



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL CASE NO.E004 OF 2020

AHMED AHMED MOHAMED.....PLAINTIFF/APPLICANT

-VERSUS-

1. MOHAMED KASSAM MOHAMED

2. ABDULGANI AHMED NURMOHAMED ISSAK

3. YUSSUF AHMED NURMOHAMED

4. SIDDIK AHMED NURMOHAMED

5. ABDULATIF AHMED NURMOHAMED

6. ISSAK A.N ISSAK.....DEFENDANT/RESPONDENTS

-AND-

COAST CALCIUM LTD.....INTERESTED PARTY/RESPONDENT

RULING

1. This Ruling is in respect of the application by way of **Notice of Motion** dated **30th September, 2020** and filed contemporaneously with the **Plaint** on even date. The Plaintiff/Applicant in the said Ruling seeks the following orders:-

1. Spent;

2. The Honourable Court do order that the Plaintiff's/Applicant's shares and position as member and shareholder/director be immediately reinstated by the Registrar of Companies following the outcomes of the police investigation and as adopted and recommended by the office of the Attorney General.

3. This Honourable Court be pleased to issue a freeze and search order, following the Plaintiff to enter upon the premises of the Company, the Interested Party's properties, residential homes and places of business of the Defendants, their agents, and/or proxies and any other place where the Interested Party's records are kept, hidden and/or stored, for the purpose of obtaining books of accounts, financial statement and any other information of shareholding, membership and accounts relating to the Interested Party and/or any other place where records of the Interested Party are stored, hidden and/or kept by the Defendants.

4. That pending the hearing and determination of this application, the Honourable Court be pleased to issue a temporary injunction restraining the defendants jointly and severally whether by themselves, their employees, agents servants, relatives, proxies, nominees and associates from denying or in any way obstructing the Plaintiff's/Applicant's access to the Interested Party's premises, businesses, accounts and employees.

5. That pending the hearing and determination of this application, the Honourable Court be pleased to issue a temporary injunction restraining the Defendants jointly and severally whether by themselves, their employees, agents, servants, relatives, proxies, nominees and associates from selling, transferring, charging, mortgaging, pledging or dealing with the properties and assets of the Interested Party Company in anyway and in whatsoever manner.

6. That pending the hearing and determination of this suit, the Honourable Court be pleased to issue a temporary injunction restraining the Defendants jointly and severally whether by themselves, their employees, agents, servants, relatives, proxies,

nominees and associates from selling, charging, mortgaging, pledging or dealing with the properties and assets of the Interested Party Company in anyway and in whatsoever manner.

7. Pending the hearing and determination of this suit, the Honourable Court do issue an injunction restraining the Defendants jointly and severally from transacting upon all the accounts held by the Interested Party Company and specifically with Diamond Trust Bank account No.0344048002 and ECO Bank account No.6586000870, or with any other bank account held by the Interested Party and the Honourable Court do order further that all such bank accounts be frozen forthwith and be operated only with the Plaintiff as a mandatory co-signatory with one of the Defendants herein nominated by the Defendants.

8. Pending the hearing and determination of this application, the Honourable Court do issue a temporary injunction restraining the Defendants jointly and severally from transacting upon all the accounts held by the Interested Party Company and specifically with Diamond Trust Bank account No.0344048002 and ECO Bank account No.6586000870, or with any other bank account held by the Interested Party and the Honourable Court do order further that all such bank accounts be frozen forthwith and be operated only with the Plaintiff as a mandatory co-signatory with one of the Defendants herein nominated by the Defendants.

9. The Honourable Court do issue a temporary injunction restraining the Defendants from utilizing, drawing, paying, or in any other way dealing with finds deposited in any bank accounts or any other money payment platforms held by the Company and their private bank accounts on account of the Interested Party/Company without the express authorization of the Plaintiff/Applicant herein pending the hearing and determination of this application.

10. The Honourable Court do issue a temporary injunction restraining the Defendants from utilizing, drawing, paying, or in any other way dealing with finds deposited in any bank accounts or any other money payment platforms held by the Company and their private bank accounts on account of the Interested Party/Company without the express authorization of the Plaintiff/Applicant herein pending the hearing and determination of this suit.

11. The Honourable Court do issue a temporary injunction restraining the Defendants by themselves, their employees, agents, servants, relatives, proxies, nominees and associates from receiving any cash payments on account of operations of the Interested Party and further directed to all the Defendants that all monies received from the customers including from cash sales be deposited into a bank account operated by two signatories one being the Plaintiff and the other being nominated by the Defendants pending the hearing and determination of this application.

