



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NUMBER 454 OF 2004**

**BELGO HOLDINGS LIMITED.....PLAINTIFF**

**V E R S U S**

**ROBERT KOTCH OTACHI ..... FIRST DEFENDANT**

**WILSON BIRIR..... SECOND DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff came to this Court by way of the Plaint dated **12<sup>th</sup> August, 2004** and filed on even date. The Plaintiff sought for judgment against the Defendants jointly and severally for:-
  - a. **An injunction restraining the First and Second Defendants and each one of them from claiming to be Directors of the Plaintiff or otherwise purporting to act on behalf of the Plaintiff or instructing any advocate to act on behalf of the Plaintiff or in any other manner claiming to have any authority to act for the Plaintiff.**
  - b. **A declaration that neither of the Defendants is or has ever been a Director of the Plaintiff.**
  - c. **Damages.**
  - d. **Costs of this suit.**
2. In response to the Plaintiff's claim, the Defendants filed their Defence dated 21<sup>st</sup> September, 2004 on even date, denying the Plaintiff's claim.

**THE PLAINTIFF'S CASE**

3. The Plaintiff's case was that the Defendants are not and have never been directors of the Plaintiff Company. The Plaintiff averred that the Defendants had contended to have been so appointed by claiming that they were shown as such in a Company Form Number 201 A dated 4<sup>th</sup> August 1995 filed with the Registrar of Companies by the then Secretaries of the Plaintiff on 7<sup>th</sup> August 1995. The Plaintiff's assertion was that the said form, after it was so filed, had been altered or forged by the First and or the Second Defendants by adding their names thereto so as to show that they had

- been appointed as Directors of the Plaintiff with effect from 5<sup>th</sup> June 1995.
4. The Plaintiff further averred that in the alternative, if the Defendants were appointed as Directors of the Plaintiff by virtue of their names being in that document, then the appointment was void and of no effect. The Plaintiff also averred that in the further alternative if the Defendants were appointed as Directors of the Plaintiff Company in the manner and on the date aforesaid (which is also denied) then in accordance with the Plaintiff's Articles of Association, they ceased to be such Directors on or about 5<sup>th</sup> July 1995.
  5. It was also the Plaintiff's assertion that by a Special Resolution passed unanimously by all the shareholders of the Plaintiff on 10<sup>th</sup> May 2004, the Articles of Association of the Plaintiff were amended whereby all the powers of the Directors of the Plaintiff were bestowed solely on one A. A. K. Esmail whose re-appointment as a Director of the Plaintiff was confirmed by the same Special Resolution. A copy of the said resolution was duly filed with the Registrar of Companies on 13<sup>th</sup> May 2004. It was therefore the Plaintiff's case that the Defendants herein ceased to have any powers as purported Directors of the Plaintiff with effect from 10<sup>th</sup> May 2004 when the said Special Resolution was passed altering the Articles of Association of the Plaintiff.
  6. It is the Plaintiff's contention that the First and or Second Defendants have since at least November 2003 purported to act as Directors of the Plaintiff and have instructed one K. Getanda practicing as Getanda & Company to purport to act on behalf of the Plaintiff, *inter alia*, in HCCC 507 of 2003 (O.S) and HCCC 244 of 2004. It is further the Plaintiff's contention that the Defendants now intend to commence further legal proceedings purportedly on behalf of the Plaintiff without any authority to do so.
  7. The Plaintiff is apprehensive that unless restrained by this Court, the Defendants and each one of them will purport to act for the Plaintiff without any authority to do so, hence the present suit.

#### **THE DEFENDANTS' CASE**

8. In their Defence dated 21<sup>st</sup> September, 2004 and filed on even date, the Defendants denied the Plaintiff's claim and maintained that they were still directors of the Plaintiff Company. They stated that they were directors of the Plaintiff Company by virtue of their appointment through a resolution and notification of change of Directors dated 4/8/1995 and filed at the companies registry on 7/8/1995 by Samvir Registrars.
9. It was the Defendants' assertion that the purported resolution of 10/5/2004 did not give A. A. K. Esmail powers of directorship over the Plaintiff Company as the same did not comply with the clear provisions of the Companies Act.

