



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI-MILIMANI
COMMERCIAL DIVISION
CIVIL SUIT NO. 257 OF 2013 (OS)

SAFINA PROPERTIES LIMITED.....1ST PLAINTIFF

JOHN BM MUYA.....2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

AND

ELKANA MUKUNDI GATIMU.....INTERPLEADER APPLICANT

RULING

An Allegory: “Cut the Baby in Two”

[1] **ELKANA MUKUNDI GATIMU** filed an application intituled as SUMMONS dated 24th September 2013, and which is expressed to be brought under Order 50 Rule 1, Order 34 Rule 1 & 2 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3B & 91 of the Civil Procedure Act and all other enabling provisions of the Law. **ELKANA MUKUNDI GATIMU** is described in the application as Interpleader/Applicant. The application is seeking for the following Orders:-

- 1) *A stay of any further proceedings herein pending the hearing and determination of the application inter partes;***
- 2) *A declaration that there is no lawful authority vide a Board of Directors Resolution filed by the Plaintiff, Safina Properties Limited authorizing Messrs. Andrew Ombwayo & Company Advocates to institute and prosecute this suit and their acts and omissions are hereby deemed unlawful.***
- 3) *Costs of the Interpleader (application) and of the Originating Summons be borne by the co-director of the Plaintiff company known as John Bosco Makumi Muya and/or the firm of Andrew Ombwayo & Company Advocates.***

The application is supported by the Supporting Affidavit of Elkannah Mukundi who is co- director of the Plaintiff and is opposed through a Replying Affidavit of John BM Muya dated 16th July 2014.

[2] On 17th July 2014, the Court directed that the application dated 24th September, 2013 as well as the Notice of preliminary objection filed by the 1st and 2nd Plaintiffs shall be heard together. Parties were also ordered to file submissions on the application dated 24th September 2013. I shall refer to the Applicant as interpleader. Looking at the kind of arguments coming through from counsels, this case presents quite difficult circumstances, and, therefore, I will deal with all the issues raised together in order to attain the justice the case demands.

The Interpleader says he is true Interpleader and saviour of the company

[3] The Interpleader stated that he is one of the two directors of the 1st Plaintiff Company, Safina Properties Limited, whose Articles of Association provides for a quorum of two directors to make decisions on behalf of the said company. As such director of the Plaintiff Company, he has a duty to ensure that the company does not suffer losses or incur liabilities at the hands of strangers who have no legal mandate to institute or commence proceedings on behalf of the company. The Interpleader stated that, the Board of Directors of the Plaintiff has never authorized M/s Andrew Ombwayo & co. Advocates to represent it in the company's proceedings. He further contended that the High Court in *Nbi Hccc No. 611 of 2004* in a judgment delivered on 29th January 2013, directed the Registrar of Companies to call a meeting to appoint directors. Directors have not been appointed yet in the manner directed hence there cannot be any authority that was given to the firm of M/S Andrew Ombwayo Advocates to file or pursue these proceedings on behalf of the 1st Plaintiff. And in the absence of such board resolution by the directors of the Plaintiff, no instructions can be issued to purported agents to execute the decree herein. Again, no undertaking has been issued by the 2nd Plaintiff to safeguard and to protect the interests and assets of the 1st Plaintiff Company. The Interpleader's contention is that this suit was allegedly filed by the Plaintiff, and is mischievous and unlawful and merely meant to intimidate the Defendant and open the company to the risk of liability.