12. The Honourable Court do issue a temporary injunction restraining the Defendants by themselves, their employees, agents, servants, relatives, proxies, nominees and associates from receiving any cash payments on account of operations of the Interested Party and further directed to all the Defendants that all monies received from the customers including from cash sales be deposited into a bank account operated by two signatories one being the Plaintiff and the other being nominated by the Defendants pending the hearing and determination of this suit.

13. The Honourable Court do issue a temporary injunction prohibiting the Defendants jointly and severally from holding, hoarding, warehousing, transferring, wiring, transporting, depositing any money paid to and belonging to the Interested Party Company to any bank account to which the Plaintiff is not a signatory pending the hearing and determination of this application.

14. The Honourable Court do issue a temporary injunction prohibiting the Defendants jointly and severally from holding, hoarding, warehousing, transferring, wiring, transporting, depositing any money paid to and belonging to the Interested Party Company to any bank account to which the Plaintiff is not a signatory pending the hearing and determination of this suit.

15. The Honourable Court do order that upon terms of reference to be set out by the Honourable Court, a reputable audit firm to be agreed upon by the parties be appointed to undertake a forensic audit of all facets of the Interested Party's financial state, finances and dealings from 2008 and 2020 and to report and file its findings in court. And further that if such an audit firm is not agreed upon by the parties, the court do appoint an audit firm to carry a forensic audit of the Interested Party herein for the past 13 years and file the same with the court and that the Board of Directors do implement the findings forthwith.

16. The Honourable Court be pleased to issue a permanent injunction Stopping, restraining and prohibiting the Defendants by themselves, their employees, agents, servants, relatives, proxies, nominees and associates from paying themselves, receiving, drawing any monies however described whatever called whether be it dividend, loans, allowances, advances or any other monies from the Company to the exclusion of the express consent of the Plaintiff/Applicant.

17. Pending the hearing and determination of the suit herein, the Honourable Court be pleased to issue a temporary injunction prohibiting, stopping and restraining the Defendants from selling,

transferring, charging, mortgaging, pledging, exchanging and/or disposing off and dealing in anyway whatsoever the shares they hold, subscribe to and own in the Interested Party Company

18. Pending the hearing and determination of the application herein,

the Honourable Court be pleased to issue a temporary injunction prohibiting, stopping and restraining the Defendants from selling, transferring, charging, mortgaging, pledging, exchanging and/or disposing off and dealing in anyway whatsoever the shares they hold, subscribe to and own in the Interested Party Company.

19. The Defendants by themselves, their employees, agents, servants, relatives, proxies, nominees and associates be restrained from managing, running, overseeing or transacting daily business operations of the Company to the exclusion of the Plaintiff/ Applicant herein.

20. The Court be pleased to give such further orders and/or directions that it deems fit, necessary, equitable, fair and just in light of the circumstances of the case.

21. The cost of this application be paid by the Defendants.

2. The application is founded on the 16 grounds on its face and the **affidavit** of **Ahmed Mohamed**, the Plaintiff/Applicant sworn on **30th September, 2020**. In his affidavit in support of the application, the Applicant stated that he is a member/director of the interested party Company but his shares were fraudulently transferred by a forgery of his signatures. He deponed that he together with the 2nd Defendant incorporated the interested party company in the **year 2007** and he participated in the active management of the said Company until the **year 2008** when the Defendants approached him for allotment of shares. He annexed an extract of minutes of a meeting held on **10th January, 2008** and return of the allotments together with the receipts paid to support his claim.

3. Further, **Mr. Ahmed** deponed that after the allotment of shares in the **year 2008** to date, the Defendants took up the active management of the Defendant Company. He avers that he believed that the Defendants would comply with their fiduciary duties in his favour until sometimes in **January, 2020** when officers from the office of DCI who were investigating whether stamp duty had been paid for transfer of his shares to the 1st Defendant approached him. Soon thereafter, he contacted the 5th Defendant who was in active management of the Company. According to the Plaintiff, the 5th Defendant/Respondent was apologetic and promised that the shares would be reverted once the 1st Defendant returned from India.

4. The Plaintiff/Applicant avers that when the 1st Defendant returned from India, he (1st Defendant) promised the Applicant that the shares would be returned within a period of 3 months but the 1st Defendant ended up renegeing on his promise. As a result, bad blood developed and the Defendants ended up declaring the Plaintiff/Applicant persona non grata and prohibited his access to the company to the extent that whenever a gateman allowed the Plaintiff into the Company, he (the watchman) suffered the consequence of being dismissed from work.

