



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 228 OF 2005 (O.S) AS CONSOLIDATED WITH CIVIL SUIT NO. 229 OF 2005 (O.S)**

**JOHN OKUKU ODWORA .....**  
**.....1<sup>ST</sup> PLAINTIFF**

**WILFRED RITHO NJERU.....**  
**.....2<sup>ND</sup> PLAINTIFF**

**• VERSUS -**

**SAMUEL GITIHA NGARUIYA and**

**JAMES MWANGI WAINAINA sued as trustees of**

**MLIMA EDUCATIONAL TRUST....**  
**.....1<sup>ST</sup> DEFENDANT**

**AMEDO MADISON HOLDINGS**  
**LIMITED.....2<sup>ND</sup> DEFENDANT**

**BATIAN LIMITED.....3<sup>RD</sup>**  
**DEFENDANT**

**JUDGMENT**

1. The plaintiffs in the two consolidated originating summonses were employees of Madison Insurance Company Kenya. John Okuku Odwora, the 1<sup>st</sup> plaintiff, was an employee between the years 1987 and 2002. Wilfred Njeru Ritho, the 2<sup>nd</sup> plaintiff, was so employed from 1988 to 2002. In the course of their employment, they were offered 2,500 and 7,500 shares respectively in Batian Limited, the 3<sup>rd</sup> defendant. The offer to take up those shares was made by Mlima Educational Trust, the 1<sup>st</sup> defendant. The shares were classified as “A” with a par value of Kshs 20 and were sold to the plaintiffs for Kshs 90 each.
2. The terms of the contract were contained in identical letters of offer dated 20<sup>th</sup> March 1991 marked ‘A’ annexed to the summonses. On 8<sup>th</sup> December 1993 the plaintiffs accepted to exchange their category ‘A’ ordinary shares in Batian Limited for ordinary shares in a new entity known as Amedo Madison Holdings Limited, the 2<sup>nd</sup> defendant. At the time of the suit, the 1<sup>st</sup> plaintiff’s shares in the 2<sup>nd</sup> defendant stood at 104,000 while those of the 2<sup>nd</sup> plaintiff were 417,188.

3. The originating summonses have four questions for determination:
  - i. *Whether the plaintiffs as holders of 417,188 and 104,000 shares respectively in Amedo Madison Holdings Limited hold the shares as trustees for Mlima Educational Trust.*
  - ii. *Whether the plaintiffs are entitled to an order requiring the 1<sup>st</sup> defendant to buy the plaintiffs' shares in the 2<sup>nd</sup> defendant and a further order requiring the board of directors of the 2<sup>nd</sup> defendant to execute the share transfers to Mlima Educational Trust or its nominee.*
  - iii. *Whether the price payable by Mlima Educational Trust or the person nominated by it for the purchase of the shares should be determined by the 2<sup>nd</sup> or 3<sup>rd</sup> defendants' external auditors through the net asset value method using their latest audited balance sheets at the time of the transfer of the shares.*
  - iv. *Whether the plaintiffs are entitled to costs*
4. Directions were granted by the Court to hear the summonses upon the depositions on record and the written submissions of the parties. Both parties have filed detailed submissions. In addition learned counsels for both parties briefly highlighted those submissions in Court on 6<sup>th</sup> November 2013. I have studied the summonses, the two supporting depositions of the plaintiffs sworn on 26<sup>th</sup> April 2005, the two replying affidavits of James Wainaina sworn on 8<sup>th</sup> June 2006 and the rival submissions.
5. The key issue for determination is whether the 2<sup>nd</sup> defendant should be compelled to purchase the plaintiffs' shares in terms of the letters of offer dated 20<sup>th</sup> March 1991. As the letters are material, I will set out their terms *in extenso*. Save for the number of shares and the allottees, the two letters are identical. The following is the letter to the 2<sup>nd</sup> plaintiff:

***MLIMA EDUCATIONAL TRUST***

*P.o. Box 40350 NAIROBI, KENYA*

*TEL. 725893/725899*

*TELEX: 22411*

*Mr. W.R. Njeru*

*C/o Madison Insurance*

*20<sup>th</sup> March, 1991*

*Dear Mr. Njeru*

***RE: SALE OF ORDINARY SHARES IN BATIAN LTD***

*We are pleased to advise you that Mlima Educational Trust has agreed to sell to you 7500 'A' ordinary shares of Kshs 20/- each in Batian Ltd on the following terms and conditions:-*