[4] The Interpleader averred that he has no interest in the subject matter in dispute save to protect the 1st Plaintiff Company from unnecessary liabilities in the hands of unauthorized agents. The Interpleader asserted that as a director of the Plaintiff Company he did not at any time attend any board meeting to pass any resolution to authorize the Plaintiff to file the present suit against the Defendant. Similarly, it is not permissible that the co- director John B M Muya as a single director could pass a resolution on behalf of the 1st Plaintiff authorizing the filing of the present suit against the Defendant. In the circumstances Mr. John B. M. Muya has no Authority to institute this suit as the Articles of Association of the Plaintiff Company provide for quorum of two to three directors to make decisions on behalf of the Company. The actions of the co- director John B. M Muya are therefore unlawful and can only be interpreted as an attempt to subject the 1st Plaintiff Company to losses and exposing the 1st Plaintiff Company to unnecessary risks and liabilities based on fraudulent actions.

[5] The Interpleader argued further that the meeting held on 6th July 2012 appointing the firm of M/S Andrew Ombwayo Advocates to institute proceedings was signed by one Rosalind Wanjiru Kunyiha who is neither a shareholder nor a director of the Plaintiff. The gist of the suit filed in the High Court of Kenya being *Hccc No. 611 of 2004* was to determine the Shareholding and Directorship of the Plaintiff Company between the Interpleader and another shareholder by the name Kenyua Ngunjiri against the said Mr. John B.M Muya and Rosalind Wanjiiru Kunyiha. The suit was determined by a judgment delivered by the Honourable Justice Kimondo on the 29th January 2013 who reaffirmed that Rosalind Wanjiru Kunyiha was neither a director nor a shareholder of the Plaintiff Company. In the said judgment the court also held that all the Resolutions made affecting the constitution of board, shareholding of the company or bank

account mandates were null and void and further, that all returns made and documents and declarations filed in the register of the company by the registrar of Companies pursuant to meeting held on 25th May 2004 and any subsequent meetings were cancelled. Further to the foregoing an order was also issued that the Registrar of companies shall cause to be convened a meeting of all the shareholders of the Plaintiff Company for the purpose of appointing new directors of the company and to transact any other business which has not yet be complied with up to date. Thus, the resolution authorizing the filing of this suit is null and void hence all the proceedings herein are a nullity ab initio.

[6] The Interpleader submitted further that, the property known as NAIROBI/BLOCK 32/911 in dispute in this matter is also the subject matter of litigation in Milimani Cmcc No. 12398 of 2004 which was filed by one James Mwaura Muya (who is a brother to the 2nd Plaintiff herein - John B M. Muya) and one George Kariuki Mwangi against the 1st Plaintiff Company. The said property is also the subject of litigation in Milimani Cmcc No. 7901 of 2004 which was filed by the same brother to the 2nd Plaintiff namely James Mwaura Muya against the Interpleader, Kenyua Ngunjiri who is a shareholder of the Plaintiff Company and other co-defendants. The co-director of the 1st Plaintiff Company namely John B.M. Muya (the 2nd Plaintiff) in both these matters has supported the Plaintiffs in the above cases which suits have been lodged against the 1st Plaintiff Company instead of defending the suits and protecting the interests of the Company.

[7] On the basis of the above disclosed facts, the Interpleader believes he rightfully and properly moved this Honourable Court as an Interpleader and as a co- director of the Plaintiff Company to bring the true facts of this matter to the attention of this Honourable Court to ensure that the company does not suffer losses and incur unnecessary liabilities in the event its assets are illegally disposed of by the 2nd Plaintiff. The Interpleader also responded to the 1st Plaintiff's preliminary objection dated 16th July 2014 to the current application alleging. The objection is that the Interpleader does not qualify to be an Interpleader. The Interpleader insists that he has no interest in the subject matter save to ensure that the law is followed and upheld by staying the proceedings until such a time when the a meeting will be convened and proper resolutions passed to enable the 1st Plaintiff transact its business. He cited Order 34 Rule 1 and 2 of the Civil Procedure Rules on what an Interpleader must satisfy to the court that:-

“...he claims no interest in the subject matter in dispute other than for charges or costs, that there is no collusion between the Applicant and any of the claimant and that the he is willing to pay or transfer the subject matter into court or to dispose of it as the court may direct. ”

Accordingly, he says that he qualifies as an Interpleader and in the interests of justice and for the preservation of the subject matter, the Preliminary Objection by the Plaintiffs should be dismissed and instead the orders sought in the Application dated 24th September 2013 should be granted.

