



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 611 of 2004

ELKANA MUKUNDI GATIMU.....1ST PLAINTIFF

KENYUA NGUNJIRI.....2ND PLAINTIFF

VERSUS

JOHN B.M. MUYA.....1ST DEFENDANT

MRS. R. W. KUNYIHA.....2ND DEFENDANT

AND

SAFINA PROPERTIES LIMITED.....3RD PARTY

JUDGMENT

1. The plaintiffs' suit is predicated on a further re-amended plaint dated 7th July 2010. There are four primary prayers. First, the plaintiffs seek to nullify all the resolutions passed at a meeting of the company held on 25th May 2004. Secondly, the plaintiffs pray that the allotment of 13,000 shares to the 1st defendant and 3,290 shares to the estate of Geoffrey Kunyiha, deceased, be cancelled. Thirdly, they pray that all resolutions, documents and returns filed with the Registrar of Companies following the impugned meeting be expunged from the register. Lastly they seek a declaratory order that the 1st and 2nd defendants cannot take up shares of the plaintiffs in Safina Properties Limited or Safina Limited without their consent or full compensation.

2. The plaintiffs' case is that the shareholders meeting of 25th May 2004 and a subsequent board meeting of the directors of the same date were illegal for want of notice, quorum and statutory requirements. Accordingly all the resolutions passed, including appointment of the 2nd defendant as a director, the appointment of a company secretary, and subsequent returns made to the Registrar of Companies were null and void. In particular allotment of shares to the 1st defendant and to the estate of the deceased is pleaded as fraudulent, illegal and without necessary consideration.

3. The 1st and 2nd defendants deny all those allegations. They pleaded in their amended defence dated 14th July 2010 that the suit has no merit and should be dismissed with costs. On 14th October 2010, the defendants were granted leave to enjoin Safina Properties Limited as a third party. In the notice to the third party, they sought indemnity from the third party for the wrongs alleged by the plaintiffs. Strangely, the 3rd party entered an appearance through the defendants' lawyers. In a defence dated 29th October 2010, the third party also set up a counterclaim: an order for an account by the plaintiffs for 100,000

shares sold to Branton Investments Limited and for payment of proceeds from the sale.

4. The plaintiffs called two witnesses. The first was the 2nd plaintiff, Kenyua Ngunjiri. He relied on a statement dated 24th March 2011. He said he was a director and chairman of Safina Properties Limited. The other shareholders were the 1st defendant, the 1st plaintiff and Geoffrey Kuniyiha, deceased. They each had about 1000 shares. He testified that the meeting of 25th May 2004 was not valid because there was no proper notice. Only one shareholder, the 1st defendant, attended. The other people in the meeting were strangers including Mrs. Rosalind Kuniyiha, the widow of the deceased shareholder. He said he was not served with any notice of the meeting. He testified that at that meeting three key resolutions were passed: The 1st defendant allotted himself 13,000 shares while the 2nd defendant was allotted 3,290 shares; A company secretary, Satima Registrars, was appointed; and, the 2nd defendant was appointed a director of the company. The bank mandates for operating the accounts of the company were also altered. The witness stated that he was not invited to yet another meeting of the company held on 5th July 2010.

5. Upon cross-examination he conceded that he was aware of the planned meeting but that he did not receive a formal notice. He filed an action to stop the meetings. One of those actions was dismissed on 30th April 2010. He said he was a shareholder but not a subscriber to the memorandum and articles of the company. He insisted he was the chairman of the company. He thus contested the returns at page 73 of the defendants' bundle from 14th January 1999 to 11th July 2009. He stated that the company held a series of meetings in the year 2003. The deceased, Geoffrey Kuniyiha died in 1998. He conceded that the deceased's wife Rosalind Kuniyiha attended some meetings on behalf of the estate. He said the company's address was P.o. Box 72327 as per the document at page 24 of the defendants' bundle but the notice at page 2 of the bundle is addressed to P.o. Box 8354. The latter is the 1st defendant's postal address. He was emphatic that he has not attended a shareholders or directors meeting since the year 2004. He said the document at page 164 of the defendants' bundle shows he still holds 1,023 shares even as late as July 2009. He concluded by stating that the defendants have shut out the plaintiffs from the business unfairly and illegally. The plaintiffs had complained in writing to their company secretary. The secretary insisted that the returns on record were correct. They made it a party to the suit but later withdrew the claim after the proprietor passed on.