#### **THE HEARING**

10. The hearing of the suit commenced on 7<sup>th</sup> June, 2010 and was concluded on 20<sup>th</sup> February, 2015. It was part-heard before the Honourable Justice Njagi. The Plaintiff's witness gave his testimony, was cross-examined and re-examined before the said Judge. The Defendant's witness testified before this Court.
11. The Plaintiff called one witness, **AKBER ABDULLAHI KASSAM ESMAIL** while the 1<sup>st</sup> Defendant, **ROBERT KOTCH OTACHI** testified on his own behalf and that of the 2<sup>nd</sup> Defendant.
12. The evidence given by both parties were extensive and the Court will substantially consider the same in this judgment.

#### **THE WRITTEN SUBMISSIONS**

13. The Defendants filed their written submissions dated **16<sup>th</sup> March, 2015** on **18<sup>th</sup> March, 2015** while the Plaintiff filed its submissions dated **17<sup>th</sup> April, 2015** on even date. The Defendants filed a reply to the Plaintiff's submissions on **23<sup>rd</sup> April, 2015**. Counsel for both parties highlighted the submissions before the Court on 31<sup>st</sup> July, 2015.

## **ISSUES FOR DETERMINATION AND ANALYSIS**

14. The Plaintiff submitted that the issues for trial were settled by Honourable Koome J. (as she then was) on **2<sup>nd</sup> November, 2009** when the said Court decided that it would decide the suit on issues framed by the Plaintiff. It was further submitted by the Plaintiff that when the trial started before Njagi J. and the Defendants attempted to go beyond the framed issues, the Court ruled on **12<sup>th</sup> March, 2012** that directions given by Koome J. were to be observed to the letter.
15. The Defendants in their submissions also addressed the issues as drawn and filed by the Plaintiff and decreed by the Honourable Court to be the issues for trial. Having perused the said issues as framed by the Plaintiff and the pleadings herein, it is evident that the dispute before the Court is one of directorship. Therefore in deciding the matter herein, this Court will be guided by the prayers the Plaintiff sought for in its Plaint, the main one being the issue of directorship. In doing so, the Court will address the issues as framed by the Plaintiff.
16. Before delving into the main issues for determination, the Court will deal with some preliminary issues as raised by the Defendants in their submissions.
17. It was the Defendants' submission that without a resolution passed by the directors of the Plaintiff authorizing the filing of the present suit, the entire suit was a nullity. It was also their submission that there was no resolution produced by the Plaintiff appointing the Plaintiff's firm of Advocates on record to act and file the suit herein on its behalf.
18. From the pleadings herein and the documents on record, it is evident that no such authority was sought before the Plaintiff instituted the present suit. The Plaintiff's witness testified that the Plaintiff Company belonged to him and therefore he did not need any authority to institute the suit. He also testified that his fellow director had given him a go ahead to institute the suit. It was submitted for the Plaintiff that the acts and deeds of A.A. K Esmail had not been questioned by any director or shareholder since the suit was filed eleven years ago. Counsel further submitted that there was no need to pass or file in Court formal resolutions.
19. This Court is alive to the fact that pursuant to the provisions of **Order 9 Rule 2 (c) of the Civil Procedure Rules 2010**, a corporation is required to authorise any of its officer through its corporate seal, to represent it in court and/or execute any document to be used in pleadings. The Court also recognizes the persuasive High Court authorities as cited by the Defendants to the effect that companies ought to pass a resolution(s) to authorise the commencement of legal proceedings in its name. I do not intend to re-invent the wheel.
20. However, each and every case must be determined according to the circumstances. The issue of lack of a resolution from the Plaintiff in filing this suit should have been raised by the Defendants at the earliest opportunity being a **preliminary** issue. To this end, I find guidance in the passage under **Halsbury's Laws of England (4<sup>th</sup> Edition) Vol. 7 (1)** at paragraph 1011 on pages 737 and 738 as quoted by the Plaintiff. At the said paragraph it is stated thus:-

***“Control of company’s litigation.** As regards litigation by an incorporated company, as a rule the directors are the persons who have authority to act for the company; but, in the absence of any contract to the contrary in the articles of association, the majority of the members are entitled to decide, even to the extent of overruling the directors, whether an action in the company’s name should be begun or allowed to proceed. The secretary of a company cannot institute proceedings in its name in the absence of express authority to do so; but proceedings begun without proper authority may subsequently be ratified.*

***Any objection** that an action in the name of the company is not properly authorised should be raised at the outset by an application to have the name of the company struck out; if not so raised, it may be raised when it comes to the attention of the court or the defendant that this is the case. Where appropriate, the action may be adjourned so that the issue as to the initial authorization, or subsequent ratification, of the proceedings may be tried”.*

