



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 450 OF 1999

MOHAMED ELTAFF.....1ST PLAINTIFF

SAGA SAFARI LIMITED.....2ND PLAINTIFF

SAGA TRAVEL AND SAFARIS A.B.....3RD PLAINTIFF

TUOR AFRICA SAFARIS LIMITED.....4TH PLAINTIFF

-VERSUS-

DREAMCAMP KENYA LIMITED.....DEFENDANT

RULING

1. This matter has been a subject of litigation in court for over 20 years. In a nutshell the Judgment herein was delivered by the late Hon Justice Mulwa Kasanga J, on 28th July 2000, whereby the Defendant was ordered to sell its 10% shareholding to the existing shareholders of the Company at a fair market value. However the Judgment did not set “the effective date of valuation”. Subsequently, the same was determined by Hon Justice Mabeya J, where he held that the effective date was “the date of valuation”. Being aggrieved with that decision, the Defendant filed an Appeal; in the Court of Appeal and the Court of Appeal held that; the effective date to fix the fair market value is the “date of Judgment” being 28th July 2000.”

2. The matter was then handled by Hon Justice Kimaru J, on how to conduct the valuation of the shares and he delivered the ruling thereon on 12th June 2009. The Defendant subsequently sought from the court directions on how to conduct the valuation and the same was given on 30th July 2018, whereby the court literally reiterated the orders issued by Hon Justice Kimaru. The parties were ordered to comply accordingly. Defendant complied and filed a valuation report.

3. The Plaintiff did not comply with the court orders and instead filed an application seeking inter alia that the orders given be stayed pending the hearing of the application and the court reviews the said orders to enlarge time for compliances thereof by a further sixty (60) days or such period as the court deems fit in the circumstances. The Plaintiff sought that the Defendant be directed to provide the 1st Plaintiff with all documents the Arbitrator shall require to conduct the valuation of the subject shares and grant the necessary access to the premises for the Arbitrator to gather information and data necessary for the valuation. The costs of the application be in the cause.

4. The application was heard whereby the court granted the 1st Plaintiff fourteen (14) days from the date of the order within which to comply with the order earlier given, failure of which, the court would rely on the valuation report filed by the Defendant to make the final orders. It was further ordered that in the meantime, the Defendant should accord the 1st Plaintiff cooperation in compliance to facilitate the valuation and the report thereof.

5. Upon filing of the respective valuation reports, it became apparent that the reports were at variance, hence the need to cross examine the makers thereof. The cross examination was conducted on 28th November 2018. Mr. Koimbuni for the Defendant produced a valuation report dated 4th September 2018 and informed the court that he relied on the audited accounts and the interview with senior managers of the company to prepare his report. He averred that the audited accounts are the principal source of data he relied on. The same relates to the period 20th July 2010. He argued that the audited accounts are reliable in that they are approved by the shareholders and are usually used to declare dividends. In cross examination he conceded that, the auditing of accounts of a company is usually conducted by the external auditors. He also stated that, the report captures payment of the lease agreement.

6. The Plaintiff's witness Mr. Idris Khalid testified that, he required additional information to the audited accounts to prepare the valuation. That he wrote to the Defendant requesting for the same, but he was not given. According to him the audited accounts do not provide sufficient information as they deal inter alia, with lumped up figures, gross and/or consolidated figures of debtors, payments are not explained, historical costs and do not reflect the current and the future value of the assets. The company's fixed assets register would be required to give details of the assets. During cross examination he conceded that, he is known to the 1st Plaintiff as their wives are sisters. Further that, he is aware judgment was delivered 18 years ago and that company's accounting documents are usually required to be retained for seven years save for where there is an allegation of fraud. He denied the suggestion that he was attempting to re-audit the accounts which had been audited by the shareholders and the tax compliance agency.