6. Regarding the counterclaim by the 3rd party, he conceded that there was a transfer of 100,000 shares to Branton Investments Limited for consideration of Kshs 6,000,000. He said the money was received by the company and banked. He did not produce details of the bankings. Lastly, he said that there was no counterclaim by the 3rd party for Kshs 6,000,000.

7. The second witness was the 1st plaintiff. He largely restated the narrative by the 2nd plaintiff. He is one of the original subscribers to the shares of the company. He confirmed that he was not served with notices for the meetings held by the company on 25th May 2004 and 5th July 2010. He in particular wrote a letter dated 20th May 2004 protesting to a letter from the 1st defendant dated 3rd May 2004 convening a special general meeting for 5th May 2004. He thus prays that the suit be allowed as pleaded in the further re-amended plaint dated 7th July 2010.

8. He conceded in cross-examination that he had received the letter dated 3rd May 2004 calling a meeting for 5th May 2004. No such meeting occurred. In particular, he was not aware of the material meetings held on 25th May 2004. The letter addressed to him with respect to those meetings does not bear his true address. He distanced himself from the annual returns made after that date. He stated that Rosalind Kuniyiha, the 2nd defendant, could only have attended the meeting as an observer as she was neither a shareholder nor a director of the company. He for example referred to minutes dated 7th August 2003 where Rosalind Kuniyiha attended a meeting of the company and was nominated to take the minutes. He said article 9 of the articles of association on transmission of shares of a deceased shareholder was subject to approval by the board. The quorum, he said, needed to be two.

9. He accepted that he received the notice for the meeting to be held on 5th July 2010 but he protested through his lawyers particularly on resolutions to dispose off his shares. He denied that he deliberately absconded or failed to attend meetings of the company. As far as he knows, the legitimate directors or shareholders of the company are four: himself, Kenyua Ngunjiri, the 1st defendant and the late Geoffrey Kuniyiha. Lastly he confirmed that the company received Kshs 6,000,000 for the shares sold to Branton Investments Limited. He said the payment was by cheque.

10. The defendants called two witnesses. The first was John Bosco Makumi Muya, the 1st defendant. His deposition sworn on 2nd August 2011 was admitted as part of his evidence in chief. He testified that the company had only 2 directors: himself and the 1st plaintiff. The 1st plaintiff had by his conduct denied the board and the company the requisite quorum. He referred to his letter of 9th February 2004 (page 1 of defendant's bundle) which was followed by a requisition for an extraordinary general meeting through his letter dated 3rd April 2004. The meeting was to take place on 5th April 2004. The latter date may be an error, he said, as is clear from the notice at page 3 of the bundle. The letters were sent to all shareholders (including the 2nd defendant as a representative of the estate of Geoffrey Kuniyiha, deceased) to their last known addresses. The agenda of the meeting was clear and was circulated. The extraordinary general meeting took place in the morning followed immediately by a board of directors meeting.

11. In his view, Rosalind Kuniyiha was properly appointed as a director and allotted shares for two primary reasons: The returns of 14th January 2004 provided for shares held by the estate of the late Geoffrey Kuniyiha; and accordingly, a personal representative of that estate, in this case Rosalind Kuniyiha, was entitled to attend and vote at the meeting. As she was so nominated by the estate and was known by the plaintiffs, she was firmly in the shoes of the deceased. The witness also referred to the proxy forms at pages 16 to 18 of the bundle appointing Rosalind Kuniyiha to attend and vote at the company's meeting. He defended the resolutions to appoint her as a director, allot her shares and capitalize the debts and interest owed to the estate of Geoffrey Kuniyiha, deceased.

12. He testified that Safina Limited is a wholly owned subsidiary of Safina Properties Limited, the 3rd party. It had been resolved at an extraordinary general meeting on 21st September 2001 that Safina Limited do cease trading. The 3rd party held 79,997 shares out of 80,000 shares of Safina Limited. The latter owed a debt of Kshs 1,310,870 to the 1st defendant. This was to be capitalized into shares in the 3rd party as per the resolution at page 20 of the defendants' bundle. The sum translated to 13,000 shares issued to the 1st defendant. The debt to the estate of the deceased was Kshs 329,000 translating to 3,290 shares issued to Rosalind Kuniyiha. To support his argument, the 1st defendant asserted that even Kenyua Ngunjiri, the 2nd plaintiff, had sought to capitalize his debt as per his letter of 15th October 2003. The 1st plaintiff's debt after reconciliation was negative. He owed the company some monies and was withholding a company vehicle. As the two defendants acted in their capacity as directors and shareholders of the company, they have sought indemnity from the 3rd party.

