



# **REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 342 OF 2012(603 OF 06)**

**MEDINA CORPORATION CO. LTD ::::::::::::::: PLAINTIFF**

**VERSUS**

**MERIDIAN PROPERTIES LTD. ::::::::::::::: 1<sup>ST</sup> DEFENDANT**

**CONSOLIDATED WITH**

**CIVIL CASE NO. 603 OF 2006**

**MEDINA CORPORATION CO. LTD. ::::::::::::::: PLAINTIFF**

**VERSUS**

**MERIDIAN HOLDINGS LTD. ::::::::::::::: 2<sup>ND</sup> DEFENDANT**

## **R U L I N G**

1. The **Notice of Motion** application before the court is dated **13th June 2014** and filed in court on 16th June 2014 by the Plaintiff. The application is filed under Order 40 Rule 1, 2 and 3, Order 51 Rule 1 of the Civil Procedure Rules, and Section 1, 1A, 1B and 3A of the Civil Procedure Act (Cap 21), Section 165 Companies Act, Articles 35 and 40 91) of the Constitution of Kenya, 2010 and all other enabling provisions of Law.
2. The application seeks the following surviving orders namely:-
  3. *That the 2nd Defendant whether by itself or its servants or agents or otherwise howsoever be restrained by a temporary order of injunction from doing or continuing with the following acts or any of them, that is to say from effecting a rights and/or share issue, allocation, allotment and/or transfer and/or otherwise howsoever altering or registering any alteration in its share capital touching on the Plaintiff's 20% share entitlement pending the hearing and determination of the suit.*
  4. *That the 2nd Defendant be compelled to effect fully statutory compliance and pari passu allocation of rights of 20% of already issued ordinary shares at Kshs.20.00 to the Plaintiff.*
  5. *That the Honourable Court do appoint an approved qualified accountant as an Inspector to investigate and report on the affairs of the 2nd Defendant from 2001 to date, with authority to seek and obtain information from the 2nd Defendant's Directors,*

*Auditors, and Managers on all the Company's income and expenditure, as well as assets, liabilities and capital and to conduct a full and proper valuation of the Company's assets and business.*

6. *That the Honourable Court do appoint a qualified and experienced hotelier as receiver manager to managed the affairs of the 2nd Defendant including in particular the Meridian Hotel effective immediately, to collect all incomes and disburse all its valid expenses, and to report quarterly on the operations of the 2nd Defendant and on its financial position.*
  7. *That the 2nd Defendant's Directors be summoned and cross-examined on their management and dealings with the finances of the company after preparation of the Inspector's Report.*
  8. *That the Plaintiff be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant.*
  9. *That the Plaintiffs' costs be provided for.*
3. The application is supported by affidavit of **Mr. Sultan Khimji** dated **13th June 2014** with its annexures. A Further Affidavit in reply filed in court on **28th July 2014** by the same person, and a Further Affidavit in Reply filed in court on **22nd August 2014** also by the same person being **Sultan Khimji**.
  4. The application is opposed by the Defendants/Respondents vide a replying affidavit filed in court on 10th July 2014 and sworn by Samuel Muthee Mureithi as a Company Secretary of the 2nd Defendant, and on behalf of the 2nd Defendant. It is also opposed vide a replying affidavit of Akbarali Karim Kurji filed in court on 10th July 2014 and his Further Affidavit filed in court on 7th August 2014, as a Director, and on behalf of the 2nd Defendant.
  5. The brief history of the application as narrated by the Plaintiff is that the Plaintiff and the 1<sup>st</sup> Defendant went into business together sometimes in 1984, subscribing to 20 and 80 percent respectively of the shares of the 2<sup>nd</sup> Defendant Company soon after its incorporation with the mutual expectation that the Plaintiff and the 1<sup>st</sup> defendant would collaborate and jointly manage and run the 2<sup>nd</sup> Defendant Company like a partnership for the mutual benefit of the existing shareholders. The Meridian Court Hotel, the 2<sup>nd</sup> Defendant's principal asset is now worth about Kshs.1 Billion, approximate value based on rental computations done by the Plaintiff using rental values obtained from Redfearn International Ltd registered valuers. A conservative estimate of the value of the hotel, only land and buildings, is alleged to be about Kshs.750 million. (See paragraphs 2 and 3 of the supporting affidavit, and annexure SKK1 pages 6 to 7).
  6. In 1993, the Plaintiff engaged in discussions with the 1<sup>st</sup> Defendant for purchase and transfer of its shares in the 2<sup>nd</sup> Defendant. The outcome of those negotiations was challenged in court by the Plaintiff in the suit herein (Civil Suit 757 of 1994, later transferred to Commercial Division and renumbered Civil Suit 342 of 2012), and the entire transaction including the transfer of shares was not effected to date. Thereafter the Plaintiff continued to be 20 percent shareholder in the 2<sup>nd</sup> Defendant while the 1<sup>st</sup> Defendant allegedly in breach of the Articles of Association which provides pre-emption rights to existing shareholders, transferred its 80 percent shareholding to the individual members of the Kurji family whose indirect interest the 1<sup>st</sup> Defendant had previously catered for. The Plaintiff continued to be a 20 percent shareholder of the 2<sup>nd</sup> Defendant. This irregular transfer denied the Plaintiff its right to have no shareholder meetings take place in its absence, since the Articles require at least two shareholders to be present in General Meetings.
  7. The Plaintiff remained in possession of 20,000 shares and hence a value of Kshs.400,000.00 against an issued and paid up share capital of Kshs.2 Million. The 2<sup>nd</sup> Defendant wanted to increase its share capital from Kshs.2 Million to Kshs.10 Million partly by way of rights issue. The Plaintiff's lawyer contested this notice and subsequently filed HCCC 603 of 2006. The 2<sup>nd</sup> Defendant increased the share capital from 2 Million to 6 Million and in the notice of the resolution to increase was a request that it subscribe to its portion of shares paying a sum of Kshs.800, 000.00 which the Plaintiff agreed to do using a banker's cheque which was returned with a letter saying the shares would be held in abeyance following the pending court case.
  8. The 2<sup>nd</sup> Defendant Company then increased its authorized and issued share capital from 6 Million to 10 Million while still holding in abeyance the Plaintiff's additional shares while the Plaintiff