1. *The price will be Kshs. 90/- per share.*
2. *You will be required to pay a minimum deposit of Kshs 67,500/- which is 10% of the total purchase price, on signing the share transfer form. The balance of the purchase price of Kshs. 607,500/- which will not attract any interest will be paid through dividends. You may also settle the balance of the purchase price through your own sources if you choose to do so.*
3. *Mlima Educational Trust will have a lien on the shares until the entire price is settled. However, this does not prevent you from selling the shares to Mlima Educational Trust at any time so long*

as you continue to be employed by Batian Ltd or any of its associated companies. Any unpaid balance at the time of sale will be recovered from the proceeds of sale of the shares.

4. The share certificate will remain with Mlima Educational Trust until the shares are fully paid for.
5. You will be required to execute a transfer in blank for your entire shareholding as well as a memorandum of deposit. This transfer will be retained by Mlima Educational Trust until the entire purchase price is fully paid.
6. It will be mandatory for you to sell the shares back to Mlima Educational Trust or to a person nominated by it should you cease to be an employee of Batian Ltd or any of its associated companies. If you cease to be an employee of Batian Ltd or any of its associated companies, the Board of directors of Batian Ltd will execute the share transfer in favour of either Mlima Educational Trust or to a person nominated by it without further reference to you.
7. The price payable by Mlima Educational Trust or the person nominated by it for the purchase of your shares will be determined by Batian Ltd's external auditors through the net asset value method. The external auditors will use the latest audited balance sheet of Batian Ltd at the time of transfer of the shares and would take into account any material post-balance sheet events.
8. These shares will start qualifying for dividends declared from profits for Batian Ltd's financial year ending 30<sup>th</sup> September, 1991.
9. This offer is valid until 1<sup>st</sup> April, 1991 and will lapse if we do not receive your acceptance by that date.

**SIGNED**

S.G. NGARUIYA

TRUSTEE

**SIGNED**

J.M. WAINAINA

TRUSTEE

**SIGNED**

T. BUNDI

TRUSTEE

**I WILDRED R. NJERU**, hereby accept to purchase 7500 'A' ordinary shares of Kshs. 20/- each in Batian Ltd in accordance with the above terms and conditions.

6. Parties are bound by commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. See Morris & Company Vs Kenya Commercial Bank [2003] 2 E A 605 and National Bank of Kenya Limited Vs Pipeplastic Samkolit and another [2001] KLR 112.

See also Balbir Singh Sadhu & another Vs Rose Detho and others Nairobi, High Court case 259 of 2003 [2012] e KLR Lino Stationers Limited Vs IEBC Nairobi HCCC 242 of 2007 [2012] e KLR, Shimmers Plaza Limited Vs National Bank of Kenya Limited Nairobi, High Court case 895 of 2009 [2012] e KLR, Consolidated Bank of Kenya Limited Versus Securicor Security Services Kenya Limited Nairobi, High Court case 594 of 2003 [2013] e KLR.

7. From the letters of offer, the shares to the plaintiffs were in Batian Limited, the 3<sup>rd</sup> defendant. They were being offered by, and on the note paper, of Mlima Educational Trust. The offer letters are executed by S.G. Ngaruiya, J.M. Wainaina and T. Bundi as trustees of the 1<sup>st</sup> defendant. Both plaintiffs have accepted the offer. I thus find that there was a clear intention to create legal relations. Upon consideration passing from both plaintiffs for the shares, the contract contained in the letters of offer crystallized and became enforceable. The defendants concede that the full purchase price for the shares was paid.
8. Under condition 6, the plaintiffs were obliged, upon ceasing employment, to resell the shares to the 1<sup>st</sup> defendant or its nominees. To that extent, I agree with the submission by the plaintiffs that