13. Upon cross-examination, he conceded that the company did not hold any formal meetings from the date of incorporation upto 25th May 2004. No minutes of such meetings before 25th May 2004 are available. Satima Registrars were appointed company secretary on 25th May 2004 as per the notification of change of directors and secretary. He testified that as at 3rd May 2004, the company had no secretary. The meeting called for 25th May 2004 was to be held at Wakulima House, Nairobi in the boardroom of another company known as Safina East Africa Limited. He said the companies were sister companies. The registered office of Safina Properties Limited was at NSSF building. At the material time, the proprietor of Satima Registrars had died. That is why the meeting was being held at Wakulima House. The meeting of 25th May 2004 was also attended by a Mr. Donald Okonjo representing some law firm. He was not a shareholder or director.

14. The witness then gave an account of rent from a house owned by Safina at Ngummo. The tenant is his brother. He said the rent has been accounted for. He is also a director or shareholder of a company called Kzanaka Limited and Safina Properties Limited. He made reference to paragraph 13 and 15 of his

statement regarding shares held in Coopers Limited. Kzanaka Limited was formerly Coopers Limited. He was a director of Coopers Limited and is privy to the sale and transfer of shares belonging to the company in Kzanaka Limited. Lastly, he testified that Safina Limited is under liquidation. He and the 1st plaintiff are the joint liquidators as per the shareholder's resolution at page 20 of the bundle. The company that was being liquidated has not executed the resolution.

15. Although the defendants' counsel stated that he was to call 3 other witnesses, he only presented one more, Donald Okonjo. On 27th March 2012, I had ordered witness summons to issue to Donald Okonjo and two other witnesses Johnson Adera and Charles Onyancha. The witness, Donald Okonjo, relied on his statement dated 6th January 2012. He was admitted as an advocate on 15th December 2005. On 25th May 2004, he had attended the company's meeting as a pupil representing the law firm of Okong'o Omogeni Advocates who were acting for the 3rd party. He confirmed that the meeting was attended by John Muya, the 1st defendant, and Rosalind Kunyiha, the 2nd defendant and that resolutions were carried as per the 1st defendant's testimony. He also attended the board meeting that immediately followed the extraordinary general meeting. He could not remember which of the two "shareholders" nominated or seconded each other. The minutes were taken by Rosalind Kunyiha. He does not know whether she is a certified public secretary. Both meetings took place at Wakulima House, 6th Floor, in the boardroom of Safina East Africa Limited.

16. The third party called one witness, Charles Onyancha, a member of parliament for Bonchari, Kisii County. He is a company secretary. He confirmed he had dealings with Safina Properties Limited for nearly 20 years. Branton Investments Limited is one of his clients. In the year 2000 it sought to buy 100,000 shares held by Safina Properties Limited in Coopers Kenya Limited at Kshs 60 per share. That translated to Kshs 6,000,000. One of the directors of the purchaser is Chrysanthus Okemo, a member of parliament. He, Charles Onyancha, executed the transfer at page 26 of the bundle. He did not lodge it at the Registry himself. Mr. Ngunjiri and Mr. Gatimu signed for Safina Properties Limited. At the material time, he was the managing director of Coopers (K) Ltd. He was not the company secretary of Safina Properties Limited personally: but a company in which he had an interest called Gateway Registrar was. He left Coopers in 2002. He delivered the Kshs 6,000,000 in cash to the 1st plaintiff. He said the transaction was above board. He knows the 2nd defendant as the widow of the deceased shareholder. He could not comment on the complaint that the money did not reach the company.

17. I have considered the evidence, the witness statements and depositions and the respective bundles of documents by the parties. I have also considered the written submissions by both parties as well as the joint supplementary submissions by the defendants and 3rd party. This suit graphically exposes the soft underbelly of small holding private companies: their failure to follow the strict legal regime and shareholder democracy enshrined in the Companies Act and the regulations thereunder as well as the contractual foundation in their memorandum and articles of association. Those breaches, failures and poor succession rules for deceased shareholders breed this type of dispute and suit.