5. He further deponed that he launched a complaint with the police and reported the fraudulent transfer of the shares to the police whereby he was issued with **OB No.40/7/4/2020**. Later, the investigations by the police found that the transfer of the shares had been effected by a forgery of the Plaintiff's signatures and a Forensic Document Examiner's Report thereby issued.

6. The Applicant stated that the Defendants have been unable to offer any explanations for the fraudulent transfer of his share and according to him it is only this court which can change that course. He expressed his grievances in that for the last **13 years** he has not been involved in any active management of the company and neither has he been invited to any of the Board of Directors meetings nor have the Defendants sent him any financial statements.

7. He avers that the Defendants have resorted to operating the interested party company as a family affair to his exclusion thereby breaching the fiduciary duties as Directors. Due to that continued breach, the Plaintiff/Applicant avers that he has been sidelined and has not been paid any dividends or involved in sharing of profits for the last **13 years**. He also points out that the Defendants, in acts of bad faith, have directed the proceeds for sale to their personal bank accounts, and more specifically deposits made to the 5th Defendant's account held at **Diamond Trust Bank, Mombasa Branch**.

8. The Applicant also deponed that the whole situation has been exacerbated by the fact that the Defendants are brothers holding about 85% of the shares thereby dictating the decisions to be made.

9. The Plaintiff then filed submissions on **16th November, 2020** and reiterated that he had brought the suit to recover his shares, his position as a shareholder and the dividends he has not received for a long time. He is aggrieved that if the present position is allowed to continue, then he will be robbed of his investment and property which he has in the meantime been prevented from.

10. The Plaintiff's Counsel, **Mr. Cohen** submitted that the Plaintiff has met the threshold for grant of an injunction as set in the highly celebrated case of **Geilla –vs- Cassman Brown & Company Ltd [1973] EA 358**. In that case, it was stated that for a grant of an injunction to issue, the Applicant must first establish that there is a *prima-facie* case. In doing so, the Plaintiff relied on the case of **Mrao Ltd –vs- First American Bank of Kenya & 2 others [2003] KLR 125** to canvas the argument that a *prima facie* case is established where an applicant has demonstrated the existence of a right which has apparently been infringed by the opposing party so as to call for an explanation.

11. In that regard, it is submitted that the Plaintiff established a *prima-facie* case through the Forensic report by the DCI which has clearly shown that the Plaintiff's signature in the purported allotment was forged. Further that the Attorney General has initiated the process of reinstating the Plaintiff in the company's register as a shareholder. It is argued that the two public institutions have vindicated the plaintiff hence reiterating that the plaintiff has established a *prima facie* case.

12. Secondly, the Plaintiff/Applicant must show that he stands to suffer irreparable harm. On this, it was submitted that the Defendants have been running the affairs of the interested party company and since the fraudulent transfer of shares, the Plaintiff established that the Defendants engage in cash sales and the proceeds are not accounted for or documented, leave alone the fact that the Defendants have denied him access to the company. It is further submitted that although the losses likely to be suffered by the Plaintiff can be addressed by way of an award of damages, it will be a small scale of his losses that does not address in entirety the harm he is bound to suffer.

13. Lastly, in event of doubt, then the court should decide the case on a balance of convenience. Here, the Plaintiff has submitted that the defendants have shown the willingness to dispose of the Plaintiff's property and if an injunction is not issued, then the Plaintiff will never be able to make accurate sense of the value of property in the Defendants' hands. The Plaintiff avers that the Defendants will have nothing to lose in return and if the injunctive orders are issued, the operations of the Company will not stall as alleged.

2ND DEFENDANT'S/RESPONDENT'S CASE

14. The Defendants opposed this application. In opposing the same, the 2nd Defendant filed a **Replying Affidavit** on **17th November, 2020** and sworn by himself on even date. He deponed that he holds **150 ordinary shares** in the interested party company and that sometimes in the year **2008**, he had assumed the position of a Director after the Plaintiff had relinquished the same. He later passed the directorship to the 1st Defendant and then to the 5th Defendant who is currently the director of the said Company.

15. He further deponed that it is true that the company was incorporated in **2007** with the Plaintiff and 1st defendant as the initial shareholders with each holding one (1) share. That in the year **2014**, the Plaintiff transferred his shares to the 1st Defendant at a consideration of **Kshs.8,000,000/=**. And since it was a transfer of shares by two shareholders inter se, then the other shareholders could not object.