Plaintiffs: ‘Interpleader’ acting maliciously and is not an Interpleader in the sense of law

[8] The Plaintiffs filed Replying Affidavit sworn by John BM Muya on 16th July 2014 and a Notice of Preliminary Objection dated 16th July 2014. They stated that the 1st plaintiff is the registered owner of property known as NAIROBI/ BLOCK 32/ 911 which it charged to the defendant vides a Charge dated 9th June 1994 (and registered on 1st July 1994) for a loan of Kshs.910, 000/= advanced to its subsidiary, SAFINA LIMITED. In addition, further charges to secure additional amounts from the defendant were subsequently registered, the last of which was done on the 10th November 1995. The debtor, SAFINA LIMITED, eventually paid a total of Kshs. 13, 000, 000/= then outstanding, which was forwarded to the defendant on or about the 16th May 2001 as a result of which the defendant became obligated to surrender to the 1st plaintiff the title deed of the property above together with a duly executed discharge of charge deed. The defendant, however, neglected to surrender both documents despite various demands. The

Defendant, however, decried, in its letter dated 19th April 2012, the delay in processing the surrender of the title deed and discharge of charge deed to the 1st plaintiff. But, owing to the defendant's continued refusal to release the documents from the year 2001 when the duty to do so accrued, the then directors of the 1st plaintiff, John BM Muya and RW Kunyiha, on 6th July 2012, resolved, through a Board of Directors' Resolution (Ref. Annexure JBMM 1 to plaintiffs' Amended Originating Summons, that M/s Andrew Ombwayo & Company Advocates institute legal proceedings against the defendant bank to compel them to surrender the company's title document, which was done by filing these proceedings vide an Originating Summons dated 15th January 2013, and later amended vide an Amended Originating Summons dated 15th August 2013. The date of the Board of Directors' resolution is important since, in a suit, NBI HCCC NO. 611 OF 2004 in which judgment was rendered on the 29th January 2013, way after the resolution to commence this suit had been made, the Court nullified the directorship of M/s RW Kunyiha, leaving the two directors of the 1st plaintiff company to be the 2nd plaintiff herein, John BM Muya, and the purported interpleader, Elkanah Mukundi Gatimu. However, it is material that the Resolution that gave rise to this suit was made by two directors acting in their fiduciary role to safeguard the interest of their company by reclaiming from the defendant the company's title document.

[9] The 2nd plaintiff's co-director, Elkanah Mukundi Gatimu, who had failed to attend a meeting organized by the Registrar of Companies on the **11th October 2013**, has frustrated the revamping of the company as is evident from the Registrar of Company's Report dated 6th November 2013 (**Ref. Annexure JBMM 1 TO Replying Affidavit supra**). The Interpleader has now and then not been acting in the best interest of the 1st plaintiff company. This application is yet another gimmick to frustrate these proceedings especially noting that it is seeking for orders for:

1. Stay of any further proceedings herein;
2. A declaration that there is no lawful authority vide a Board of Director's Resolution by the plaintiff, Safina Properties Limited, authorizing M/s Andrew Ombwayo & Co. Advocates to institute and prosecute this suit, and their acts and omissions are hereby deemed unlawful;
3. Costs of the interpleader and the Originating Summons to be borne by the co-director of the plaintiff company, John Bosco Makumi Muya and or the firm of Andrew Ombwayo & Co. Advocates.