21. From the above passage, it is clear that the Defendants' argument that there was no resolution from the Plaintiff authorizing the institution of the present suit has been brought too late in the day. The parties and the Court herein have expended so much time in going through the hearing of this matter that it would be a waste of judicial time to go back to determining preliminary issues

- that have the effect of terminating the suit. In determining all matters presented before it, this Court is enjoined under **section 1B** of the **Civil Procedure Act** to ensure the efficient disposal of the business of the Court as well as the efficient use of the available judicial and administrative resources.
22. It is also very clear that both parties herein are interested in having the issue of directorship of the Plaintiff Company resolved. Having the current suit dismissed for want of a resolution from the Plaintiff will not serve such purposes neither will it serve the interest of justice in this matter. This Court is also minded of the overriding objective of the Civil Procedure Act under Section 1A which is to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes.
23. In light of the foregoing, and considering that the matter is now at the stage of rendering a Judgment, it is plain that the issue of whether or not there was a resolution by the Plaintiff to institute the present suit on its behalf cannot be entertained at this point.
24. The second issue raised by the Defendants that can be dealt with as a preliminary issue is the production of documents by the Plaintiff. It was the Defendants' contention that the materials used to cross-examine the 1<sup>st</sup> Defendant were not part of the pleadings and that they were not produced at all. Though the Defendants acknowledged that the said documents were in the Court record, it was their position that they were prejudicial to them because they had not been given an opportunity to cross-examine the Plaintiff's witness on the same. It was their case that they did not admit any of the said documents used during cross-examination.
25. On the other hand, it was the Plaintiff's submissions that in the course of cross-examining the 1<sup>st</sup> Defendant, a total of eight bundles of documents were put across to him. These documents were Bundles marked ONE to SEVEN respectively and Document marked as Plaintiff's Exhibit Number "F". The Plaintiff further submitted that the 1<sup>st</sup> Defendant had referred to the said documents in his evidence, and widely commented upon them. According to the Plaintiff, these documents were put to the 1<sup>st</sup> Defendant, and made subject of cross examination, with the consent of Defendants' advocate and assent of the Court as well as in accordance with provisions of the Evidence Act.
26. It was submitted for the Plaintiff that in order to give adequate notice to the Defendants of these documents, on 5<sup>th</sup> October 2012, the Plaintiff filed and served upon the Defendants' advocate "Plaintiff's additional list of documents".
27. The Defendants in their submissions did not specify which documents were not produced by the Plaintiff and which ones they did not admit to. At no point did the Court object to the documents produced by the Plaintiff during the 1<sup>st</sup> Defendant's cross-examination. The Defendant's Advocate also did not raise any objection during the cross-examination of the 1<sup>st</sup> Defendant when the documents in question were being produced or referred to. Besides, the Defendants have not demonstrated the prejudice such documents would occasion to their case. In case of any clarifications, Counsel for the Defendants had the opportunity to re-examine the defence witness.
28. I now turn to the substantive issues for determination in this matter. These are, as earlier stated the issues framed by the Plaintiff as follows:-

1. **Whether the Defendants were appointed as Directors of the Plaintiff with effect from 5<sup>th</sup> June 1995 by a resolution and Notification of Change of Directors dated 4<sup>th</sup> August 1995 and filed with the Registrar of Companies on 7<sup>th</sup> August 1995;**
2. **If answer to issue No. 1 is in the affirmative, was the purported appointment of Defendants as directors of Plaintiff void and of no effect;**
3. **If answer to issue No. 1 is in the affirmative did Defendants cease to be such Directors on or about 5<sup>th</sup> July 1995;**
4. **Was the Special Resolution of shareholders of Plaintiff passed on 10<sup>th</sup> May 2004: (i) Bestowing solely on AA K Esmail all powers of Directors of Plaintiff; and (ii) confirming said A A K Esmail's re-appointment as Director of Plaintiff.**
5. **Does the said special resolution fail to give A A K Esmail powers of directorship as it does not comply with provisions of the companies Act Chapter 486 Laws of Kenya;**
6. **If issues Nos. 1, 2 and 3 are in the negative then did Defendants or either of them cease to have any powers as Directors with effect from 10<sup>th</sup> May 2004;**

7. **Have Defendants or either of them since November 2003 purported to act as Directors of Plaintiff and instructed one K Getanda Advocate to act on behalf of Plaintiff;**
8. **Whether the Plaintiff is entitled to all or any of the prayers sought.**

29. I begin with issue (1) which is whether the Defendants were appointed as directors of the Plaintiff on **5<sup>th</sup> June, 1995**. The Defendants in their Defence filed on **21<sup>st</sup> September, 2004** stated that they were directors of the Plaintiff Company by virtue of their appointment through a resolution and notification of change of Directors dated 4/8/1995 and filed at the companies registry on 7/8/1995 by Samvir Registrars.