- this was an employee share scheme tied to their employment at Madison Insurance Company Limited (to be distinguished from Amedo Madison Holdings Limited, the 2<sup>nd</sup> defendant) or associated companies. It is not disputed that the plaintiffs were employed as such and have since left employment.
9. The legal status of the three defendants is material. The 3<sup>rd</sup> defendant was a local private company. 49% of its shares were foreign owned by ITM International Sa Group. The other 51% was owned by Mlima Educational Trust (3 %) and other local shareholders (48%) who were largely staff and management of the group companies. Sometimes in 1993, a reorganization involving ITM International Sa Group of companies took place worldwide. It affected the local shareholding interests in the 3<sup>rd</sup> defendant. As a result, a new private company called Amedo Madison Holdings Limited (2<sup>nd</sup> defendant) was registered on 27<sup>th</sup> September, 1993 vide certificate of registration C. 55756. In 1994 there was an exchange of shares in Batian Limited for shares in Amedo Madison Holdings Ltd. Batian Limited shareholders became Amedo Madison Holdings Ltd shareholders, which in turn became the new holding company. In 1995 the 2<sup>nd</sup> defendant, with a view to list on the Nairobi Stock Exchange resolved to become a *public* company. It acquired a new certificate of incorporation number C.9/95. However the 2<sup>nd</sup> defendant failed to get listed on the Nairobi Stock Exchange.
  10. The plaintiffs now crave to enforce condition 6 of the letters of offer. This would force the defendants to buy the shares at a price determined by clause 7: net asset value method by Batian's external auditors based on the last audited accounts. Had the legal status of the parties remained static, I would not have been hesitant to order specific performance for the value outlined in clause 7. See *Chitty on Contracts* 27<sup>th</sup> Edition Vol 1 General Principles paragraph 27 – 001 page 1281. The matter however is not that simple or straightforward. There are two critical questions. First, what was the effect of *transformation* of the 2<sup>nd</sup> defendant from a *private* to a *public* limited liability Company? The plaintiff's case is that the change did not extinguish the plaintiffs' rights to enforce the agreement of 1991.
  11. The plaintiffs' learned counsel cited the following passage from *Palmer's Company Law* Vol 1, London, Sweet & Maxwell paragraph 2.205:

*“Despite the requirements of the re-registration and the issue of a new certificate of incorporation, the legal personality of the old company is continued in the new form. It is not the law that old persona of a company is extinguished and a new one has come into existence. Consequently, no transfer of property is required from the old to the new company and legal proceedings by or against the company may be continued, but the designation of the company on the pleadings may have to be suitably altered under the R.S.C”.*

12. That is not on point in the present case. The relevant text is found in the next paragraph 2.206 in *Palmer's Company Law*, which the plaintiffs have omitted. It deals with *transformation* of a *private* company into a *public* company. It is much more illuminating. I also find the passage in Gower & Davies, *Principles of Modern Company Law* 9<sup>th</sup> Edition, Sweet & Maxwell paragraph 4 – 40 page 105 persuasive: When a private company converts into a public company its form and substratum completely changes. The learned authors state as follows –

*“If the Registrar is satisfied on the above matters on the basis of the documents the company is required to include in its application, the alterations in the articles take effect, and the company becomes a public company. In effect, the certificate is a combined certificate of incorporation and trading certificate which would have been needed had the company initially registered as a public company”.*

13. A good and relevant illustration is that the restrictions on transfer of shares of a private company provided by section 30 of the Companies Act do not apply to a public company. The constitutive instruments of a public company's memorandum and articles of association are markedly different from those of a private company. The nature and reporting requirements of the former changes significantly. As a corollary, the rights and duties of shareholders *inter se* and to the company and