[10] The 1st and 2nd plaintiffs submitted in support of the **Preliminary Objection dated 16th July 2014** that; a) the summons/ application and the prayers sought therein are untenable in law and cannot be granted to an interpleader or even a purported interpleader; b) based on the evidence on record, Mr Elkanah Mukundi Gatimu does not qualify as an interpleader and therefore lacks the locus *standi* to act or purport to act as such in these proceedings, or to lodge an interpleader application; and c) on the face of the summons/ application, the orders sought betray the fact that the purported interpleader has an interest in the suit and the subject matter of the same and is otherwise incompetent. Accordingly, they urged the court to find that the application lacks merit. They gave their reasons. First, **section 58 Civil procedure Act Cap 21** defines an interpleader as a person having a debt, sum of money or other property which two or more parties have competing claims over; in this case, Mr Elkanah Gatimu has no property he is holding in which the plaintiffs and the defendant have a competing interest over and he therefore does not qualify as an interpleader. These proceedings are seeking to recover from the defendant title document to property known as NAIROBI/ BLOCK 32/ 911 which the Defendant is holding illegally. Section 58 *supra*, provides thus:

58. Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants, or where a suit dealing with the same subject-matter is pending may intervene by motion on notice in such suit, for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself:...

Second, Mr Gatimu does not have such debt; money or property, there is no willingness or readiness to surrender such debt, money or property, which is an hallmark of an interpleader. Third, because of the two reasons above, Mr Gatimu cannot intervene in a manner to have this Court determine the real owner to whom he may then pay or surrender to such debt, money or property. Fourth, for all three reasons above, Mr Gatimu cannot be an interpleader, and his application cannot qualify as an interpleader application. Fifth, the Mr Gatimu has similarly failed to satisfy the Court of the following under **Order 34 Rule 2(a-c) Civil Procedure Rules 2010:**

“(a) That the applicant claims no interest in the subject matter in dispute other than for charges or costs;

(b) That there is no collusion between the applicant and any of the claimants;

(c) That the applicant is willing to pay or transfer the subject matter into court or to dispose of it as the court may direct.”

Sixth, the best the Interpleader can be is an interested party, and even if the applicant were an interpleader, which he is not, his application would still lack merit for reasons that; the 1st plaintiff’s Board of Directors’ Resolution dated 6th July 2012 (Ref. Annexure JBMM 1 to plaintiffs’ Amended Originating Summons *supra* at pages 7 and 8 thereof), existed and had been made by the then bona fide directors of the company. It was a valid document executed by the Chairman of the Board of Directors, the 2nd plaintiff herein, jointly with the Secretary of the company, Lantern Associates. The Resolution appointed M/s Andrew Ombwayo & Co. Advocates to institute these proceedings, which instructions were communicated and acted upon by the Advocates. Accordingly, the Advocates filed this suit on instructions and cannot be penalized for costs as sought. The judgment dated 29th January 2013 in **NBI HCCC NO. 611 OF 2004** was made and delivered after the Board Resolution had been made, and was thereafter acted upon. It would, therefore, be draconian to strike out this suit on the basis that there was no lawful Board of Directors’ resolution as sought in prayer 2 of the application. In addition, striking out the suit would also be unjustified since the co-director, John BM Muya, has also been enjoined to these proceedings, and he is similarly entitled, in his fiduciary capacity, to protect the interest of the company, and especially its assets. Striking out the suit would be tantamount to ignoring his claim in these proceedings, without being heard, on the basis of an application made by a vengeful co-director, and which would only adversely affect the company. It is noted that the Summons by the Interpleader has not made out any case against the 2nd plaintiff despite being filed after the 2nd plaintiff had been enjoined in these proceedings.

Seventh, the facts opposing the application as set out in the plaintiffs’ replying affidavit are uncontroverted by the applicant and hold sway.

[11] On the basis of the foregoing, the Plaintiffs urged the Court to dismiss the ‘Interpleader’s’ Summons dated 24th September 2013 with costs calculated on a higher scale pursuant to paragraphs 50 and 50A Advocates Remuneration Order. The plaintiffs further pray that this Honourable Court enters judgment in their favour as regards the Amended Originating Summons dated 15th August 2013 pursuant to the plaintiffs’ submissions dated 25th April 2014.

