



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 235 of 2010

ELIJAH MUGIKA OMBWORO PLAINTIFF/APPLICANT

VERSUS

KISII BOTTLERS LIMITED DEFENDANT/RESPONDENT

RULING

1. The plaintiffs Notice of Motion dated 5th October 2012 is brought under **sections 1A, 1B, 3, 3A, 63(b), (e) and 95** of the **Civil Procedure Act, Order 26 Rule 1, 3 and 6, Order 51 Rules 1 & 13(1) & (2)** of the **Civil Procedure Rules** and All Enabling provisions of the law.

2. It seeks for the following orders:-

(1) That this application be certified urgent and same be heard ex parte in the first instance.

(2) That the merger proposed to be entered between the defendant, Rift valley and Mount Kenya Bottlers Ltd to create Almasi Beverages Ltd be stopped pending the hearing and determination of this application.

(3) That pending the full hearing and determination of the suit herein, the Defendant/Respondent be ordered to deposit security in the sum or amount not less than Kshs. 14,000,000 plus costs of the suit to secure the applicants substantive suit herein.

(4) That costs of this application be provided for.

3. The application is premised on the grounds that the respondent is in the process of merging its business with Rift Valley and Mount Kenya

Bottlers Beverages Ltd which action will create a new legal entity that will complicate and hamper the applicants claim against the respondent. There is an affidavit in support of the application sworn by the plaintiff/applicant himself wherein he states that the respondent is in the process of merging with other companies and that unless the proposed merger is stopped, he is bound to suffer great prejudice, especially as regards the claims against the respondent.

4. The applicant further states that the respondent's intention is to defeat his claim against them through the merger as the entity to be created will be distinct from the defendant herein. It is applicant's

contention that the respondent will not suffer any prejudice if the orders sought are granted.

5. The application is opposed through the replying affidavit dated 16th October 2012 sworn by VINCENT H. L. OPANGA the Managing Director of the Defendant/Respondent Company. The deponent contends that as a shareholder of the Defendant/Respondent, the applicant is fully conversant with the goings on within the company and in particular the proposed merger and the attendant implications.

He also states that the applicant was provided with full information leading up to the decision for the proposed merger and that in any event, the Defendant/Respondent has the capacity to settle any claims the applicant may have against it.

6. Concerning the applicant's prayer for security for costs, the deponent avers that such an order would have no basis since the Defendant/Respondent has not gone outside the jurisdiction of this honourable court. He also says that there are no plans on the part of the Defendant/Respondent to dissolve itself upon the proposed merger and further that if such an order were to be made, it would adversely affect the Defendant's economic operations. he urged court to dismiss the application with costs.

7. By consent of the parties, this application proceeded by way of written submissions. Counsel also highlighted the submissions when they appeared before me on 28th January 2013. The submissions were also supported by authorities; including the classic case of **Salomon –vs- Salomon & Co. Ltd. [1985-99] All ER 33.**

8. The court has carefully read the submissions and the law. The question that arises for determination is whether the plaintiff/applicant has made out a case for the orders sought. In my considered view, the plaintiff/

applicant has not done so.

9. The applicant's case is that if the proposed merger is allowed to proceed then his contractual rights with the Defendant/Applicant shall be completely demined. The applicant relies on the provisions of **Section 41 of the Competition Act, No.12 of 2010** which act came into force on 1st March 2011. The section provides thus:-

“A merger occurs when one or more undertakings directly or

indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.”

10. The applicant contends that because his case against the Defendant has not been heard, and further that because Almasi Beverages, being the product of the proposed merger will take direct control of the undertakings of the Defendant/Respondent, once the said merger is concluded, then there will be no one to meet the decree should he win this case.

11. In response to this issue, counsel for the Defendant/Respondent submitted that the proposed merger does not, infact have the effect of closing down the Defendant/Respondent but is only a restructuring which will leave the Defendant/Respondent as a subsidiary of the new company to be known as Almasi Beverages Limited. Counsel further submitted that the proposed merger is meant to harness the synergies of the three entities to make each a stronger entity, and that as a shareholder, the plaintiff/applicant is bound to benefit in an even greater way.

12. Looking at this suit as a whole, the plaintiff has sued the defendant/respondent in his capacity as an employee. He is also a shareholder of the defendant/respondent. The law is that a company is bound by the contracts between it and other third parties, and in the instant case, the contract of employment between the plaintiff/applicant and the defendant/respondent is binding between them, so that should the plaintiff/applicant eventually succeed on his claims, I have no doubt that he would still have the decree satisfied. See **Southern Foundries Ltd –vs-shirlaw [1940] AC 701.**

13. In any event, there must be a clear distinction between the plaintiff/applicant as an employee of the defendant/respondent and as a

shareholder. As he has not come to court in his capacity as a shareholder, there would be no justification for this court to stop the proposed merger. Such an order would result injury not only to the defendant/respondent but also to the plaintiff/applicant in his capacity as shareholder.

14. It was also submitted on behalf of the Defendant/Respondent that this court has no jurisdiction to hear and determine this matter since the dispute herein is labour related. Counsel submitted that under **Article 162 (5)** of the **Constitution**, the jurisdiction of this court in labour-related disputes was ousted and that upon promulgation of the Industrial Court which became law, this court ceased to have any jurisdiction over this case; and that applicant should have transferred the suit to the Industrial Court.

15. For the plaintiff/applicant, it was contended that this civil and criminal jurisdiction by dint of **Article 162 (1)** of the **Constitution** and that in any event, at the time of filing of the instant suit, the Industrial Court Act was yet to come into operation. It was thus argued that subsequent events after filing of this suit appropriately on 25th August 2010 cannot render the suit incompetent, nor can they oust the jurisdiction of this court. Reliance was also placed on the case of **John Kenyaga & others –vs- Jaydees Knitting Factory, Nairobi HCCC No.3417 of 1989** (unreported) where it was persuasively held that the High Court has unlimited jurisdiction in civil and criminal matters and the creation of concurrent jurisdiction (e.g. the Trade Disputes Act) does not dispossess the High Court of the same.

16. Considering all the law in this case, I am persuaded that this court has the jurisdiction to hear this suit, the same having been filed prior to the enactment of the Industrial Court Act which came into force on 30th August 2011. I therefore find that the Defendant/Respondent's argument that this court has no jurisdiction over this matter is not well founded.

17. The final issue is the applicant's prayer for an order requiring the Defendant/Respondent to deposit into court a sum of Kshs.13,000,000/= to secure the applicant's substantive suit. All I can say on this issue is that if such an order were to be made, the Defendant/Respondent would suffer grave prejudice. It has not been demonstrated by the plaintiff/ applicant that the Defendant/Respondent has either transferred or is in the process of transferring its assets. On the other hand, the Defendant/Respondent has clearly demonstrated the prejudice it would suffer if such an order were granted by this court.

18. In the premises and for the reasons above given, I find the applicant's Notice of Motion dated 5th October 2012 to be misconceived and without merit. The same is accordingly dismissed with costs to the Defendant/Respondent.

19. It is so ordered.

Dated and delivered at Kisii this 27th day of March, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

M/s Mose Nyambega(absent)for the Plaintiff

Mrs E. Asati for Wathuta for the Defendant

Mr. Bibu Court Clerk

RUTH NEKOYE SITATI

JUDGE.

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