18. The pertinent issues for determination in this suit can be condensed as follows;

- (i) Were the two meetings of the company held on 25th May 2004 and another meeting held on 5th July 2010 valid?
- (ii) Were the resolutions passed at those meetings and subsequent board actions sanctioned by the company?
- (iii) Was the transfer of 13,000 shares to the 1st defendant and 3,200 shares to the 2nd defendant legal?
- (iv) Were the subsequent sales or transfer of shares after 25th May 2004 valid?
- (v) Should the annual returns and any other document filed with the Registrar of Companies following the impugned meetings of 25th May 2004 be nullified?

(vi) Are the defendants entitled to indemnity from the 3rd party?

(vii) Is the present action defective for failure to proceed to arbitration?

(viii) Is the 3rd party entitled to its claim against the plaintiffs for Kshs 6,000,000? and,

(ix) Is the 3rd party entitled to the prayer for an account?

19. Although a tome of materials have been put before the court, the competing claims by the plaintiffs and defendants turn around the efficacy of the impugned meetings of 25th May 2004. Were proper and effective notices served? Were the meetings quorate or properly convened? Were binding resolutions put to the meeting and carried? That truly is the elephant in the room.

20. From the evidence, there were only 3 living directors or shareholders of Safina Properties Limited on 25th May 2004: The two plaintiffs and the 1st defendant namely John Makumi Muya and Elkana Mukundi Gatimu who were the original subscribers to the memorandum and articles of the company and, though disputed, Kenya Ngunjiri. The other undisputed shareholder was Geoffrey Kirunda Kunyiha, now deceased. The plaintiffs and the 1st defendant conceded freely that on the above date, the company did not have a company secretary. Doubt is removed by the document at page 23 of the defendants' bundle: It is a letter by Emu Registrars tendering their resignation as secretaries on 18th February 2004. The defendants conceded to the fact at paragraph 4 of their amended defence to the further re-amended plaint dated 14th July 2010. I have then seen the document at page 69 of the same bundle. It is a company form 203 A notifying the Registrar of Companies that Satima Registrars were appointed secretary with effect from 25th May 2004.

21. Section 178 of the Companies Act provides as follows:

“178. (1) Every company shall have a secretary.

(2) Anything required or authorized to be done by or to the secretary may, if the office is vacant or there is for any other reason no secretary capable of acting, be done by or to any assistant or deputy secretary or, if there is no assistant or deputy secretary capable of acting, by or to any officer of the company authorized generally or specially in that behalf by a resolution of the board of directors”.

22. By amendments to the Companies Act, a new section 178 A came into effect. It provides further as follows:

“Every secretary to the company shall hold a qualification prescribed by section 20 of the Certified Public Secretaries Act, 1988”.

Reference to “other officers” in section 178 can only be to either directors appointed under section 177 or by virtue of being the original subscribers to the memorandum and articles of the company or persons duly authorized by the company. By dint of section 179 of the Act, a company cannot have a sole director as the sole secretary of the corporation or vice versa.

23. Article 19 of the articles of association of Safina Properties Limited provided that:

“Unless and until otherwise determined by the company in general meeting the number of directors shall not be less than two or more than five”.

The company's articles expressly modified clause 68 of Table A deleting the words “from any cause to be a director”. On the face of it then, Rosalind Kunyiha qualified to be a director. But she could only be appointed in a meeting properly convened by either the company secretary or in default by a person duly authorized generally or specially in that behalf by a resolution of the board of directors.

24. I find without hesitation that the company was operating unlawfully without a company secretary between 18th February 2004 and 25th May 2004. The appointment of new company secretaries, Satima Registrars, on that date is equally fraught with serious shortcomings: Was the meeting appointing them properly convened or quorate? Were the requisite majority votes available? Could that resolution be properly carried? The only two directors of the company, John Muya and Elkana Gatimu, were entitled to call a board meeting of the company. There seems to be no love lost between them. One is the 1st plaintiff, the other the 1st defendant. The 1st defendant wrote to the 1st plaintiff on 9th February 2004 to convene a meeting. Nothing happened. On 5th April 2004 he wrote a demand to his co-director stating that unless he concurred to a meeting, he would be constrained to convene an “extra-ordinary general meeting under section 132 of Cap 84 C (sic) of the Laws of Kenya”. There was hence a gridlock that is the genesis of the impugned meetings of 25th May 2004. The 1st defendant then took the matters into his own hands and unilaterally issued a notice. But he went about it in the wrong manner, very much so like in the case of directors’ gridlock in *Lilian Njeri Mungai Vs Njoroge Mungai* Nairobi, Court of Appeal, Civil Appeal 191 of 1995 [1997] e KLR.