For the sake of concluding this matter, M/s Andrew Ombwayo & Co. Advocates undertook to safely hold the 1st Plaintiff's title document in the interest of all directors or shareholders of the company if the Court allows the Amended Originating Summons, pending any resolution of the dispute in the 1st Plaintiff Company. In the alternative, the title document may be deposited in court for safekeeping pending resolution of such dispute. This concession is, however, made without prejudice to the entire claim by the plaintiffs against the defendant, for which judgment has been sought.

DETERMINATION

Is the interpleader true interpleader?

[12] Section 58 Civil procedure Act Cap 21 defines interpleader as follows:

“ ***Interpleader***

58. Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants, or where a suit dealing with the same subject-matter is pending may intervene by motion on notice in such suit, for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself:...”

Order 34 Rule 2(a-c) Civil Procedure Rules 2010 is founded on the above section and lays out the characteristics of an interpleader. Interpleader is, therefore, a person who holds a debt, sum of money or other property, movable or immovable, to which two or more persons lay claims adverse to one another, but does not himself claim any interest therein except for charges or costs appurtenant to the property so held. The Interpleader should also be ready and willing to pay or deliver the property so held. A good example is a vehicle held in a garage after repairs but whose ownership is being claimed by two or more persons. The vehicle repairer is an Interpleader and in such case he should file interpleader proceedings against all persons making such claims adversely to one another. His will be seeking reliefs of the nature that the court to determine the rightful owner of the vehicle to who the vehicle shall be released; and for his costs or charges on the repairs on the vehicle. He should not have or lay any proprietary claim on the vehicle. Applying this test, is the Interpleader herein a true Interpleader in the sense of the law?

[13] Although the Interpleader is claiming to be the protector and saviour of the 1st Plaintiff Company from exposure to liability by strangers, he does not claim to have any debt, sum of money or property, moveable or immovable, to which the Plaintiffs, between themselves or with other persons, are laying claims adversely to one another and which he has no interest. In all senses of the law, the Interpleader herein is not a true interpleader in law. I agree with the Plaintiffs that the best the Interpleader herein can become is an interested person in these proceedings. But the matters raised would need to be decided upon in a conclusive manner because they are serious and are affecting the Company. Therefore, I will treat the Interpleader as an interested party in these proceedings and pronounce myself on the issues raised with finality. Henceforth, I will refer the Interpleader as the interested party.

Substantive issues

[14] The Plaintiffs have described the Interested party as “*a vengeful person*”; *a malicious person who is likened to; cutting one's nose in order to spite the face; or woman in Christian story of King Solomon...where an alleged mother of a baby in a maternity dispute made a request that the baby be cut in two and a piece be given to each of the two women in the dispute.* These depictions of the interested party are based on the following set of facts. According to the

Plaintiffs; this case is to compel the Defendant to surrender to the Company the title document to property known as NAIROBI/ BLOCK 32/ 911 which the Defendant is holding illegally. Invariably, they claim that the suit is for the benefit of the Company. The suit was instituted by a resolution of directors of the Company at the time, and before the judgment in NBI HCCC NO 611 OF 2004 had been concluded. On the other hand, the application by the interested party will only dim or completely obliterate the chances of the Company to receiving its title documents from the Defendant. Contrary to the averments by the interested party, the action would be prejudicial to the Company and its assets. As if that is not enough, the interested party refused to attend the meeting of the Registrar of Companies of the appointment of new directors of the Company as directed by the Court.