7. The parties subsequently filed skeleton submissions. The Plaintiff filed submissions dated 30th March 2018 and submitted that following the orders given on 19th November 2018, that the parties appointed valuers to appear before the court on 28th November 2018. The valuers appeared accordingly. However the court should consider the demeanor of the valuers in giving further directions on this matter. He further submitted that the 1st Plaintiff had indicated the 19th November 2018, that it was willing to consent to an order for a court appointed valuer to value the shares of the company; but the Defendant, through its Advocates objected to and thereby further delaying these proceedings;

8. The Plaintiff invited the court to consider issued by the Honourable Justice Kimaru on 12th June 2009 this on 26th July 2018 and confine itself to them. That in the light of the orders of 26th July 2018, the only issue that requires further directions is; what information is necessary/pertinent in carrying out valuation of the shares of a private company such as the Defendant's company; and whether Audited accounts of the company are sufficient for this purposes.

9. It was submitted that although the 1st Plaintiff, is a shareholder, he has been totally excluded from the affairs of the Company from inception and hence has no documents nor information relating to the affairs of the company and for purposes of valuing his shares. He relied entirely on information provided by the Company. Further the Defendant has all along been aware that the issue of valuation of the company shares has been pending and for this reason, it cannot be heard to say that due to the delay in settling the case, they cannot provide/furnish relevant information related to the valuation. That it was incumbent upon the Defendant to preserve all the information considering it has been their contention that any such valuation must be determined at the time of judgment which indeed was their basis of the appeal to the Court of Appeal.

10. The Plaintiff observed that Mr. Koimbuni testified that he relied only on the audited reports of the company for the period 1999-2001 to arrive at the valuation. During cross examination he testified that this was the only information availed to him. He further testified that the value of the lease for the property where the company stands, which is the only valuable asset of the company, was not disclosed in the audited accounts. Thus a valuation done in the absence of such crucial and critical information is completely erroneous as the main asset of the company is the long term lease of the land where, Dream Camp Kenya Limited, where the subject matter of the suit stands. The court also must be alive to the fact that Mr. Koimbuni was evasive in his answers and overly technical with a view to obfuscating the issues for determination. To the contrary, Mr. Khalid whose demeanor was honest and open testified clearly and in a simple way. He explained clearly to the court why he sought the information detailed in his letter dated 24th October 2018, attached to his affidavit sworn on 23rd November 2018. He explicitly stated that the information contained in the audited report is insufficient for valuation of the company's shares and highlighted the reasons why. Therefore Mr. Khalid testimony is credible and logical.

11. The Plaintiff relied on an Article on "Legal issues and case laws on valuation" by Sharad D. Abhyankar, Solicitor and Mehul J. Shah, Advocates, which makes reference to several decisions. That as held in the case of; Commissioner of Wealth Tax vs Mahadeo Jalan & Others quoted in the Article on page 64, the 'Yield Method' of valuation of shares of a private company is the generally applicable method. In adopting the 'Yield Method' of valuation, factors and information which is not contained in the audited accounts of a company, such as the dividend yield of a public company in the same industry, must be taken into account.

12. The Plaintiffs submitted that the court should take into account that the audited accounts only contain historical financial information of the company without any further details and are insufficient for purposes of valuation of the shares of the subject company for purposes of valuation herein.

13. However the Defendant submitted that the documents purportedly sought for by the 1st Plaintiff are irrelevant and/or unnecessary as all the relevant information has been captured in the audited Financial Statements for the period prepared by Ernest & Young which is one of the world's top-ranked Accounting firms and the share valuation has been carried out by Mr. Koimburi in accordance with international accounting standards and best practice. That Mr. Idris Khalid and/or his firm ought to be disqualified from performing any valuation since he is neither impartial nor independent due to the manifest conflict of interest on his part arising from his relationship with the 1st Plaintiff. Further the 1st Plaintiff has no right to require the Honourable court to exercise its jurisdiction in his favour having termed these proceedings "illegal" and by demonstrating bad faith in seeking to derail these proceedings and prevent the final conclusion by continuing to employ delaying tactics, prevarication and obfuscation as he has consistently done ever since the judgment of the High court was delivered on 28th July 2000. The 1st Plaintiff has not taken the share valuation process as ordered by the Honourable court seriously and has questioned the power of the Honourable court to order the same.

14. The Defendant submitted that; Mr. Owen Koimburi is a highly qualified, experienced and well respected Certified Public Accountant being amongst other things a fellow of the Institute of Certified Public Accountants. He gave clear concise and consistent expert testimony presenting the findings of his valuation report dated 4th September 2018 and justifying why the audited accounts are a sufficient basis for valuing a company's shares. He had a commanding knowledge of the methodology of the valuation. The quality and content of his share valuation report speaks for itself. No specific objection has been raised at any time by the 1st Plaintiff in respect to any aspect of the same.

