



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO.525 OF 2012**

**GUDKA WESTEND MOTORS LIMITED ..... PLAINTIFF**

**VERSUS**

**KISII BOTTLERS LIMITED ..... DEFENDANT**

**RULING**

1. The application before court is the Notice of Motion by the plaintiff/applicant dated 15<sup>th</sup> November 2012 brought pursuant to **Order 40 Rules 2, 3, 4 and 10** of the **Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63 (e)** of the **Civil Procedure Act, Section 118 of the Company's Act Cap 486, Article 27 and 159 (2) (d)** of the **Constitution of Kenya 2010** and all enabling provisions of the law. In the application the plaintiff/applicant is seeking for orders:-

1. ....
2. ....
3. *The Honourable Court be pleased to grant an order of Temporary Injunction restraining the Defendant/Respondent by herself, directors, agents, servants and/or anyone claiming under the said defendant/respondent from negotiating and/or entering into any merger with the two other related companies with a view to creating Almasi Beverage Limited prior to rectification of the defendant's Company Register of Shareholders and thereby including the plaintiff as such shareholder and without approval of the plaintiff/applicant, pending the hearing and determination of the instant suit.*
4. *The Honourable Court be pleased to issue further directions towards expeditious hearing and disposal of the instant application and the attendant suit.*
5. *Costs of this application be borne by the defendant/respondent.*
6. *Further orders as the court may deem fit and expedient.*

2. The application is premised on the grounds on the face thereof and supported by the annexed affidavit of Ashwin Gudka the managing director of the plaintiff/applicant herein sworn on the 15<sup>th</sup> November 2012.

3. Briefly the deponent claims that on the 16<sup>th</sup> day of November 1994 the plaintiff/applicant wrote to the defendant/respondent offering to purchase 800,000 shares subject to the value of the shares being reasonable. See annexure marked "AG 2". The said letter "AG 2" was not responded to by the defendant/respondent, however ICDC which held majority shares in the defendant/respondent company offered to sell and sold 300,000 underwritten shares to the plaintiff/applicant with the knowledge of the defendant/respondent. A certificate of transfer was duly issued and executed by ICDC on behalf of the defendant/respondent company ("AG 3").

4. Further that upon the purchase of the above mentioned shares, the plaintiff/applicant lawfully became a member and shareholder of the defendant/respondent company and was entitled to all the benefits attendant to such share holding which include Bonus shares and Right Issues.
5. That at the time of purchasing the 300,000 underwritten shares, the defendant/respondent's shares stood at 1,533,540. That pursuant to the plaintiff's shareholding capacity which now stands at to 49%, it was then imperative that the plaintiff/applicant herein be included in the respondent's register of members which was not done and this prompted the plaintiff/applicant to file proceedings vide Kisii HCCC No.234 of 1995 between the applicant and ICDC.
6. Pursuant to the above mentioned proceedings, the honourable court directed that the 300,000 underwritten shares sold to the plaintiff/applicant herein be transferred to the plaintiff/applicant "**Ag 5 (a) and (b)**". Upon the said judgment, the defendant/respondent herein filed a motion for review of judgment but the motion was heard and dismissed by the honourable court.
7. Despite the dismissal of the application for review the defendant/respondent herein have refused to admit the plaintiff/applicant as shareholders but they (defendant/respondent) continue to pay dividends to the plaintiff/applicant thereby acknowledging their rights "**AG7**".
8. That there is on going a negotiation for a merger with two other related companies initiated by the defendant/respondent with a view to creating Almasi Beverage Limited which is bound to take over and assume the management and affairs of the defendant/respondent. This it is stated is bound to compromise the plaintiff's/applicant's shares, interests and privileges in the defendant's/respondent's company and shall thereby generate serious changes in the defendant/respondent company. It is further stated in the supporting affidavit that though the plaintiff/applicant is a major shareholder, the defendant/respondent has not found it fit to notify them of the intended merger but they (plaintiff/applicant) only got to know about the same through the print media.
9. That the said merger was to take effect from August 2012 ("**AG8**") but there was no general meeting to deliberate and approve the intended merger as the defendant/respondent has neither invited nor informed the plaintiff/applicant nor anyone else for that matter of the same. The plaintiff/applicant contends that the intended merger, (without the approval of the plaintiff/applicant a major shareholder) will prejudice them thus they may suffer irreparable loss. The deponent also believes that the balance of convenience in this case tilts in the plaintiff/applicant's favour and that unless the orders sought are granted they are bound to suffer irreparable loss as the crux of the case could be destroyed.
10. He also depones that in the circumstances it is necessary that temporary injunction is granted so as to preserve the status of the defendant/respondent company. That conversely the defendant/respondent shall not suffer any loss whatsoever and the plaintiff/applicant is ready and willing to give an undertaking as to damages, pursuant to granting of the order of injunction as the court may deem expedient.
11. The application is opposed. The defendant/respondent filed grounds of opposition dated 30<sup>th</sup> November 2012 and a replying affidavit by Robert Kinuthia sworn on the 18<sup>th</sup> March 2013. Mr. Kinuthia who is the managing director of Kisii Bottlers Limited states that the letter alluded to "**AG2**" was merely a letter of intent from the plaintiff/respondent and that the defendant/respondent was not bound to respond, accept and/or transact with plaintiff/applicant herein.
12. Further that ICDC was a mere shareholder in the defendant/respondent company and there was no special status accorded to ICDC or the shares that were held in its name. He states that the respondent has never been aware of any offer for the sale of any shares in the respondent company that were capable of acceptance by the applicant and if any such offer existed, it ought to have been made to the members of the respondent in the first instance in accordance with **Clause 15** of the **Articles of Association** of the respondent. That any purported sale/purchase of shares between ICDC and the Applicant is completely out of place, unlawful, misplaced and ineffective. He adds that apart from an approval by the respondent, any sale of shares in a limited liability company must be done within the confines of the **Companies Act Cap 480 Laws of Kenya**, same has to be supported by a sale agreement, share transfer form or a valid