remained willing to pay for them. The Plaintiff alleges that in further attainment of the Defendant's scheme to dilute the Plaintiff's shares, the 2<sup>nd</sup> Defendant through its Company Secretaries sent a notice by post to the Plaintiff of an Extraordinary General Meeting scheduled for 30<sup>th</sup> July 2012 with the agenda "to discuss the serious financial and business position of the Company and how to resolve it." The said notice was sent and received late and later the Plaintiff found out that there was a further increase of the share capital from Kshs.9.2 Million to Kshs.49.2 Million vide a resolution passed by the board. There was a further increase of the capital from Kshs.49.46 Million to Kshs.97.46 Million in an Extraordinary General Meeting held on 4<sup>th</sup> April 2014, with the Plaintiff's shares being held in abeyance.

9. Parties filed submissions to the application. The Applicant identified the following issues for determination:-

1. ***Whether a change of name alters the Plaintiff's rights.***
2. ***Whether the Plaintiff is entitled to an injunction***
3. ***Whether an inspector should be appointed to investigate the affairs of the company***
4. ***Whether a receiver/manager should be appointed***
5. ***Whether costs should be provided for.***

10. Before we go into the substantive issues in the prayers, there is the issue of the change of Plaintiff's name, with the Respondents contending that the said change of name altered the Plaintiff's rights herewith. I will summarily dispense with this issue so that we move forward. A company is by law allowed to alter its name. **Section 20(1)** of the Companies Act provides that:

***"A company may, by special resolution and with the approval of the registrar signified in writing, change its name."***

It goes further in **subsection 4** to provide:

***"A change of name by a company under this section shall not affect any rights or obligations of the Company or render defective any legal proceedings by or against the company and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name."***

In **Shell & BP (Malindi) Kenya Ltd .v. Kings Motors Ltd [2004] 2KLR** the Plaintiff made an application for an injunction against the Defendant who argued that the Plaintiff lacked *locus standi* to bring the suit after the name of the Plaintiff Company was changed. It was held that a change of name by a company does not affect any rights or obligations of the company or render defective any legal proceedings by or against the company. The suit was first brought forth by Kassam Khimji Limited which has since changed its name to Medina Corporation Company Limited. This change in name has been evidenced by the certificate of change of name dated 13<sup>th</sup> July 2010. Further, the Court allowed this change of name upon an application dated 2<sup>nd</sup> October 2012 vide the ruling delivered on 6<sup>th</sup> February 2013 in open court.