25. The train of errors then commenced on 3rd May 2004 when the 1st defendant addressed a letter to the shareholders calling for a special general meeting of the company to be held on 5th May 2004. The address used was P.o Box 72327. It is the address of the company. That notice of two days was completely unreasonable for a letter going out by snail mail in the Kenyan postal service. The 1st defendant states the date was an error and he meant 25th May 2004. Granted that set of circumstances, I would be willing to assume that the actual notices are the documents at pages 4 and 5 of the defendants’ bundle. They are dated 3rd May 2004 calling a meeting for 25th May 2004. The difficulty I have is twofold: first they are executed jointly by Mrs. Rosalind Wanjiru Kunyiha who at the date had not been appointed a director or officer of the company and whose interest was only in the shares of Geoffrey Kunyiha deceased; secondly, the plaintiffs denied receipt of the notices. However, the 1st plaintiff at least conceded receipt. It would have been ludicrous to do otherwise in view of his letter dated 20th May 2004 querying the notice. To be fair to the defendants and 3rd party, the address used was regularly acknowledged by the plaintiffs. Even the latest verifying affidavit by the plaintiffs dated 7th July 2010 contains the address P.o. Box 72327 Nairobi. The plaintiffs’ protestations are thus a red herring.

26. Section 132 of the Companies Act allows members holding not less than one-tenth of the paid up capital of a company to requisition an extra-ordinary general meeting of the company. Safina Properties Limited was incorporated on 12th July 1988. It had two subscribers to its memorandum and articles: John Makumi Muya and Elkana Mukundi Gatimu with 1 share each. From the 1999 returns, the issued shares were 4000. The 1st defendant had 1395 shares, Kenyua Ngunjiri had 1023, whereas Geoffrey Kunyiha and Elkana Gatimu had 791 shares each. So the 1st defendant, as a shareholder, could requisition the meeting. If he did so in that capacity, it was up to the directors to convene the meeting within 21 days failing which the members or shareholders could convene the meeting.

27. One question begging an answer is whether the meeting of 25th May 2004 was convened by the 1st defendant as a shareholder or as a director. Secondly section 132 (2) required that the requisitionists state the objects of the meeting. Rosalind Kunyiha could not be such a requisitionist on that date.

28. I have not seen any cogent evidence that the shares of Geoffrey Kunyiha had been transmitted to her on that date. Again, from the two notices, special business was to be transacted for which special notice was required by dint of sections 132 (6), 141 and 142 of the Companies Act. The notice required to increase the number of directors, for example, in a meeting requisitioned under section 132 was then 28 days. That is clear at section 142. The notices issued by the 1st defendant on 3rd May 2004 for an extraordinary members’ meeting to be held on 25th May 2004 was thus fatally flawed. Clause 48 of Table A of the Companies Regulations is superseded by sections 132 (6), 141 and 142 of the Act. And I have already held that the company was operating outside the fringes of the law for want of a company secretary. Articles 1 to 26 of the company or regulations 98 to 106 of part 1 of Table A of the Companies Regulations in the Act do not provide any firm basis for the notices issued by the 1st defendant titled

“notices of motion” dated 3rd May 2004.

29. I also note that the notice for increase of directors (page 4 of defendants bundle) does not set the time or place for the meeting. It was also superfluous. I say so because article 19 of the company’s articles of association that I set out earlier already provided for upto 5 directors. The true object of the meeting should thus have been to appoint additional directors. The use of the term “increase the number of directors” was thus misleading. The notice is also predicated on the impeached letter of 3rd May 2004 that had stated the meeting would be on 5th May 2004. I thus find that the notices for the meeting were incurably defective.