30. The Defendants submitted that in a letter dated 19<sup>th</sup> February, 2004 (page 83 of Plaintiff's Bundle B) the registrar confirmed them as Directors of the Plaintiff. They also submitted that, in a letter dated 8<sup>th</sup> September 2004, the Registrar confirmed them as Directors (page 88 of the said Bundle B). In its submissions the Defendant also noted that in a letter dated 3<sup>rd</sup> August, 2004 issued earlier than the aforesaid letters, the registrar had confirmed A.A K Esmail (PW 1) as a director of the Plaintiff. The Defendants submitted that in light of the contradictions from the registrar's office, the Court (Justice OKwengu, as she then was) had ruled that there was need to hear evidence and consider original records from the company's registry. Their contention was that the Plaintiff during the hearing neither produced the original records from the Registrar of Companies nor did they call a witness from the said office.

31. On the other hand, it is the Plaintiff's case that the Defendants have failed to produce the said resolution and notice of change of directors dated **4<sup>th</sup> August 1995 (Form 203A)**. According to the Plaintiff this is the document on which the Defendants' entire case rests.

32. In submitting that the Defendants are not and have never been Directors of the Plaintiff, the Plaintiff made reference to the two Notices to Admit documents dated 24<sup>th</sup> October 2007 and 27<sup>th</sup> November 2007. According to the Plaintiff, the following documents relate to who the directors of the Plaintiff are:-

- Registrar's letter of 11<sup>th</sup> November 2003 (page 12 of Bundle of Admitted Documents) addressed to Masore Nyang'au & Company clearly shows that the only Director of Plaintiff on that date was Samvir Trustees Limited.
- Computer print out from Registrar's Office dated 6<sup>th</sup> June 2004 (page 23 of said Bundle) confirming that sole Director was Samvir Trustees Limited.
- Annual Return of Plaintiff made up to 20<sup>th</sup> July 1995 (pages 24 to 30 of said Bundle") which shows that sole Director was Samvir Trustees Limited.
- Document Examiner's Report dated 25<sup>th</sup> March 2004 (pages 15 to 22 of said Bundle) which confirms that Form 203A on which Defendants seek to rely on was altered after the original document had been made, and additions had been made using a different machine.
- Registrar's letter of 3<sup>rd</sup> August 2004 addressed to Plaintiff's advocates (page 31 of the said Bundle) confirming that on that date Directors of Plaintiff were Akber. A.K. Esmail and David Muthoga.

33. It was PW 1's testimony that by a resolution dated **5<sup>th</sup> June 1995**, the Plaintiff appointed Samvir Trustees Limited as an additional Director and on **11<sup>th</sup> July 1995** both PW 1 and his mother resigned as Directors. He testified that prior to the proceedings herein he had never met the Defendants and that he had never dealt with them either as shareholders or directors.

34. There is a Form 203 A on record showing that the Defendants were appointed as directors with effect from **5<sup>th</sup> June 1995**. The Plaintiffs claim that the said document is a forgery. They relied on the Document Examiner's report in which the examiner states that the said Form 203A was altered after the original document had been made, and additions had been made using a different machine. It was PW 1's testimony that the alteration in print was obvious even to the naked eye. He testified that the prints differed from one item to another. He referred the Court to pages 17 to 21 of the Notice to admit documents in demonstrating the said differences. With regard to the allegations of forgery, the Defendants submitted that the Plaintiff had failed to enjoin the Registrar of Companies who is the custodian of company documents at the Companies' registry. The