The Plaintiff Company therefore is entitled to the same rights it had before the change of name.

11. The Applicant has submitted that this court should grant the injunction as prayed. The Applicant relied on **Order 40 Rule 1** of the Civil Procedure Rules, 2010 provide that:

***"Where in any suit it is proved by affidavit or otherwise-***

***(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***

***(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be***

*obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”*

Rule 2 provides that:

*“In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may at any time after the commencement of the suit, and either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or relating the same property or right.*

*(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”*

By virtue of **Order 40**, the court has the power to grant an injunction against the Defendant. However, this power was held to be discretionary in **Nyutu & 3 others .v. Gatheru & 2 others [1990] KLR**. That discretionary is a free one and must be exercised judicially exercised. It must be based on common sense and legal principles.

12.The Applicant also relied on the case of **Olympic Sports House Limited .v. School Equipment Centre Limited** where the Learned Judge considered the principles set out in **Giella .v. Cassman Brown** that the Applicant must establish a prima facie case with a probability of success, that the applicant must demonstrate that damages will not be an adequate remedy and that if the Court is in doubt on the foregoing, it determines the matter on a balance of convenience. The Plaintiff submitted that it has shown a *prima facie* case by the definition held in **Mrao –Vs- First American Bank (K) Ltd** In that the 2<sup>nd</sup> Defendant failed to allow the Plaintiff exercise its pre-emptory rights and as such, a legal right was infringed. Further, from the evidence produced, it is clear to see that the 2<sup>nd</sup> Defendant has been high handed in its dealings with the Plaintiff and its conduct being tantamount to illegal.

13.The Plaintiff also submitted on whether an Inspector should be appointed to investigate the affairs of the company? The Plaintiff cited the Companies Act at **Section 165** which provides that:-

*“(1) the court may appoint one or more competent inspectors to investigate the affairs of the company and report thereon in such manner as the court directs-*

- a. *In the case of a company having a share capital, on the application either of not less than two hundred members or of members holding not less than one-tenth of the shares issued;*
- b. *In the case of a company not having a share capital on the application of not less than one-fifth in number of the persons on the company’s register of members.*

2. *The application shall be supported by such evidence as the court may require for the purpose of showing that the applicants have good reason for requiring the investigation, and the court may, before appointing an inspector, require the applicants to give security, to an amount not exceeding ten thousand shillings for payment of the costs of the investigation.”*

14.The Plaintiff relied on the case of **SALAMA MAHMOUD SAAD -V- KIKAS INVESTMENTS LIMITED & ABDILLAHI ABDI [2012] eKLR** where the Applicant sought an order that an inspector be appointed to investigate the affairs of the company. The learned

judge granted the order for appointment of an inspector after considering the evidence brought forward and was satisfied that it warranted appointment of an inspector. She appreciated that the Applicant is a 50% shareholder. The Plaintiff submitted that in the annual return filed in 2004 by the 2<sup>nd</sup> Defendant's company secretaries, the Plaintiff owned 20% of the number of shares issued. This met the threshold provided by section 165. However, in the annual return filed in 2014, the Plaintiff owns 0.843% of the total number of shares issued. This is pellucid evidence that the 2<sup>nd</sup> Defendant Company did indeed increase share capital with a malicious motive of diluting the Plaintiff's control in the 2<sup>nd</sup> Defendant Company. As such, the Plaintiff invokes the provisions of **Section 211** which provides:

***“(1) any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members( including himself), or in a case falling within subsection (2) of section 170, the Attorney –General may make an application to the court by petition for an order under this section.***

***2. If on any such petition the court is of opinion-***

***(a) That the company's affairs are being conducted as aforesaid; and***

***(b) That to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company would be wound up,***

***The court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital.”***

15.As to whether a receiver/manager should be appointed, the Plaintiff cited **Order 41 Rule 1(1)** which provides that:-

***“(1) where it appears to the court to be just and convenient, the court may by order-***

- a. Appoint a receiver of any property, whether before or after decree;***
- b. Remove any person from the possession or custody of the property***
- c. Commit the same to the possession, custody or management of the receiver***
- d. Confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits, and the execution of such documents as the owner himself has, or such of those powers as the court thinks fit”***

The Plaintiff submitted that this court has power to appoint a receiver. In the current circumstances, it would be in the interest of justice for one to be appointed during the pendency of this suit to take into custody the property of the 2<sup>nd</sup> Defendant Company as it has failed to truthfully value its worth to the disadvantage of the shareholders in particular the Plaintiff.