[15] The interested party has depicted himself as the protector and saviour of the 1st Plaintiff Company from exposure to liability by strangers. He is also self-acclaimed preserver of the assets of the Company. His mission is to stop these proceedings which he says were initiated without the authority of the company as required in the company's Memo and Articles of Association. Again he stated that the alleged resolution was annulled by the decision of the court in NBI HCCC NO 611 OF 2004. He has made other useful disclosures that the suit property is subject of other suits being Milimani CMCC NO 7901 OF 2004 and Milimani CMCC NO 12398 OF 2004 which he says were instituted by one James Mwaura Muya, the brother of the 2nd Plaintiff herein. He sees mischief on the part of the 2nd Plaintiff because the 2nd Plaintiff supported his brother's cause of action against company in the two cases in the subordinate court instead of vice versa.

[16] Bad time comes. You can see a company being run down by the unending squabbles of directors, despite the fact that the Court has pronounced itself in NBI HCCC NO 611 OF 2004 and directed the Registrar of Companies to convene a meeting to, inter alia, appoint new directors of the Company. This directive by the court carries and places the solution herein at the horizon. Yet the solution is too far and elusive to the company which in law is a legal person separate from the feuding directors. This wonderful innovation of law on corporations does not seem to stir any awakening and consciousness upon the feuding parties to realize they must act in the best interest of the Company. Instead, they engage in accusations upon accusations regardless of what will happen to the company. I am not surprised the living word of the scripture has been used to describe this sad situation, and often, for those who believe, in the face of the living word of scripture, real light is not far. I think this matter requires real Solomonic Wisdom to discern the truth in this matter from the inspiration from the biblical story below;

“The woman whose son was alive was filled with compassion for her son and said to the king, “Please, my lord, give her the living baby! Don’t kill him!” But the other said, “Neither I nor you shall have him. Cut him in two!”

[17] The circumstances of this case are very difficult. But certain things are clear. This suit was filed before the judgment in NBI HCCC NO 611 OF 2004. From the few documents provided to the court, it is discernible that the interested party refused to attend the meeting called by the Registrar of Companies to appoint new directors. He also refused to submit audited reports of the Company. And there seems to be a notice to show-cause why execution should not issue against the interested party. I do not have the advantage of the entire proceedings in NBI HCCC NO 611 OF 2004. But from the material before me these facts are irreconcilable with the claim by the interested that he is the protector of the Company and preserver of its assets. Asking these proceedings to be stayed yet he does not act *bona fides* to ensure new directors are appointed to proceed with the case is a comedy of extravagant humour. I agree with the submissions of the Plaintiffs that the present application is not made in the best interest of the Company but for selfish ego or other reason of the interested party. The Companies Act gives the court and the Registrar of Companies power to intervene where a company is being run contrary to the law or for any exceptional circumstances. There is an order for the Registrar to convene a meeting of shareholders and directors to appoint new directors of the company. There are reasonable grounds to suppose that the conduct of the directors herein is oppressive- and probably fraudulent to the company, and contrary to the law. There is no doubt there is absolute need to recover the title

documents from the Defendant and the interested party does not seem to care about that need. In such situations, a derivative suit would be in order to enforce right of the company against the Defendant. This suit would perfectly fit the bill and on appropriate application, leave of the court would not be difficult to grant to the director or shareholder of the company to continue with the suit as a derivative suit. In light of what clearly seems to be illegal maneuvers by the existing directors and which will give a kiss of death to the company unless appropriate action is taken, I do not think staying these proceedings or issue any order on the application by the interested party would be the answer. The correct path is to first dismiss the application by the interested party which I hereby do. Then, as the interested party proclaims to be the protector of the company, I order the interested party to be joined in the suit. I also direct that file No NBI HCCC NO 611 OF 2004, Milimani CMCC NO 7901 OF 2004 and Milimani CMCC NO 12398 OF 2004 be placed before me on a date I shall fix. With full information and better elucidation of the respective status in each case, the Court will be in a better position to give further directions on the hearing of the main motion herein. The Deputy Registrar to ensure the respective registries comply with this order. It is so ordered.

Dated, signed and delivered in court at Nairobi this 26th day of February 2015

F. GIKONYO

JUDGE