- presence of the registrar may have been necessary due to the contradictions in the various letters from the registry with regard to directorship and also to clarify the veracity of the different Form 203 A on record. That notwithstanding, the Plaintiff in its evidence went ahead to show the difference between the two forms and testified that the one indicating the Defendants as directors was a forgery. The Defendants did not quite offer a rebuttal to this position.
35. A careful look at the said Form 203 A that was purportedly altered or forged, at pages 17 to 21 of the admitted documents reveals that the print used in the writings of the Defendants' names as directors is different from the one used in indicating Samvir Trustees Limited as directors. This was confirmed in the document examiner's report as earlier stated herein. The same was not challenged by the Defendants. Their qualm was that the Plaintiff did not call the said examiner to testify in Court. However, it was also open to the Defendants to request the attendance of the said examiner for cross-examination purposes which they did not do.
  36. PW 1 also pointed out that in the Form 203 A that was allegedly forged, the sequence of events therein was illogical. This is because item 1 indicated that Samvir Trustees Limited were appointed as directors with effect from 5<sup>th</sup> June 1995, then item 2 was the resignation of A.A K Esmail, PW 1 herein and Shirin Esmail as the directors with effect from 11<sup>th</sup> July 1995 then item 3 was the appointment of the Defendants herein as directors of the Plaintiff Company with effect from 5<sup>th</sup> June 1995. It is clear that the sequences of the items herein are not in chronological order. It only appears logical to this Court that if the Defendants herein were appointed as directors of the Plaintiff on the same date as Samvir Trustees Limited, being 5<sup>th</sup> June 1995, then the particulars should have been in the same paragraph or item just as was the case with the resignation of PW 1 and his counterpart director on 11<sup>th</sup> July 1995. The fact that their appointment was not indicated together with that of Samvir Trustees Limited and was only indicated after the resignation of some directors which was later than their appointment raises more questions than answers. This actually gives credence to the Examiner's report that there were alterations to the original Form 203 A document.
  37. There is a Notification of change of directors dated 4<sup>th</sup> August 1995 at pages 16 to 19 of the Plaintiff's bundle of Documents (B). This is Form No. 203 A. The Defendants names do not feature in the said Form which indicates Samvir Trustees Limited as the Plaintiff's directors with effect from 5<sup>th</sup> June 1995. According to the Plaintiff this is the authentic Form 203 A. The Plaintiff produced a certified copy of the said authentic Form 203 A from the Registrar of Companies.
  38. PW 1 further pointed out that the Defendants did not appear anywhere in the register of Directors as can be seen at page 49 of the Plaintiff's Bundle of documents marked B. The said register shows the directors of the Plaintiff's Company until 2<sup>nd</sup> February, 2004 after which there are no entries or changes. It was his testimony that he was currently a director of the Plaintiff having been re-appointed on 4<sup>th</sup> August 1999 and the 2<sup>nd</sup> director was David Muthoga who was appointed on 2<sup>nd</sup> February, 2004.
  39. PW 1 also testified that as of 11<sup>th</sup> November 2003, the Defendants' names did not appear anywhere in the Registrar's office. He referred to the Registrar's letter dated 11<sup>th</sup> November 2003 indicating the only director of the Plaintiff on that date as Samvir Trustees Limited. However, there are various letters on record from the Registrar that suggest that the Defendants were the directors of the Plaintiff. These letters are attached to the Defendant's list of documents as well as Plaintiff's list of documents marked Bundle B. One of the said letters is the one dated 19<sup>th</sup> February 2004 where it is stated that according to the 1995 annual returns, which were the latest in the file, the Defendants were directors of the Plaintiff (see page 83 of the Plaintiff's Bundle). According to the PW1, the said letter did not represent the correct position as the annual return of 1995 had the signatures of the secretary and PW1 and did not show the Defendants as directors. (The Plaintiff produced a certified copy of the annual returns made up to 20<sup>th</sup> July, 1995). Thereafter, the said Registrar also wrote to the Plaintiff's advocate vide the letter dated 12<sup>th</sup> May 2004 indicating that Samvir Trustees Limited were appointed the Plaintiff's directors with effect from 5<sup>th</sup> June 1995.
  40. There were however subsequent letters dated 8<sup>th</sup> and 9<sup>th</sup> September, 2004 indicating that the Defendants were directors of the Plaintiff. The Defendants sought to rely on the same. The

Plaintiff sought for clarification from the Registrar with regard to the latter letters through its Advocates vide the letter dated **September 13, 2004**. The Registrar responded on **17<sup>th</sup> September, 2004** confirming that the said letters were issued from its office only that the same were issued based on irregular annual returns filed by the 1<sup>st</sup> Defendant on 20<sup>th</sup> August, 2004. The Registrar further stated that the said returns had been rejected and returned to the 1<sup>st</sup> Defendant. He also stated that the aforesaid letters had since been withdrawn as they did not reflect the correct position in the Plaintiff's company file. The Defendants did not dispute this letter from the Registrar and it only means that the said letters of September 2004 that they intend to rely on to prove their directorship cannot stand.