16.The Defendants/Respondents on their part while revising the history of the application, submitted that the Plaintiff has not satisfied the requirements laid down in **Giella vs Cassman Brown & Co. Limited [ 1973] EA 358** that is to say;

- i. Whether the Plaintiff has a prima facie case with a probability of success.***
- ii. Whether the Plaintiff will suffer irreparable harm if an order for injunction is not granted.***
- iii.If the Court is in doubt, whether the balance of convenience favours the Plaintiff.***

17. The Defendants submitted that the Plaintiff has not demonstrated a *prima facie* case that would of necessity implore this Court to grant the orders for injunction sought. It is only after full trial that this Court can determine the rightful owner of the 20,000 shares and the shares issued in a rights issue in connection thereto. In view of the agreement entered into between the Plaintiff and the 1<sup>st</sup> Defendant for the purchase of the Plaintiff's shares (which is not denied) it is the Defendant's case that the Plaintiff cannot demonstrate a *prima facie* case with a probability of success. According to the Defendants, the orders sought by the Plaintiff presupposes that the Plaintiff is the lawful shareholder of 20,000 shares and is entitled to shares issued in the rights issue and there is no need of hearing the suits filed. The Defendants further submitted that whether the Plaintiff will suffer irreparable loss/harm if an order for injunction is not granted is another issue for consideration by the Court. The Defendants submitted that the Plaintiff is not likely to suffer any irreparable harm and therefore should not get the orders sought. It has not been alleged or shown that damages cannot be adequate remedy if the Plaintiff is successful. In any event as aforesaid once the Court resolves the issue of shareholding the allocation to the rightful party of the shares and the shares issued in the rights issue will be done. In the event the court is in doubt the balance of convenience does not favour the grant of an injunction to the Plaintiff. The Plaintiff has filed several suits as aforesaid which have never been heard or determined.
18. The Defendants further submitted that the suits filed are also similar in nature and raise the same or substantially similar issues. This amounts to flagrant abuse of the court process and this Honourable Court should not let it to be continued, adding that none of the grounds raised in the application does entitle the Plaintiff to any of the reliefs sought. The orders sought are not only bad in law but are premature and can only be granted after hearing and determination of the suits. Moreover, there is no evidence whatsoever of mismanagement of the 2<sup>nd</sup> Defendant and its officers have not acted in breach of their fiduciary duties to the Company or the Plaintiff and similarly the 2<sup>nd</sup> Defendant has not breached any law or violated the Plaintiff's rights.
19. I have carefully considered the application and the submission of the parties. For me the issues for determination are simply whether or not this court can grant the prayers sought in the application. It is important to note that there are several matters or suits in courts related to this issue, and these are HCCC No. 304 of 2012; HCCC No. 603 of 2006; HCCC No. 686 of 2008 and HCCC No. 3896 of 1993. All these suits revolve around the same issue as herein, and that issue is the issue of the Plaintiffs shares. Judges who handled the issues in those suits before myself made directions for the early hearing and determination of the suits. In fact, the court in HCCC No. 686 of 2008 by its Ruling dated 25th October 2010 granted orders staying that suit pending hearing and determination of earlier suits. For one reason or another, the earlier suits including the current one have not been heard and determined.
20. It is also clear to me that the central issue to this suit and to all the other suits is an agreement for the sale of the Plaintiff's shares numbering 20% in the 1st Defendant Company pursuant to the share holding agreement central to this suit. I also believe that once the issue of that shareholding is resolved the stalemate in all these cases would be resolved. It is also correct to say that as long all the said issues of shares is not resolved, the Plaintiff herein remain entitled to its shares in the 1st Defendant company, and is also entitled to participate in the affairs of the Company in accordance with the Memorandum and Articles of Association of the Company, and the Companies Act, Cap 486 of the Laws of Kenya.
21. The 1st Defendant has attempted to increase the shareholding rights of the members of the 2nd Defendant by creating more shares. The Applicant believes that that action dilutes its shares, and wants the process halted until the 2nd Defendant's Company is valued and its worth is determined through a legal and verifiable process. The Applicant appears to be in a legal dilemma. On the one hand, the Applicant wants to sell its shares to the Respondents at a valuable price, while at the same time, the Applicant who is clearly kept out of the operations of the Company, seeks to oversee, know, participate in, and control the operations of the 2nd Defendant's Company in his capacity as a shareholder. That is a legitimate expectation. However, to what extent can these expectations assure the Applicant the grant of the orders sought herein? It must be noted for record that the 2nd Defendant's Company has been operating ever since the 1st case herein was filed in 1994, and that the allegations against the mismanagement of the company is the concern only of the Plaintiff/Applicant. This concern, however, is not supported by any documentary evidence of mismanagement. Mismanagement or any such misgivings, alleged against a company