16. It has been submitted on behalf of the 2nd Respondent that the material presented by the Plaintiff are contradictory especially the police abstract with regard to number of shares he was holding in the Company.

17. The 2nd Respondent's Counsel further maintained that it cannot be explained why the plaintiff has waited for 12 years then seek to be reinstated as director. In any event, it is the interested party company which can appoint directors but not the defendants. The counsel added that the Plaintiff was not appreciating that the Defendants and the interested party have a different legal personality.

5TH DEFENDANT/RESPONDENTS CASE

18. The 5th Defendant also opposed the application on the basis of the **Replying Affidavit** and **Supplementary Affidavit** filed on **13th October, 2020** and **20th November, 2020** respectively. They were both sworn by **Abdulatif Ahmed Nurmohamed**, the 5th Defendant herein on **12th October, 2020** and **20th November, 2020** Respectively.

19. His case is that he has been running the operations of the interested party as a Director on a full time basis after the Plaintiff voluntarily offered to cease from being a Director and a Shareholder. Minutes for a special meeting held on **24th October, 2014** which oversaw the transfer were annexed as "**AHN**".

20. He added that for the last **12 years**, the Plaintiff ceased from being a member of the Interested Party Company and had all along not been involved in the operations of the company which had been running smoothly until **6th October, 2020** when he re-appeared with a Court Order. He avers that the Plaintiff then began to interfere with the running of the company by firstly purporting to sack the security officers of the company and then demanded that he be given the keys and locks of the company. Further, he demanded that the company be opened at 8.00am and closed on 4.00pm.

21. He deposited that the allegations and the claim by the plaintiff are false because the Plaintiff personally signed the transfer forms. According to him, in different meetings held by the Company, the Plaintiff has continuously changed his signature on the documents presented to him to sign. That besides those documents, the deponent avers that even the Plaintiff's signature in his national identity card is different. (The documents as well as a copy of the national identity card were annexed to the aforesaid affidavit).

22. The deponent further stated that Plaintiff has never been a signatory of the Company and his request to that extend is tantamount to changing the mandates of the signatories without a resolution by the directors. He reiterates that there have been no claims of fraud or malpractices save for the allegations now being made. He is also of the view, that forgery is a criminal offence but no charges have been preferred against anyone yet.

23. Lastly, he laments that the nature of the prayers sought in the application are similar to the ones in the plaint and if allowed the court will be condemning the parties unheard.

24. In his **Supplementary Affidavit**, he first informs the court that the 1st defendant informed him that the plaintiff had signed the transfer

forms in his (1st Defendant) presence and the presence of **Mr. Were G.T. Sirioyi**, Advocate. He then instructed his advocate to engage the services of a Forensic Document Examiner to compare the signature of the Plaintiff and all the documents supplied by the Plaintiff were consequently forwarded to **Mr. Emmanuel Karisa Kenga**.

25. It is deponed that after subjecting the documents to forensic examination, **Mr. Kenga** arrived at a conclusion that there were similarities on the signatures indicating that they are from a common origin and from the same author. He then compiled a forensic report dated **22nd October, 2020**.

26. For purposes of record, **Mr. Abdulatif** informed the court that the **Firm of Magolo Advocates** would represent all the Defendants save for the 2nd Defendant.

27. Accordingly, **Mr. Magolo** filed submissions on behalf of the 1st, 3rd, 4th, 5th & 6th Defendants on **10th November, 2020**. The learned counsel in his submissions, which he subsequently highlighted before the court pointed out that it was not in dispute that as at now the Plaintiff is not a shareholder of the interested party and that has been the position since 2014 when he rightfully transferred his shares. And although the Plaintiff alleges that there was forgery, the learned counsel submitted that the report which forms the basis of his assertions is not conclusive and its authenticity has to be established after hearing the author.

28. The learned counsel further submitted that the Plaintiff has failed to establish a case deserving the issuance of injunctive orders leave alone the fact that the application seeks the same orders as those sought in the Plaintiff and even more. He argues that if the orders are granted then they will have the effect of concluding the matter at an interlocutory stage.

29. It is **Mr. Magolo's** submission that the Plaintiff has not placed any evidence to show that the signatures were forged and the report he has produced has been countered by another expert report with a completely opposite opinion. The counsel is of the view that the Plaintiff has not established a *prima facie* case and his application should fail.