41. On the credibility of the 1<sup>st</sup> Defendant's evidence, during his testimony in cross-examination, he admitted that he had been charged with robbery with violence in November 1993 and was convicted to serve two years in prison on 19<sup>th</sup> December, 1994. This is despite the fact that he had earlier testified that he had never been charged with a criminal offence and that he was acquitted of the charge of robbery with violence. He also told the Court that he was released from Prison on 6<sup>th</sup> July, 1995. However, at page 63 of the Plaintiff's bundle F, there is a letter from the officer in charge, Kamiti Prison, indicating that the 1<sup>st</sup> Defendant was released from prison on 4<sup>th</sup> September, 1995. He confirmed that on 5<sup>th</sup> June 1995, the 1<sup>st</sup> Defendant was still in Jail in Kamiti Prison. This is the same date the Defendants were allegedly appointed as directors of the Plaintiff. At this point the 1<sup>st</sup> Defendant confirmed that he was not at Corner House on the alleged date of his appointment as he had earlier testified. He stated that it was actually his father who represented him in the meeting at Corner House where he had been appointed as a director. The foregoing is a clear demonstration that the 1<sup>st</sup> Defendant lied on oath. It is apparent that he was in jail on 5<sup>th</sup> June 1995 when he was allegedly appointed as a director of the Plaintiff. This casts doubt as to the validity of his appointment, if at all it ever happened. It is therefore unbelievable that on 5<sup>th</sup> June 1995 he was called to the meeting appointing directors through his mobile phone as he earlier alleged yet he was in custody.
42. The Defendants in their submissions challenged the directorship of A.A. Esmail. It was their submission that the resolution containing the reappointment of Esmail was not delivered for registration contrary to the provisions of section 143 (1) of the Companies Act. However, I do not think it is necessary for the Court to delve into this issue. The Plaintiff's main case herein according to the pleadings is whether or not the Defendants are or have ever been directors of the Plaintiff. The Defendants did not put in any counter claim seeking for the removal of the said Esmail as a director or even challenging the validity and legality of his appointment/re-appointment as a director. In fact, it seems the Defendants in their submissions dwelt more on challenging the directorship of Mr. Esmail rather than proving how they became directors of the Plaintiff with effect from 5<sup>th</sup> June 1995, or give a sufficient rebuttal to the Plaintiff's allegation that the Form 203 A the Defendants' intended to rely on was a forgery. In addition, the Defendants in their submissions in addressing the issues for trial as framed by the Plaintiff chose to begin with issues No. 4 & 5. They clearly chose to leave out issues No. 1 to 3 which were to directly address whether or not they were directors of the Plaintiff.
43. It was also the Defendants' case that the Plaintiff never produced Form 201 A as pleaded in paragraph 3 of its Plaint. It was therefore their submission that the Plaintiff was bound by its pleadings. It is clear that there is no Form 201 A under the Companies Act and the documents on record clearly demonstrate that the document the Plaintiff intended to refer to was Form 203 A and not Form 201 A as stated in the Plaint. This is an apparent error as submitted by the Plaintiff and this Court will not belabor on this issue.
44. In view of the foregoing, the Plaintiff has established on a balance of probabilities that the Defendants were never appointed as the directors of the Plaintiff Company vide the resolution of 4<sup>th</sup> August, 1995 that the Defendants intended to rely on or at all.
45. Having determined issue No. (1) in the negative, issues No. (2) and (3) are hereby dispensed with.
46. With regard to issues No. 4 and 5 which in essence challenges the directorship of A.A.K Esmail, I reiterate the contents of paragraph 42 of the judgment herein. It was the Defendants' case that the purported special resolution reappointing Esmail as a director and passed on 10<sup>th</sup> May, 2004 was null and void for want of compliance with the provisions of the Companies Act. It is also on this