- third parties are altered considerably. On 15<sup>th</sup> May 1995, Amedo Madison Holdings Limited passed a resolution to convert from a private into a public company. It *replaced* its articles of association with a fresh slate of articles. That fact is not contested. This was thus not a simple re-registration of a private company: The 2<sup>nd</sup> defendant transformed from a private company into a public company and became a new entity.
14. The plaintiffs, upon the share swap, became shareholders of an entirely *different* company, the 2<sup>nd</sup> defendant. The passage cited by the plaintiffs from *Palmer's Company Law* (Supra) paragraph 2.205 is thus inapplicable. What transpired in this case was not a simple change of name of the company. The decision cited by the plaintiffs in *David Chege Mwangi Vs Mugambo wa Gachoho* Nairobi, High Court case 430 of 2004 [2005] e KLR can thus be distinguished. Even the plaintiffs concede in their written submissions at paragraph 1.6 that the share swap "*effectively made the Batian Limited shareholders to become Amedo Madison Holdings Limited shareholders which also became the new holding company of the insurance group*".
  15. The other question is on the effect of the *exchange* of the *Batian* shares into *Amedo* shares. On 8<sup>th</sup> December 1993 the plaintiffs accepted to *exchange* their category 'A' ordinary shares in *Batian Limited* for ordinary shares in *Amedo Madison Holdings*. In that regard, the 1<sup>st</sup> plaintiff exchanged his 2500 'A' ordinary shares in *Batian* for 5000 ordinary shares of Kshs 10 each in *Amedo Madison Holdings Limited*. The 2<sup>nd</sup> plaintiff converted his 7,500 'A' ordinary shares in *Batian Limited* for 15,000 'A' ordinary shares of Kshs 10 each in *Amedo Madison Holdings Limited*.
  16. Prior to that date, both plaintiffs had received their dividends from *Batian Limited*. It must follow logically that from 8<sup>th</sup> December 1993, the plaintiffs ceased holding any shares in *Batian Limited*, the 3<sup>rd</sup> defendant. This is clear from the acceptance of the 2<sup>nd</sup> defendant's shares by the plaintiffs annexed to the deposition of James Wainaina marked "JMW 3".
  17. A company is a distinct legal entity *Salomon Vs Salomon* [1987] AC 22. It is a truism that the 2<sup>nd</sup> defendant is a distinct legal entity from the 1<sup>st</sup> and 3<sup>rd</sup> defendants. I have no evidence that the terms and conditions in the letter of offer of 20<sup>th</sup> March 1991 with respect to shares in *Batian Limited* were transferred to or accepted by *Amedo Madison Holdings Limited*. Fundamentally, I am satisfied that the swap of shares on 8<sup>th</sup> December 1993 made the plaintiffs *new* shareholders in *Amedo Madison Holdings Limited* with distinct rights and duties.
  18. In order to answer the first question in the originating summonses, it is necessary to establish whether the plaintiffs hold the shares in *Amedo* as *trustees* for *Mlima Educational Trust*, the 1<sup>st</sup> defendant. Paraphrased, is *Mlima* the beneficiary of the plaintiffs' shares in *Amedo*? The plaintiffs concede they received dividends from *Batian Limited* up to 28<sup>th</sup> May 1993, for the year ending 30<sup>th</sup> September 1992. From 1994 to 1999, the plaintiffs received their dividends from *Amedo Madison Holding Limited*. Two matters arise: First, the plaintiffs have never accounted or been called upon to account to *Mlima* for those dividends. Secondly, I stated at the beginning that the plaintiffs paid *full* consideration for their shares. Granted those circumstances it would be illogical for the plaintiffs to say that they hold their shares in trust for *Mlima*.
  19. The closest analogy to a trust is that the plaintiffs were required to re-sell and re-transfer their shares upon termination of employment to *Mlima Educational Trust Limited*. Is there a trust in fact or by implication? There must be evidence of a settlor's *intention* to create a trust. See *Black's Law Dictionary* 9<sup>th</sup> Edition 2009, West Publishing, Minnesota page 1647. See also *Marie Ayoub and others Vs Standard Bank* [1963] E.A. 619. The condition to re-transfer the shares to *Mlima* for a consideration to be determined by auditors was akin to a restriction or pre-emptive right.
  20. The shares for all purposes belonged to the plaintiffs. They were only to transfer them upon termination of employment for consideration or net asset value to be determined by external auditors. I have stated that the plaintiffs received dividends on their shares without need for an account to *Mlima*; that the plaintiffs paid in full for those shares; and that *Mlima* has not demanded an account or called for re-transfer of the shares. Fundamentally, the plaintiffs now hold independent shares in a distinct company, the 2<sup>nd</sup> defendant.
  21. Granted all those circumstances, my answer to the first question in the consolidated originating summonses is *negative*: The plaintiffs, as holders of 417, 188 and 104,000 shares respectively, in