certificate on transfer of certain marketable securities form under **Stamp duty Act Cap 486 Laws of Kenya**. He states that the respondent has never authorized ICDC or any other person to execute any documents or instrument on their behalf and therefore “AG3” is totally inaccurate. That the purported form D annexed to the supporting affidavit is not an instrument of transfer as alleged and the same is signed by one Charles C. Mkamba Ag Chief Accountant of P.O. Box 45519 Nairobi; that the respondent's auditors did not execute the said document nor was the respondent aware of the existence of such a document. The said Charles C. Mkamba was an employee of ICDC and not the respondent's auditor - See “RK1”.

13. Mr. Kinuthia states further that the plaintiff/applicant could not become a member or shareholder of the defendant/respondent company herein and as such would not have acquired any rights or interest in the defendant/respondent company herein.

14. That if at all the applicant genuinely believed that he was a member of the respondent, he should have participated in the activities of the respondent including the approval of the already concluded restructuring process. Further any issue of any bonus shares and rights issue is a privilege extended to all share holders and is well within the defendant's/respondent's right to undertake the same in the normal course of its business and non-member are not allowed to participate in rights issue or to take any bonus shares as doing so would be unlawful.

15. That ICDC currently holds 45.02% of the shares and as such the plaintiff cannot claim to have any greater interest than that of ICDC and puts the plaintiff to strict proof thereof. “RK2” is the defendant's annual returns as at 31<sup>st</sup> day of December 2011. On the issue of cancellation of the plaintiff's/applicant's share, the deponent states that they did not seek to cancel the shares as the same was not within its right and the plaintiff/applicant is put to strict proof.

16. The defendant/respondent further states that the genesis of the proceedings in **Kisii HCCC NO.234 of 1995 M/s Gudka Westend Motors -vs- M/s Industrial and Commercial Development Corporation** was:-

- a. *to seek a declaration that the defendant's cancellation of the contract between it and the plaintiff was improper and unlawful.*
- b. *to seek for specific performance of the contract between the parties therein directing the defendant to transfer its 300,000 shares to the plaintiff herein.*

1. That it is evident from the pleadings in the said case that the plaintiff/applicant herein was and has never been a shareholder of the defendant/respondent and thus the present suit seeking to compel the defendant/respondent to admit it as a shareholder is a non-starter. It is also contended that the orders in the case mentioned above as enumerated in the ruling of Justice Mbaluto had nothing to do with Kisii Bottlers Limited the defendant/respondent herein.

2. It is the deponent's contention that the applicant is deliberately misleading the court as **Almasi Beverages Limited** was duly incorporated in the name of **Zorro Limited** on 6<sup>th</sup> January 2012 and subsequently changed its name to Almasi Beverages Limited on or around 2<sup>nd</sup> July 2012. **RK3(a)** and **(b)** are copies of the certificates of incorporation for **Zorro Limited and Almasi Beverages Limited**.