- ground that the Defendants wanted this Court to declare the present suit a nullity as the verifying affidavit to the Plaintiff had been sworn by the said Esmail who had no authority of the Plaintiff to file the present suit. In the interest of doing substantive justice, the Court had earlier rejected this position by the Defendants as the said issue should have been raised at the preliminary stage. As to the legality or otherwise of the directorship of Mr. Esmail based on the resolution of 10<sup>th</sup> May 2004, this Court has already stated that the same is not directly in issue in the present suit as it was not pleaded by any of the parties. What was directly in issue in this matter is the legality or otherwise of the directorship of the Defendants. Issue No. 6 seems also to be related to issue No. 4 and 5. Since the Court has made no direct finding with regard to the resolution passed on 10<sup>th</sup> May, 2004, it will not be necessary to address issue No. 6.
47. As regards issue No. 7, the question was whether or not the Defendants or either of them since November 2003 purported to act as directors of the Plaintiff and instructed one K Getanda Advocate to act on the Plaintiff's behalf. Notably, the Defendants did not submit on this particular issue at all and the Plaintiff on the other hand did not say much other than reiterating their position that the Defendants had masqueraded as Directors of the Plaintiff. Having established that there was no sufficient evidence to prove that the Defendants were indeed appointed as directors of the Plaintiff with effect from 5<sup>th</sup> June 1995, it therefore follows that the Defendants were masquerading as directors in whatever actions they took on behalf of the Plaintiff. In addition the 1<sup>st</sup> Defendant during his testimony admitted that they had instructed K Getanda Advocate to act on behalf of the Plaintiff. In summary, the answer to issue No. 7 is in the affirmative.
48. The 8<sup>th</sup> and last issue is whether the Plaintiff is entitled to all or any of the orders sought. It was the Plaintiff's submission that they had proved their case beyond reasonable doubt. The Defendants on the other hand maintained that the suit was a nullity and therefore the Plaintiff was not entitled to any prayers that it sought.
49. The Plaintiff had prayed for an injunction restraining the Defendants from claiming to be Directors of the Plaintiff or otherwise purporting to act on its behalf as well as a declaration that neither of the Defendants had ever been a Director of the Plaintiff. The Plaintiff also prayed for damages and Costs of this suit.
50. In view of the determination of the foregoing issues as framed by the Plaintiff and in particular issue No. 1, prayers No. 1 and 2 in the Plaintiff seeking for injunction and declaratory orders are granted, since this court is satisfied that the Plaintiff has proved its case on those issues on a balance of probability.

### **Damages**

51. As regards prayer No. (c) for damages, it was the Plaintiff's submission that based on the abominable conduct of the Defendants, it was entitled to exemplary or aggravated damages. The Defendants objected to the Plaintiff's prayer for exemplary or aggravated damages on the ground that the Plaintiff had not pleaded the same in the Plaintiff. The Plaintiff at prayer no. 3 had prayed for damages. The only damages that need to be specifically pleaded and strictly proved are special damages. The Plaintiff has asked for exemplary or aggravated damages which need not to be specifically pleaded or strictly proved. Its prayer for damages was open and it is at the discretion of the Court to determine whether or not the Plaintiff is entitled to damages and which kind of damages. In the case of **Abdulhamid Ebrahim Ahmed -vs- Municipal Council of Mombasa (2004) eKLR, at Mombasa (Civil Suit No. 290 of 2000)**, Maraga J (as he then was) cited the case of **Rookes-vs- Bannard(1964) 1 All ER, 367** and stated as follows:-

*“aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved. They are awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, person or goods, conspiracy and infringement of copy right. Such damages are part of or, included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief.”*(Emphasis supplied)

52. In seeking for exemplary damages the Plaintiff urged the Court to take into account the impudence with which the Defendants had abused the process of the Court for the past 11 years. It was the Plaintiff's case that the 1<sup>st</sup> Defendant had sworn one false affidavit after another to delay the just conclusion of this suit which was in contempt of Court. It was also the Plaintiff's case that the 1<sup>st</sup> Defendant perjured himself in the witness box by making up one false story after another. It was the Plaintiff's contention that the 1<sup>st</sup> Defendant lied with a view to enrich himself and deprive the legitimate owner of extremely valuable properties which the 1<sup>st</sup> Defendant belatedly claimed had been given to his father as a gift. It is further the Plaintiff's contention that the Defendants also wanted to steal its properties, and conspired with others, to transfer them to "nominees", to put it out of the reach of Plaintiff.
53. The Plaintiff relied on the law on the subject of exemplary damages as set out in McGregor on Damages (17<sup>th</sup> Edition) where at paragraph 11-001 on page 365 it states:

***"The primary object of an award of damages is to compensate the claimant for the harm done to him; a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages or even retributory damages, and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like.***

54. With regard to swearing false affidavits, the 1<sup>st</sup> Defendant testified that he had sworn an affidavit dated 29<sup>th</sup> March 2001 where he denied being a director or shareholder of Garden Estate Limited and he even denied the existence of the said company. He admitted that he had lied in the said affidavit and accepted responsibility. This was in HCCC No. 372 of 2001. In the present case, the 1<sup>st</sup> Defendant confirmed that he was a director and shareholder of the said company. From the Judgment herein and the proceedings on record (the 1<sup>st</sup> Defendant's cross-examination) it is clear that there are instances when the 1<sup>st</sup> Defendant lied yet he was giving evidence on oath. For instance, the 1<sup>st</sup> Defendant had earlier testified that when he was allegedly appointed a director of the Plaintiff on 5<sup>th</sup> June 1995, he was not a remandee of Kamiti Prison. On cross-examination he retracted from this position and testified that on the material day he was in jail in Kamiti. The 1<sup>st</sup> Defendant also testified that he had no knowledge of the transfers of L.R Nos. 3859 and 3860 to Jays Syndicate and then to Lakeview. He also denied the transfer to the Plaintiff by Lakeview. This is despite the fact that he had acknowledged that the Plaintiff acquired the properties from Lakeview in various affidavits sworn by him.
55. It is not in dispute that the 1<sup>st</sup> Defendant committed perjury during these proceedings. The Plaintiff also accused the 1<sup>st</sup> Defendant of being fraudulent and being a serial forger. The issue of fraud was not pleaded and was not directly an issue for determination before this Court. All that was proved was that the 1<sup>st</sup> Defendant had been previously charged and convicted of fraud. With regard to forgery, it was found on a balance of probabilities that the Form 203 A that the Defendants intended to rely on was a forgery. As to whether or not it is the 1<sup>st</sup> Defendant who made the said forgery is a matter to be determined in a criminal Court process, and the standards therein are beyond reasonable doubt. The other instances where the issue of forgery came up was during cross-examination of the 1<sup>st</sup> Defendant where the Plaintiff implicated the 1<sup>st</sup> Defendant to have forged documents. However, the 1<sup>st</sup> Defendant did not admit to forging any of the documents and this Court did not make a determination on the same as it was not directly in issue. Therefore the only ground upon which this Court may award exemplary damages is the perjury committed by the 1<sup>st</sup> Defendant.
56. In the case of **Bank of Baroda (Kenya) Limited vs. Timwood Products Ltd Civil Appeal No. 132 of 2001**, the Court of Appeal citing **Obongo & Another vs. Municipal Council of Kisumu [1971] EA 91** and **Rookes vs. Banard & Others [1964] AC 1129**, held that in Kenya punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where

the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff. This position is also to be found in **Clerk & Lindsell on Torts, 18th Edition**, where the authors have stated at paragraph 29-123, that, unless expressly authorized by statute, exemplary damages should be awarded only in two cases, first, in a case of oppressive, arbitrary or unconstitutional action by the servants of government and secondly, in cases where the defendants' conduct has been calculated by him to make a profit for himself which may as well exceed the compensation payable to the Plaintiff.

57. From the foregoing, this Court is not satisfied that the Plaintiff has made out a case for exemplary damages. There is no indication from the above authorities that perjury committed by the Defendant(s) entitles a Plaintiff to exemplary damages or that perjury falls in the category of the two cases under which exemplary damages should be awarded.

### **DISPOSITION**

58. In the upshot, Judgment is herein entered for the Plaintiff in the following terms:-

- a. **An injunction restraining the First and Second Defendants and each one of them from claiming to be Directors of the Plaintiff or otherwise purporting to act on behalf of the Plaintiff or instructing any advocate to act on behalf of the Plaintiff or in any other manner claiming to have any authority to act for the Plaintiff.**
- b. **A declaration that neither of the Defendants is or has ever been a Director of the Plaintiff.**
- c. **Costs of this suit to be awarded on higher scale for the two counsel who represented the Plaintiff herein.**

59. That is the Judgement of the Court.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI**

**THIS 4<sup>th</sup> DAY OF DECEMBER 2015.**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Ochieng Oduol and Mr. Karanja for the Plaintiff

Mr. Marigi h/b Oyugi for Defendant

Teresia - Court Clerk