30. That takes me inside the meeting room on 25th May 2004. Article 12 of the company provided that quorum for any meeting of the company shall be two members. The only shareholder and director present was John Makumi Muya. Rosalind Kunyiha had come to the meeting as a representative of the estate of Geoffrey Kunyiha, deceased. The letter at page 15 of the defendants’ bundle dated 7th September 2003 had authorized her to represent the estate “in all matters relating to the estate’s shareholding in Safina Properties Limited” and to commit the estate. It is signed by her and her co-administrator David Mucai. I did not see a copy of the grant or will of the deceased. Even assuming that the two were the legal representatives of the deceased, the company required to transmit the deceased’s shares to them. The issue of a grant would not *ipso facto* transmit the shares. I will return to the legal aspects of that matter shortly. She could thus only attend the meeting as a representative of the estate.

31. The other relevant document is a proxy form signed by the two administrators dated 20th May 2004 (page 16 of defendants’ bundle) authorizing Rosalind Kunyiha to vote at the meeting of 25th May 2004. But the shares having not been transmitted to her or co-administrator under articles 9 or 10 of the articles, I express serious doubt about her capacity to be elected a director or be allotted further shares. I am fortified there by the limitations found at section 30 of the Act regarding transfer of shares by a private company.

32. From the returns to the Registrar of Companies made on 14th January 2001 (page 88 of the defendants’ bundle) the 791 shares of Geoffrey Kunyiha are stated to be held by the “estate of the late Geoffrey Kirunda Kunyiha”. I have no evidence of transmission to the administrators or beneficiaries. Certainly by the date of the meeting of 25th May 2004, Rosalind was not a shareholder: she was there to represent the estate.

33. Articles 9 and 10 of the articles of association of the company (page 59 of the bundle) deal with transfer of shares. They state:

“9. Any share standing in the names of the trustees of any settlement or of the will of any deceased member may be transferred upon any change of trustees to the trustees for the time being of such settlement or will.

10. Except in the case of a transfer of shares expressly authorized by the last preceding Article, the right to transfer shares in the company shall be subject to the following restrictions, namely.....”

34. I stated earlier that I had not seen the will of the deceased or the grant. Clearly article 9 does not operate. It then became subject to the notices and conditions set out at sub clauses (a) to (e) of the article 10 where applicable. In a nutshell, such transfer required board sanction. One of the directors Elkana Gatimu states in his letter of 20th May 2004 that there has been no such allotment. It could be self serving but I have no clear evidence of transmission. I am there guided by the Court of Appeal in Surco Limited Vs Prabha Mahesh Gudka Nairobi, Court of Appeal, Civil of Appeal 311 of 2000 [2006] e KLR holding that an allotment of shares is not effective until the registration of the instrument of transfer of shares with the Registrar of Companies and entry in the company’s register. Clauses 29 and 32 of Table A of the Companies Act do not thus come to the aid of Rosalind Kunyiha.

35. There is then the matter of the number of shares represented at the meeting. Even assuming that

Rosalind Kunyiha was entitled to vote, she represented 791 shares. The 1st defendant had 1395 shares. That was 2,186 out of 4000 shares representing about 55% of the issued shares and falling well below the required threshold of votes under sections 132, 141 and 142 of the Companies Act. But fundamentally, the defendants were in effect sidelining and excluding the plaintiffs from participating in the management of the company.

36. The other person who attended the meeting was Daniel Okonjo, the defendants' witness number 2. He was a law pupil to merely observe the proceedings. Minutes were being taken by Rosalind Kunyiha. There was no company secretary present at the shareholders extra-ordinary general meeting. I thus find, without doubt, that the meeting was neither quorate nor did the votes cast meet the required threshold to carry the special resolutions. The plaintiffs had taken up cudgels with the venue of the meeting on 6th Floor Wakulima House at the offices of Safina East Africa Limited. There was nothing wrong there. Prior meetings had been held there. The second notice dated 3rd May 2004 for the board meeting had specified that venue. The notice calling the extra-ordinary general meeting had failed to name the time and place.

37. Having reached that conclusion, it must follow as a corollary, that all the resolutions purported to have been carried at the members extra-ordinary general meeting and the subsequent board meeting held on 25th May 2004 or 5th July 2010 were null and void. My answers to issue number (i) and (ii) are thus negative: there were no valid meetings and no legitimate resolutions carried or sanctioned by the company.

