to keep its focus on simply interrogating the legality or otherwise of the two impugned Board Resolutions.

8. Articles 35 and 36 of the Articles to the Company provide as follows in respect to proceedings of Directors:-

*“35. The Directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In the case of an equality of votes, the Chairman shall have a second or casting vote. A Director may, and the Secretary on the requisition of a Director shall at any time summon a meeting of the Directors. It shall be necessary to give notice of a meeting of Directors to any Director for the time being absent from Kenya.*

*36. The quorum necessary for the transaction of the business of the Directors may be fixed by the Directors and unless so fixed shall be two”.*

9. Since there is no evidence that those provisions have been changed or that the Directors have fixed the quorum other than the two set out in Article 36, the Court holds that the quorum of a Directors meeting of the Company to be at least two Directors and that questions arising at a meeting of the Board shall be decided by a majority of votes.

10. The two Board Resolutions under challenge suggest that 4 people named therein attended the Board as Directors of the Company. Each is said to have signed the minutes as though they were Board members. Yet, as emerging from the evidence of Elba who claims to have attended the meeting and supports the withdrawal, Abdullahi Yusuf Robleh and Zainab Abdi Osman were not Directors at the time of the meetings. This is an important concession by Elba. She however sought to explain their presence by stating that they attended the meetings in their capacity as shareholders. If that is true then the minutes of the meeting are misleading because they signed them as Directors.

11. Something else was revealed about the minutes of 12<sup>th</sup> March 2015 which speaks to the legality of the Board meeting. In her testimony Elba told Court that Abdullahi Yusuf Robleh did not attend that meeting. If that was so then why did he sign as being present? Was that not misleading? It is against this backdrop that the application before Court takes some credence.

12. Another person who Elba contends attended the two meetings is Mustafa Haji Ahmed Dahir. The Applicant doubts his attendance and the authenticity of the signature appearing on the Board papers said to be his. There is an apparent difficulty in regard to Dahir because he is dead and cannot vouch to the truth or otherwise of the allegations. The Dead tell no tales! But in support of the argument that Dahir could not have possibly attended the meetings, at least that of 10<sup>th</sup> December 2015 which allegedly sanctioned the withdrawal of suit, Mr. Omwenga draws this Court's attention to Mr. Dahir's affidavit herein sworn on 7<sup>th</sup> May 2015. In it he deposes:-

*“That I renounce all my dealings with Quick Handling Aviation services limited, and I will not claim any share or interest in the Company”.*

It is suggested that given this stance, he could not have attended the meeting.

13. To be observed is that both sides of the divide agree that Dahir was a Director of the Company upto the time of his death. This is also borne out from the records with the Registrar of Companies. The Court does not have unequivocal evidence that what is said to be a forgery of his signature on the minutes was indeed a forgery as the Applicant who had the onus of proving this aspect failed to do so. Yet given the nature of the dispute herein being a boardroom wrangle and the fact that the minutes that led to the withdrawal of the suit do in themselves contain patently misleading information, this Court is not sufficiently assured that there was a proper resolution to withdraw these proceedings. For that reason the Court will be allowing the application.

14. In doing so the Court is alive to a complaint by Adan that this suit is without proper authority of the Company and should have been commenced as a derivative action by any aggrieved member of the Company. That is a question that can be substantively addressed and resolved once raised. The solution is not a short circuit of the proceedings by one wing of the Directors of the Company.

15. Prayer 2 of the Notice of Motion dated 29<sup>th</sup> March 2016 is hereby allowed with costs to the Applicant.

**Dated, Delivered and Signed in open Court this 15<sup>th</sup> day of March, 2019.**

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**F. TUIYOTT**

**JUDGE**

In the presence of:

Oriri for Asuli for Defendant

Ogula h/b Wesonga for Plaintiff

Momanyi h/b Omwenga for Plaintiff

Nixon -Court Assistant