



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 623 OF 2004

ABDI RAZAK KHALFAN (Suing on behalf of.....1ST PLAINTIFF

The International Air Transport – IATA)

MERCANTILE LIFE AND GENERAL.....2ND PLAINTIFF

ASSURANCE COMPANY LIMITED

-VERSUS –

PINNACLE TOURS & TRAVEL LIMITED.....1ST DEFENDANT

SUSAN WAMAE.....2ND DEFENDANT

RULING

1. The application before me was brought by **EDWARD ANTHONY NJOROGE, ZEPHANIA MBUGUA** and **PEGGY WANGARI KINNA**.
2. The 3 applicants were, at the material time, directors of **PINNACLE TOURS & TRAVEL LIMITED**, which is the 1ST Defendant.
3. The applicants have asked the court to strike out the application dated 24th January 2006, in its entirety, in as far as it seeks orders against the applicants jointly and severally.
4. It is common ground that on 15th January 2005 the court entered judgement in favour of the plaintiffs, against both the defendants.
5. It is further common ground that by an application dated 24th January 2006, the plaintiffs sought to cross-examine the Directors of the 1ST Defendant.
6. According to the applicants, on 19th September 2011, the Deputy Registrar presided over proceedings when **ZEPHANIA MBUGUA** was cross-examined.
7. The applicants' position is that **ZEPHANIA MBUGUA** answered all the questions asked of him, and he also presented the Company's audit report.

8. The applicants' further position was that on 13th October 2016, the plaintiffs' advocate informed the Court that he had completed the cross-examination of **ZEPHANIA MBUGUA**.

9. As the cross-examination of Mbugua failed to establish any fraudulent actions on the part of the 1st defendant or that the said defendant had unlawfully dealt with its assets, the applicants submitted that an attempt to have them cross-examined would constitute an abuse of the court process.

10. The applicants view was that the tracing of the assets of the 1st defendant, through the process of the cross-examination of the company's directors, was spent.

11. It was the applicants' opinion that any attempt to carry out further cross-examination of the directors would be an act of intimidation of the directors, in the hope that the directors would then have to personally pay the debts of the company.

12. As the company directors were, in law, not personally liable for the debts of the company, they submitted that it would be contrary to the law to intimidate them into paying the company's debts.

13. It was in those circumstances that the applicants asked the court to strike out the plaintiffs' application.

14. In answer to the application, the plaintiffs first pointed out that the cross-examination of Zephania Mbugua had not been completed. He was stood down due to a shortage of time.

15. Thereafter, the parties consented to marking the cross-examination as completed, but that that was conditional upon the production of the company's remaining Directors, for cross-examination.

16. In the light of the disagreement over the facts, the court has perused the record of proceedings on 13th October 2016. It shows that Mr. Khayota advocate held brief for Mr. Gichuhi, the advocate for the plaintiffs. Mr. Khayota is recorded as saying;

“We have finished cross-examination of directors and I am informed by my senior, Mr. Allen, that he is through with cross-examination of Mr. Zephania Mbugua & wishes to cross-examine the rest of the directors?.

17. In answer, Mr. Gachuhi the advocate for the directors said;

“If the cross-examination is completed as stated, I will pray for 2 weeks to take further instructions on the same on 27/10/2016?.

18. As the proposed date was convenient to both the court and to the plaintiffs' advocates, the court adjourned the case to 27th October 2016, when it was expected that further Directors would be given.

19. When the matter was next in court, the plaintiffs reiterated their desire to cross-examine the other directors.

20. Then on 5th December 2016, Hon. Wattimah, Deputy Registrar, directed that the case be listed on 17th January 2017, when the directors would be cross-examined.

21. However, the directors were opposed to the said cross-examination, and they filed the present application which is dated 11th January 2017.

22. In determining this application, I note that the applicants have not said that the court had only ordered that one of the directors be cross-examined. The applicants view was that because the cross-examination of Zephania Mbugua had not yielded any evidence that could incriminate the directors in the misappropriation of company funds, there would be no need to cross-examine any of the other directors.

23. In any event, the directors insist that as they had already made available to the court and to the plaintiffs, the audit report, there would be no basis for their further cross-examination.

24. To my mind, the directors are inviting the court to have a second look at an issue which had already been adjudicated upon by a Judge of concurrent jurisdiction.

25. On 14th October 2009 Kimaru J. delivered a Ruling in which he resolved;

“...the dispute between the 1st Defendant and the plaintiffs in regard to the interpretation to be given to provisions of Order XXI Rule 36 of the Civil Procedure Rules, especially in regard to the purpose of requiring the attendance of directors of a company in court, to be cross-examined?.

26. The learned Judge formed the view that the non-executive directors were unwilling to attend court, to be cross-examined. Their view was that the documents which they were offering to supply to the plaintiffs were sufficient to establish the state of the company’s financial affairs.

27. However, the Judge expressed the following view on that aspect;

“I think, with the greatest respect to the 1st defendant, that the requirement that directors of a company attend court for the purpose of being cross-examined on the assets of the company is not predicated upon whether or not such company had prepared documents which allegedly established its inability to settle the decree. The purpose of such cross-examination of such directors of a company is to determine whether the assets of the company were misapplied by the said directors with a view to defrauding its creditors.

Such information cannot be obtained or gleaned from documents prepared by the company.

Of necessity, the directors of the company will be required to offer an explanation to the satisfaction of the court that the dealings of the company, during the relevant period were above board.

I therefore find no merit with the claim by the 1st defendant that the Deputy Registrar erred when he ordered the directors of the 1st defendant to attend court to be cross-examined for the purposes of determining the whereabouts of the assets of the 1st defendant company?.

28. In conclusion, the learned Judge said that;

“The 2nd defendant, just like the other directors shall attend court for the purpose of being cross-examined on the assets of the 1st defendant company to satisfy the decree herein issued in favour of the plaintiffs?.

29. Nothing could be any clearer than that; the court ordered that the 2nd defendant, (*who had earlier been exempted from cross-examination*), shall attend court, just like the other directors.

30. When the plaintiffs expressed the will to cross-examine the other directors, they are simply asking that they be allowed to do the very thing which Kimaru J. had directed should happen.

31. It is to be noted from the Ruling of Kimaru J. that it is the court to determine whether or not the directors had offered an explanation to the satisfaction of the court, concerning the question as to whether or not the dealings of the company had been above board.

32. It is not for the company or the directors to assess for themselves, as to whether or not the explanation offered by either, one of them or by all the directors, was satisfactory.

33. Following the order by Kimaru J., all the directors of the company were obliged to attend court for cross-examination. If any director was dissatisfied with the order in issue, he or she could have either sought review or gone on an appeal.

34. This court's jurisdiction is concurrent to that of my learned brother, Kimaru J. Therefore, I do not have jurisdiction to review or set aside his order.

35. In any event, the application dated 24th January 2016 has already been determined on merit. It cannot therefore be struck out.

36. In the event, there is no merit in the application dated 11th January 2017. It is therefore dismissed, with costs to the plaintiffs.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of September 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

A. Gichuhi for the 1st Plaintiff

A. Gichuhi for the 2nd Plaintiff

Kiptum for Gachuhi for the 1st Defendant

Kiptum for Gachuhi for the 2nd Defendant

Collins Odhiambo – Court clerk.