



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 624 OF 2012

DAVID KABUBII KURIA.....APPLICANT

- VERSUS -

BRYAN ERIC LTD.....1ST RESPONDENT

TAFI ENTERPRISES LTD.....2ND RESPONDENT

MELDE VALE HOLDINGS LTD.....3RD RESPONDENT

SIMON KIMUTAI.....4TH RESPONDENT

INVESCO ASSURANCE COMPANY LTD.....5TH RESPONDENT

RULING

The plaintiff's application dated 26th September 2012 seeks the following 2 substantive orders;

“2. THAT the Respondents be restrained from locking the Applicant out of the company premises and/or denying the Applicant's free access to the company's premises and/or interfering with the Applicant's performance of his duties as a Director of Invesco Assurance Company Limited pending the hearing and determination of this application and of the suit herein.

3. THAT this Honourable court be pleased to grant a restraining order against the Respondents from presenting a Notification of Change of Directors to the Registrar of Companies purporting to remove the Applicant from the membership of the Board of Invesco Assurance Company Limited pending the hearing and determination of this application and the suit herein”.

2. It is the plaintiff's case that on 25th May 2012 the Board of Directors of **INVESCO ASSURANCE COMPANY LIMITED** (hereinafter **“INVESCO”**) removed him as a director of Invesco. However, the plaintiff deems such removal as unlawful because it was only the shareholders of the company who had powers to remove a director, pursuant to a resolution.

3. The plaintiff's position is that in the Articles of Association of Invesco, there was no provision which mandated directors to remove any director from the Board of directors.

4. In his considered view, the removal was malicious, and it was only meant to harass and intimidate the plaintiff. The harassment and intimidation was said to be in the form of depriving the applicant of the monthly director's allowance of Kshs. 400,000/- which he had been using to repay the loan of Kshs. 10,000,000/- which he had borrowed from Diamond Trust Bank Limited.
5. The plaintiff had borrowed that sum on behalf of the company. It was for that reason that he, and some other directors, were being given the monthly Director's allowance, to help them repay their respective loans.
6. It would therefore appear that the plaintiff has a legitimate complaint, as he would have to continue repaying the loan from his own resources, whilst the loan was for the benefit of the company.
7. But then again, there does not appear to be any express term of the contract between the parties which bars the removal of the plaintiff as a director when the loan was still outstanding. Therefore, the very fact that the plaintiff has an extra burden by virtue of the stoppage of the monthly director's allowances, may not be sufficient basis for the reliefs sought by the plaintiff.
8. The main issue is the manner of the removal.
9. The plaintiff insists that if he had to be removed as a director, it is only the shareholders who had the mandate to do so.
10. That reasoning is founded upon section 185 of the Companies Act, which reads as follows;

“A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him...”
11. If a director is to be removed pursuant to that section, there is a requirement that a special notice be given of any resolution to remove a director or to appoint another person to replace the director who had been removed.
12. The purpose of the notice is to give the director an opportunity to be heard on the issue of his intended removal.
13. The question that then arises is whether or not the provisions of section 185 are mandatory or permissive.
14. It is the understanding of the plaintiff that in the case of ***RE: K BOAT SERVICE, WINDING UP CAUSE No 35 of 1997***, the court held that the removal of a director must be done in accordance with section 185 of the Companies Act.
15. On the other hand, the company says that there was no legal requirement that a director can only be removed in terms of that statutory provision.
16. As that is the substantive issue to be determined at the trial, I have cautioned myself against making a definitive finding on it at this interlocutory stage.
17. Nonetheless, it is necessary to set out herein the words which the plaintiff relied upon to support his case. Those words were quoted with approval, by Kuloba J. in the case of ***RE: K BOAT SERVICE (above)***;

“...neither the members nor the board of directors of a company have an inherent power to remove directors before the normal expiration of their period of office in the absence of a power to do so in the articles”.

18. I understand that pronouncement to mean that the power to remove a director is not derived from the statute. It is to be derived from the articles of association.
19. Indeed, Kuloba J. was saying that shareholders and directors do not have an inherent power to remove a director from office before his term expires, unless the power for removal is derived from the articles of association.
20. As the plaintiff's case was that his removal was not in accordance with section 185 of the Companies Act, yet that section and the authority cited by the plaintiff appear to suggest that the power for the removal of a director is derived from the articles of association, it does appear that the plaintiff has not made out a *prima facie* case with a probability of success.
21. Secondly, it does appear that the action which the plaintiff was trying to stop had already been concluded.
22. He had been removed as a director. Thereafter, he was never given notices to inform him when the board of directors would be meeting.
23. Furthermore, his allowances had been stopped.
24. And, finally, the Registrar of Companies had been notified, through the Annual Returns, that the plaintiff was no longer a director of the company.
25. In these circumstances, the only way that the plaintiff could be returned to the board of directors would be through mandatory injunctions compelling the company to take appropriate actions.
26. The plaintiff has not sought any mandatory injunctions. He has only sought interlocutory injunctions to restrain the respondents from doing various things.
27. It appears to me, on a *prima facie* basis, that the plaintiff's said case does not have a probability of success.
28. I also find that the losses which the plaintiff may suffer due to his removal as a director are quantifiable, and thus capable of being compensated by an appropriate award of damages.
29. In the final analysis, therefore, the application is unsuccessful. It is thus dismissed with costs to the respondents.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of January 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Owang for Macharia for the Applicant

Miss Kimani for Kanjama for the 1st Respondent

Miss Kimani for Kanjama for the 2nd Respondent

Miss Kimani for Kanjama for the 3rd Respondent

Miss Kimani for Kanjama for the 4th Respondent

Miss Kimani for Kanjama for the 5th Respondent

Collins Odhiambo – Court clerk.