15. The Defendant reiterated that, the Arbitrator Mr. Idris Khalid appointed by the 1st Plaintiff on the other hand, is the 1st Plaintiff's childhood friend and brother in law and his unlikely to be independent and impartial in conducting the share valuation. The request for irrelevant documents in his letter dated 24th October 2018 validates the Defendant's apprehensions and concerns. His testimony was self-

servicing, vague, contradictory and lacking basis in fact and law, as well as being inconsistent with standard international accounting practice. The Defendant has no confidence in him to duly carry out a share valuation in this matter.

16. It was further submitted that Mr. Khalid has approached this exercise more as an investigation or special audit rather than a valuer. He must rely on the audited Financial Statements of the Defendant in valuing the share as they contain all the information required. He approached this entire exercise as an adversarial exercise rather than an objective and professional one, no doubt due to his relationship with the 1st Plaintiff.

17. It was submitted that during cross examination, Mr. Idris Khalid conceded to the relationship referred to and that the fact that he and/or his firm are currently the Auditors of companies in which the 1st Plaintiff is currently a director and are his important clients. That Mr. Idris Khalid has no grounds to doubt the audited financial statements of the Defendant company and is not claiming that they are deficient. Neither did he contact Mr. Koimburi to sit as a panel of Arbitrators and try to reach a consensus on the matter nor read Mr. Koimburi's valuation.

18. Having considered the arguments by the parties and the submissions and in particular the reports filed by their respective appointed experts, I find that the court is unable to ascertain the value of the shareholding as herein required. The report by Mr. Koimburi, the managing partner, in the accounting firm of Mazars dated 4th September 2018, concluded that based on the calculations. The indicative fair value of Basecamp Masai Mara Limited as at 28th July 2000 be by the net asset value be enterprise value; Kshs. 34,759,556 and value per share Kshs 173,798.

19. To the contrary, Mr. Khalid an auditor practicing as such in the firm of; Khalid & Company did not give any indicative value on the ground that, the documents requested for in a mail dated 24th October 2018 and which are necessary to confirm incompleteness and accuracy of the accounts they will be relying upon for the purpose of carrying out the valuation exercise.

20. In view of the above, and in the absence of any report from the 1st Plaintiff, the court resorts to the orders given by Hon. Justice Kimaru , on 12th June 2009, Hon. Justice Mabeya on 30th July 2011 and the directions given by this court whereby the parties were required to:

a) Each Party shall nominate an Auditor;

b) The two shall constitute a panel of Auditor to determine the fair market value of the 1st Defendant shareholding;

c) Each party shall pay their respective Auditor;

d) If there is no agreement each party to propose a name of the umpire to be appointed by the Court to determine the points of disagreement. Timelines were given for compliance. (emphasis added)

21. It follows from the above facts that condition numbers (a), (b) and (c) have been complied with, but condition (d) has not been complied with. In that regard, I order that each party shall within seven (7) days of the date of this order propose a name of an umpire to reconcile their varying positions. The court shall then rule on the matter. On the other hand, to expedite this matter, I order that in view of the fact that the parties have already failed to agree despite being accorded an opportunity to avail their respective reports, the court shall treat the opportunity given as part of compliance with condition (d) and proceed to order for appointment of an independent valuer.

22. Similarly, I note that, the Plaintiff appointed a person who is related to him to prepare a valuation report and as much as he may be impartial and/or independent in his assessment, by virtue of the relationship admitted to exist between him and the 1st Plaintiff. The assessment report as he may not be deemed to have been independent. In view of the time this matter has taken in court, I order that the parties consider the appointment of an independent valuer.

23. In the meantime, an apology is offered to the parties for the delay in delivery of the ruling based purely on the work load the court was experiencing. There will be no orders to costs at this stage until the final orders are made.

24. Those then are the orders of the court.

Dated delivered and signed in an open court this 29th day of August, 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Amin for the Defendant/Applicant

Mr. Muchiri holding brief for Mr. Katiku for the 1st Plaintiff/Respondent

Dennis -----Court Assistant