38. I have stated enough to dispose of this matter. But let me comment briefly about clauses 128 and 129 in Table A of the Companies Act. They allow a company, upon recommendations of the board of directors to resolve to capitalize any credit standing to the company for distribution of shares. The defendants' and 3rd party's counsel submitted that as the basis of the resolutions to capitalize Kshs 1,310,870 due to the 1st defendant into 13,000 shares and Kshs 329,000 into 3290 shares to Rosalind Kunyiha or the estate of the deceased. I have looked at pages 168 to 175 of the defendants' bundle. I am satisfied that Safina Properties Limited held 79,997 shares in Safina Limited. The only other three shares were held by the 1st defendant, 1st plaintiff and Geoffrey Kunyiha, deceased. That made Safina Properties Ltd the holding company of Safina Limited. On 21st September 2001, the members of Safina Properties Limited had resolved that liability of Kshs 1,310,870 owed to the 1st defendant and the 1st plaintiff by Safina Limited be transferred to Safina Properties Limited and capitalized as ordinary shares of the company.

39. I have also seen the resolutions at page 19 of the defendants' bundle providing for sale of shares and liquidation of Safina Limited. These were the basis of the resolutions made at the impeached board meeting of 25th May 2004. The alleged debt owed to the 1st defendant or the estate of the deceased is contested by the plaintiffs. They also state that the allotment of 13,000 shares to the 1st defendant and 3290 share to the 2nd defendant was unlawful and dilutes the plaintiffs' shareholding. It is also not lost on me that there was some irregularity where a debt owed in a different company was capitalized in a different company. It matters little that one is the holding company. The two are distinct and independent *Salomon Vs Salomon* [1897] AC 22. I do not wish to say more on the matter because I have already held that the meeting of the board of 25th May 2004 was irregular or unlawful and that all resolutions carried were a nullity. The answer to issues numbers (iii) and (iv) is in the negative: The transfer of 13,000 shares to the 1st defendant and 3,290 shares to the 2nd defendant was invalid and so were all subsequent sales of shares or allotments or transfers after 25th May 2004.

40. It must follow that all returns made and documents filed in the register of the company at the Companies Registry flowing from the resolutions at the meeting of 25th May 2004 and subsequent to that date are null and void. I have stated earlier that the company at the material time was operating outside the confines of the Act without a company secretary. It was in a void. My answer to issue number (v) is in the affirmative: Those returns and records are null and void and stand cancelled.

41. Article 30 of the company as read together with section 206 of the Companies Act offer directors limited indemnity. But such indemnity is outlawed by section 206 if it purports to grant indemnity for negligence, breach of duty or breach of trust. I have already stated that there was a gridlock in the board of directors. To that extent, the 1st defendant acted in good faith: and the plaintiffs are not without blemish. The 1st defendant and the estate of Geoffrey Kunyiha are entitled to limited indemnity for defending these proceedings. And to that extent, I am disinclined to order any costs to the plaintiff. However, if the defendants have breached their trust, acted negligently or misapplied the shares or assets of the company there is no cover of indemnity. Certainly the two defendants shall restore the 13,000 shares and 3,290 shares to the company at their cost and restore and reverse any sales or transfers whether to themselves or other persons made pursuant to the impeached resolutions passed on 25th May 2004 or 5th July 2010. My answer to issue number (vi) is that there shall be limited indemnity to the 1st defendant and 2nd defendant from the 3rd party, Safina Properties Limited as outlined in this paragraph only. But the defendants who have been in unilateral control of the company since 25th May 2004 to the exclusion of the shareholders will also render an account to the company on rents, income other assets and liabilities.

42. The last issue for determination is whether this action was premature or defective in view of article 29 of the articles of the company. That clause provides for arbitration. Under section 6 of the Arbitration Act, the parties should have proceeded to arbitration first. That may be so. But it is all water under the bridge. It behoved the defendants or third party to move the court *ab initio* to stay these proceedings. It is also a matter that would not rhyme now with the overriding objective to do justice to the parties set out at article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act. Put another way, it would be futile at this stage to contemplate what the benefits of that arbitration would have been. To that extent, the defendants and 3rd party have only themselves to blame for failing to invoke article 29 earlier. My answer to issue number (vii) is in the negative.

43. The claim by the third party is troubling. It has the hallmark of a fraudulent transaction. It is opaque. First, the claim for Kshs 6,000,000 is a special damage or contractual claim that required to be specially pleaded and strictly proved. It was not. The 1st defendant testified that the company had only one account or bank at Housing Finance Company of Kenya, Gill House branch Nairobi. He stated that no cash amount or banking for Kshs 6,000,000 was ever made. Mr. Charles Onyancha, the witness for the third party confirmed paying Kshs 6,000,000 in cash to the 1st plaintiff. The 2nd plaintiff said it was a cheque. Why would Branton Investments Limited pay such a huge sum in cash? One of the directors of that company and behind the purchase of the shares was Chrysanthus Okemo, a member of parliament.