3. Further that the process of the merger has since been completed and Almasi Beverages Limited was infact in existence even prior to the institution of this suit, thus rendering the present application and the entire suit not only misconceived and misplaced but a grave abuse of the court process as well. That the orders sought in the application are untenable and even if they were granted they would be in vain as the Alamasi Beverages Limited is a company that has been in existence from 6<sup>th</sup> January 2012 almost one (1) year before this suit and the present application were filed.

4. Further it is stated that the application is void of merit since the same has been overtaken by events having been filed over three (3) months after the announcement of the merger, that if the plaintiff/applicant was a shareholder he would have been notified and taken part in the merger as opposed

to his secondary source of information.

5. The respondent further states that the merger which was undertaken herein was not a clandestine affair as the necessary and requisite approvals and procedures were followed, and the same was unanimously approved by the shareholders.

6. That the plaintiff/applicant has not suffered any loss or harm since the merger was concluded and therefore any irreparable loss that the applicant may have anticipated did not occur. That since the present suit is totally unfounded and misconceived it has no substratum and/or crux which is capable of being lost in the event that the present application is dismissed. That the merger has not interfered with the status of the defendant/respondent herein and therefore the allegations or propositions that the status of the respondent will change is totally incorrect. If at all the status of the respondent were to change after the merger which has since taken place, it follows that the present case has abated and the present application and suit are self defeating. Owing to the transaction sought to be stopped and taking into account that that merger has since been concluded there is no conceivable undertaking as to damages that would protect the court from embarrassment in the event it makes orders that are overtaken by events.

7. It is also contended that the suit as filed by the plaintiff/applicant is incompetent and defective thus the court has no jurisdiction to continue hearing and determining the same. Further that the applicant is guilty of laches and is motivated by bad faith; the plaintiff has no cause of action against the defendant herein and the suit should be struck out as it is also premature, misconceived and an outright abuse of the process of this court.

8. The parties herein agreed to canvass the application herein by way of written submission. The submissions and authorities they wished to rely were duly filed. M/s Oguttu Mboya filed his submission on behalf of the plaintiff/applicant on the 29<sup>th</sup> May 2013 while M/s Simba and Simba Advocates filed their submissions on 17<sup>th</sup> April 2014 on behalf of the defendant/respondent.

9. This court has had the time to read through the notice of motion application together with the supporting affidavits and replying affidavit in opposition and has made its own analysis. The court has also carefully read through the submissions and the relevant authorities.

10. It is not in dispute that ICDC is not a party to this suit. I believe they should have been made a party to the same as they have been adversely mentioned as being a major share holder in the defendant/respondent company herein. The inclusion of ICDC as a party to this suit would have shed some light as to whether they did sell/transfer the 300,000 shares to the plaintiff/applicant or not. There is no doubt in the mind of this court that the genesis of the instant suit is **Kisii HCCC NO.234 of 1995 between the plaintiff/applicant and ICDC**. The orders made in that case were against ICDC and what seems to be the case herein is that the plaintiff/applicant is seeking to enforce those orders against the defendant/respondent herein.

11. In light of the above, can it be said that the plaintiff/applicant has satisfied the conditions for the granting of an injunction as stipulated in **Giella -vs- Cassman Brown & Co. Ltd.[1973] EA 358**? In my considered view, the plaintiff/applicant has not demonstrated that he has a *prima facie* case with the probability of success. The reason for this is that there was and there is no privity of the defendant/respondent which the plaintiff/applicant seeks to enforce against the defendant/respondent. Secondly, I find that the plaintiff/applicant has not demonstrated that if the order sought herein is not granted, he will suffer irreparable loss that may not be compensated by way of damages. In any event, the balance of convenience tilts in favour of the defendant/respondent. Evidence has been adduced to show that the merger complained of had in fact already taken place a year before the filing of this suit. Even if it were not shown, the plaintiff/applicant has not adduced evidence to show that the selling or buying the 300,000 shares from ICDC went through the prescribed process requiring the sanction of the defendant's/respondent's shareholders in accordance with the **Companies Act, Cap 486 Laws of Kenya**.

12. Accordingly, it would be a futile exercise for the court to grant the orders sought since courts do not issue orders in vain. The Notice of Motion dated 15<sup>th</sup> November 2012 is hereby dismissed with costs to

the defendant/respondent.

**Dated, signed and delivered at Kisii this 29<sup>th</sup> day of October, 2014**

**R.N. SITATI**

**JUDGE.**

Mr. Ochwangi (present) for Plaintiff/Applicant

Mrs. Kirumi (present) for Defendant/Respondent

Mr. Bibu - Court Assistant