- Amedo Madison Holdings Limited *do not* hold the shares as *trustees* for Mlima Educational Trust.
22. The answer to the second question in the consolidated originating summonses is also *negative*. I have already stated that the plaintiffs are the *absolute* owners of their shares in Amedo, the 2<sup>nd</sup> defendant. The plaintiffs swapped their Batian Limited shares for new and independent shares in Amedo, the 2<sup>nd</sup> defendant. The order sought by the plaintiffs would require Amedo Madison Holdings Limited to purchase its *own* shares. That would contravene the Companies Act. See *Trevor and another Vs Whitworth & another* [1887] 12 AC 409.
23. The situation was slightly different in condition 6 of the agreement on 20<sup>th</sup> March 1991. Under that agreement, the plaintiffs' shares were held in Batian Limited, the 3<sup>rd</sup> defendant. Under clause 6, the plaintiffs upon ceasing employment were to execute a transfer of those shares *not* to Batian Limited *but* to Mlima Educational Trust. Strictly speaking, Batian Limited was not to purchase back its shares. If the plaintiffs' prayers were to be allowed now they would require Amedo, the 2<sup>nd</sup> defendant, to buy back its shares at a price to be determined by external auditors.
24. There is another matter arising. Since the 2<sup>nd</sup> defendant is now a public company, the restrictions on transfer of shares at section 30 of the Companies Act no longer apply. The restrictions or preemptive rights by Mlima at clause 6 of the agreement are thus water under the bridge. In a word, there is no restriction on the plaintiffs to transfer their 417,188 and 104,000 shares respectively held in Amedo Madison Holdings Limited to a third party. I would even venture to add that such transfer would not be bound any more by the method of valuation at clause 7 of the agreement of 20<sup>th</sup> March 1991. The reason is self-evident: the shares now held by the plaintiffs are new and independent shares in a different entity known as Amedo Madison Holdings Limited distinct from Batian Limited.
25. The 2<sup>nd</sup> defendant is not strictly speaking a *successor* to either the 1<sup>st</sup> or 3<sup>rd</sup> defendants. Batian Limited is no longer the parent of the plaintiffs' shares. The substratum upon which Mlima Educational Trust stood to re-purchase the plaintiffs' shares has thus collapsed in fact and in law. In the result, the plaintiffs are *not* entitled to an order compelling the 2<sup>nd</sup> defendant to buy their shares. It follows that the board of directors of the 2<sup>nd</sup> defendant shall *not* execute transfers of those shares to Mlima Educational Trust or its nominee.
26. My answers to the first and second questions in the consolidated summonses make the third question a *fait accompli*. I have held that since Amedo is now a public company, there are no restrictions on the transfer of the shares held by the plaintiffs. I have also found that the plaintiffs are *not* trustees of Mlima Educational Trust, the 1<sup>st</sup> defendant, for those shares: rather, the plaintiffs are the *absolute* owners of their shares in Amedo Madison Holdings Limited. Clause 7 of the agreement dated 20<sup>th</sup> March 1991 related to shares held in Batian Limited, the 3<sup>rd</sup> defendant, which was then a private company.
27. The plaintiffs' new and distinct shares in Amedo are not *encumbered* by the restrictions in clauses 6 and 7 of the original agreement dated 20<sup>th</sup> March 1991. That is why I ventured to say that the price of the plaintiffs' shares no longer needs to be determined by the external auditors through the net asset value method using the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' latest audited accounts. As matters stand now, the price would be *any* price agreed between the vendors and purchasers over the counter of the unlisted public company. That answers issue number three in the consolidated originating summonses.
28. In the end, and on a preponderance of the evidence, the plaintiffs have failed to prove their case. The originating summonses are hereby dismissed. The fourth and last question is on costs. Costs follow the event and are at the discretion of the court. I grant the defendants costs in the consolidated summonses. Those costs shall be met by the plaintiffs in equal share.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI** this 20<sup>th</sup> day of January 2014

**GEORGE KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of***

Mrs. O. Omondi H/B for Mr. Odera for the plaintiffs instructed by Oraro & Company Advocates.

Ms A.W. Kimani H/B for Peter Gachuhi for the defendants instructed by Kaplan & Stratton Advocates.

Mr. C. Odhiambo, Court clerk.