44. The cash was given to Charles Onyancha, another member of parliament now (but not at the time) to deliver it to the company. Was there something to hide? Perhaps. Charles Onyancha was wearing too many hats: He was the managing director of Coopers Kenya Limited. Safina Properties Limited sold its stake of 100,000 shares held in Coopers Kenya Limited now known as Kzanaka Limited. The 1st defendant was also a director there. Can he now be heard to say he was unaware of the sale transaction from a company where he was a director to another where he was also a director? Mr. Onyancha had an incestuous relationship with the company, and all the key actors in that transaction. He was the company secretary of the third party: not directly but through his company Gateway Registrars Limited. He had interacted with both the plaintiffs and Safina Limited for over 20 years. He said he carried the cash of Kshs 6,000,000 from Chrysanthus Okemos's office. He did not get a receipt for the payment from the company. It was in the first half of the year 2000. I find that extremely strange. Neither the defendants nor the third party filed recovery proceedings. It was not until this suit in 2004 that that defence was raised without counterclaim. The third party notice for indemnity was only issued in the year 2010.

45. I stated that it is a strange procedural matter that the third party despite the obvious conflict of interest, entered an appearance through the defendants' law firm. In all this I find a deliberate attempt by all the parties to make material non-disclosures and to leave the court in a blind spot. That is why I stated that the transaction was opaque and suspicious. But the loser would be the third party. The court cannot sweep all that dirt under the carpet. I will thus grant the third party an order for an account by the plaintiffs for that sum. But I will dismiss the claim for judgment for that sum for want of strict pleading

and proof. My final answer to issue number (ix) is that the third party is entitled to an account.

46. For all the above reasons I make judgment as follows:

- a) **THAT** a declaration is made that the extra-ordinary general meeting and board of directors meeting of Safina Properties Limited held on 25th May 2004 contravened the articles of the company and the Companies Act. Accordingly, all resolutions made affecting the constitution of the board, shareholding of the company or bank account mandates were null and void.
- b) **THAT** the allotment of 13,000 shares to the 1st defendant and 3,290 shares to the 2nd defendant is declared null and void and is hereby cancelled.
- c) **THAT** all the returns made and documents and declarations filed in the register of the company by the Registrar of Companies pursuant to the meetings held on 25th May 2004 and any subsequent meeting including the one held on 5th July 2010 are cancelled and shall be expunged from the register.
- d) **THAT** in the interests of Justice, *suo moto*, and in view of the gridlock in the board of directors, the Registrar of Companies shall cause to be convened, upon issuing the requisite notices, a meeting of all the shareholders of Safina Properties Limited for the purpose of appointing new directors of the company and to transact any other business to ensure full compliance by the company with the Companies Act. The costs of holding the meeting shall be borne by the 1st and 2nd plaintiff and the 1st defendant.
- e) The plaintiffs shall provide a full and detailed account to the 3rd party under the hand of a reputable audit firm as to the sum of Kshs 6,000,000 paid as consideration for 100,000 shares of the company sold to Branton Investments Limited under a form of transfer made in the year 2000 or thereabouts. The report shall be made at the cost of the plaintiffs and shall be presented to the Registrar of Companies and produced at the meeting of the company ordered at (d) above. The defendants in turn shall at that meeting render a true and full account to the 3rd party of all rents, income, assets and liabilities of the company from 25th May 2004 to the effective date.
- f) Costs ordinarily follow the event. I would recap what I stated earlier: That the soft underbelly of this small holding private company has been exposed; that the directors represented by the two plaintiffs and the 1st defendant have, by causing a gridlock in the board, and breaching the strict legal regimes of company regulations and the articles of association, caused grievous damage to the company and shareholders. It is a serious indictment of their management. The company, an inanimate legal personality is the ultimate loser. Granted those circumstances, the order that commends itself to me is that subject to orders in (d) and (e), each party shall bear its own cost.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 29th day of January 2013.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mrs. F.S. Macharia for the Plaintiffs.

Mr. A. Obwayo for the Defendants.

Mr. A. Obwayo for the 3rd Party.

Mr. Collins Odhiambo Court Clerk.