must be capable of verification. It is not a subjective quality. It is an objective quality, which must be verified. It is easily verifiable whether or not the Plaintiff/Applicant is allowed to participate in the affairs of the company. However, the need to appoint an inspector to investigate the affairs of the company, or the need to appoint a receiver for a company must be based on verifiable deteriorating aspects of the company which will require the court to intervene. I can easily understand the Plaintiff's fear that if allowed free hand, and without the participation of the Plaintiff in its affairs, the 1st Defendant might interfere with the shareholding rights to the extent that the Plaintiffs 20% shareholding may end up being seriously diluted, and that the court may intervene to ensure that such a process is legally checked. But the Applicant has not laid before this court compelling evidence or reason to enable this court appoint either an Inspector, Investigator or Receiver of the Company. There is no evidence that the Company was making profits but is now engaged in losses. This reasoning is supported by the fact of unreasonable delay by the Applicant in applying for those orders. Despite the differences between the Plaintiff and the 1st Defendant, the 2nd Defendant's Company has continued to operate without any hindrance, expect, that the Plaintiff is excluded from its affairs. The Plaintiff's exclusion from the affairs of the Defendant's Company cannot be said to have reached the oppressive stage requiring the intervention of this court. The exclusion is explained by the fact that there is a case in court, filed by the Plaintiff/Applicant concerning the 20% disputed shares. This makes the Plaintiff/Applicant a person with his legs in two places; one in the court, the other in the company. The dispute in court cannot hold the company in limbo, and this company operations must continue except that where such is to, or intended to materially affect the shareholding capacity of the Plaintiff, the same can be halted pending the resolution of the case in court. In the circumstances, I believe that the Applicant merits an injunction against the 1<sup>st</sup> Defendant further alteration of the shareholding rights pending the case herein on the sale of the Applicant's 20% shares. Mr. Wainana for the Respondent had submitted that injunction cannot issue herein in the absence of an order praying for a permanent injunction in the suit herein. He cited the case of **SOUTHERN CREDIT BANKING CORPORATION – VS – CHARLES WACHIRA NGUNDO**, where Ringera J. stated –

***“ . . . interlocutory injunctive relief cannot be granted where . . . there is no relief in nature of a permanent injunction prayed for. Interlocutory relief cannot be granted in vacuo. The application is thus impotent and would be dismissed on this ground alone.”***

I do not agree with the finding of Ringera J. in that issue. Injunction is an equitable remedy. All equitable remedies became necessary when the law was too strict to provide a solution to a problem at hand. Equitable remedies cannot be killed purely on technical procedures. That is what the law did, causing the citizens to petition the king for an equitable, flexible remedy hitherto unknown to the law. Equitable remedies must remain flexible to be useful.

22. It is my view that once the issue of the sale of the 20% shares belonging to the Plaintiff is resolved, the substratum of this suit will have been resolved. The most important step is to have that issue resolved on priority, before the Plaintiff can apply for prayer numbers 4 to 7 of the application.

23. In the upshot, I make the following orders:-

a. ***That the 2nd Defendant whether by itself or its servants or agents or otherwise howsoever be restrained by a temporary order of injunction from doing or continuing with the following acts or any of them, that is to say from effecting a rights and/or share issue, allocation, allotment and/or transfer and/or otherwise howsoever altering or registering any alteration in its share capital touching on the Plaintiff's 20% share entitlement pending the hearing and determination of the suit.***

b. ***Costs assessed at 30% shall be for the Applicant.***

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 19TH DAY OF DECEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Oyugi holding brief for Kanyama for the Plaintiffs

No appearance for Defendants

Teresia – Court Clerk