30. Secondly, the learned counsel submits that the Plaintiff has not explained what injury he would suffer and whether he has invested any money in the interested party's company. And if so, he has not said how much. As such it cannot be said that he cannot be compensated by an award of damages.

31. Thirdly, the Counsel submitted that if the orders were to be granted, they would adversely affect the company by freezing its accounts and changing its signatories. In short, the Counsel's argument point to the conclusion that the orders would ground all the operations of the Company hence the application should be disallowed.

Analysis and Determination

32. I have considered the parties pleadings, evidence and their respective submissions, both oral and written as well as the law and authorities relied on. In my view, I find that the pertinent issue for determination being whether the Plaintiff has made a case for grant of injunctive orders sought pending the determination of the main suit.

33. The grant of injunctive orders is governed by the now well established principles initially well laid down in the case of **Giella vs Casman Brown & Co. Ltd [1973] 358**. Those principles settling the law have remained that; a plaintiff seeking to get and be granted a temporary injunction must establish a *prima facie case with a probability of success; must establish that he/she stands to suffer a loss that would be irreparable by an award of damages if the injunction be refused; and where the court is in doubt, it balances the convenience between the parties*.

34. In a later decision by the Court of Appeal in **Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2019] eKLR**, the law was laid that the three prerequisite principles must be proved in a sequential manner underscoring the fact that the foundation of grant of temporary injunction is a *prima facie* case with probabilities of success.

35. In the instant case, it is worth noting that the Applicant has not disputed the fact that he has not been participating in the active operation of the interested party company for the last **12 years** and he has been prompted into seeking to be reinstated as Director after realizing that his share had been fraudulently transferred. The alleged transfer of the shares is alleged to have happened sometimes in the **year 2014**. The Plaintiff does not deny that from then, he has not been a member of the company. In fact, at some point he has deponed that he forwarded the forensic report prepared by the DCI to the Attorney General so that his name could be restored as member and director of the interested party company.

36. At this point, and in my view, I must hasten to state that an order for interlocutory injunction is targeted at preserving the prevailing state of affairs between parties, by a party in the suit being directed to do or refrain from doing something so that the *status quo* is maintained pending the hearing and determination of the suit.

37. In this case, the Plaintiff seeks to be reinstated as a Director, signatory and an active member of the interested party company. However, it has not been shown that he was in that position shortly prior to the filing of the suit and the instant application. In other words, that was not the existing state of affairs which should be maintained pending the determination of the suit. If I were to direct as such, then it would amount to making definite findings at this stage, particularly where the court is required to make a determination on the nature and extent of the Plaintiff's shareholding. Which are matters that should be well ventilated at a full hearing.

38. The Plaintiff supports all his allegations on basis of the Report by the DCI which found that the Plaintiff's signatures were forged hence the allegation that the transfer of the shares was fraudulent. Needless to say at this stage, this court is independent of the Director of Criminal

Investigation and not bound by its direction. Legally, the said report is an opinion of an expert witness and the same is not binding on the court but should be considered by it together with other relevant facts in reaching a final decision. It is therefore my humble view that the said report cannot form the basis of granting the injunctive orders sought by the Plaintiff. Nonetheless, if the Plaintiff/Applicant's allegations are true and he is successful in his claim in the suit, he remains a minority shareholder in the Company. In any case his remedy would be in respect of the shares of the Company and not the property or running of the affairs of the Company. The latter are matters to be decided through a company resolution. However, the lesser I say at this stage, the better.

39. Furthermore, from the material before me, it is clear that the Company is a going concern and has financial obligations which if not properly managed, may lead to its collapse. The court has also not been shown proof of any other properties owned by the interested party Company that have been transferred to third parties or to either of the Defendants/Respondents. It is therefore my finding that the allegations are only but based on mere speculation. The same conclusion is reached with regard to the monies held by the company in its bank accounts. Although the 5th Defendant is alleged to have received some money on his personal account, it has not been shown that the same was not accounted for.

40. Having said that much, I am of the humble view that the Plaintiff/Applicant has not satisfied the first limb to warrant him being granted the orders for injunction.

41. Also, the injunction sought is declined as the Company would be irreparably damaged to the detriment of all the parties, especially there being no evidence that the Plaintiff/Applicant may be in a position to recompense the Company in the event it succeeds in the suit.

42. In the upshot, the **Notice of Motion** application dated **30th September 2020** is without merit and the same is hereby dismissed. Costs of the application shall be in cause of the suit.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 25TH DAY OF MARCH, 2021.

D. O. CHEPKWONY

JUDGE

25/3/2021