



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 268 OF 2011**

**1. TOKINORI KONO**

**2. KOJA MOTORS  
LIMITED**

**3. KOONS MOTORS  
LIMITED.....  
.....PLAINTIFFS**

**VERSUS**

**1. JAMES OMARE OINO**

**2. FENNITHA  
MAYAKA  
NYABOKE.....  
DEFENDANTS**

## R U L I N G

1. This ruling concerns a **preliminary objection** raised by the Defendants in respect to the suit. The preliminary objection was raised **by notice dated 1<sup>st</sup> July 2011**.

2. The points of law raised are as follows: -

i. That the suit does not disclose any reasonable cause of action against the Defendants and should be struck out with costs.

ii. That the suit as drawn is fatally defective and incurable by amendment.

iii. That the court has no jurisdiction to hear the suit on account of an arbitration clause in the memoranda and articles of association of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs, and arbitration as provided therein not having been exhausted.

3. The ruling also concerns an application by **notice of motion dated 9<sup>th</sup> September 2011** filed by the 2<sup>nd</sup> Defendant. She seeks the main order that the suit as against her be struck out with costs. In the alternative she seeks an order for the Plaintiffs to provide security for her costs in the suit in the sum of KShs 5.5 million pending disposal of the suit. The application is brought under **Order 26, rule 1** of the **Civil Procedure Rules** (the **Rules**). **Section 3A** of the **Civil Procedure Act, Cap 21** is also cited.

4. The grounds for the application on the face thereof are as follows: -

i. That the Plaint as drawn does not disclose the course of action against the 2<sup>nd</sup> Defendant.

ii. That the 1<sup>st</sup> Plaintiff is a foreigner and that in the event that his suit is dismissed the 2<sup>nd</sup> Defendant will not be able to recover her costs.

iii. That the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are corporations with no known assets in the country, and that similarly the 2<sup>nd</sup> Defendant would not be able to recover her costs in the event that their suit as against her is dismissed.

There is a supporting affidavit sworn by the 2<sup>nd</sup> Defendant.

5. I cannot find on the record any grounds of opposition or replying affidavit filed by the Plaintiffs in respect of the notice of motion dated 9<sup>th</sup> September 2011, but the parties proceeded upon the basis that

the application was opposed.

6. The application and the preliminary objection were canvassed by way of written submissions. I have considered those submissions, including the cases cited.

7. A perusal of the plaint and the other material now before the court discloses the following facts which appear not to be in dispute:-

i. That the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant are the directors and shareholders of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs which are limited liabilities companies.

ii. That the dispute precipitating this suit was alleged misdeeds of the 1<sup>st</sup> Defendant in his capacity as a director of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in respect to the assets and funds of those two companies. There are similar counter-accusations by the 1<sup>st</sup> Defendant against the 1<sup>st</sup> Plaintiff in his capacity as a director of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.

iii. That the 2<sup>nd</sup> Defendant is neither a director nor a shareholder of the 2<sup>nd</sup> or 3<sup>rd</sup> Plaintiffs. She appears to have been sued only because of her association with the 1<sup>st</sup> Defendant as his wife. It is alleged that she has been a beneficiary of the alleged fraud and misdeeds of the 1<sup>st</sup> Defendant in respect to the assets and funds of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.

8. It is clear that this suit is primarily a dispute between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant over the management of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. Both are the only directors and shareholders of the two companies.

9. The memorandum and articles of association of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs contain a similar arbitration clause in the following terms: -

**“Whenever any difference arises between the Company on the one hand any of the members, their executors, administrators, or assigns on the hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or any claim on account of any such breach or alleged breach, otherwise relating to the premises, or to these Articles or to any statutes affecting the Company, or to any of the affairs of the Company, every difference shall be referred to the decision of an arbitrator, to be appointed by the Association of Arbitrators Kenya Chapter, or if they cannot agree upon a single arbitrator to the decision of two arbitrators or whom one shall be appointed by each of the parties in difference.”**

10. This suit represents a dispute between the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs on the one hand and the 1<sup>st</sup> Defendant. It is a dispute between the two companies and a shareholder relating to the affairs of the two companies. By dint of the arbitration clause the dispute must be referred to an arbitrator to be appointed by the Association of Arbitrators, Kenya Chapter or to two arbitrators, one to be appointed by each of the parties in difference.

11. The arbitration clauses are freely admitted by the Plaintiffs in the submissions filed in their behalf. However, the courts attention has been drawn to **section 7(1) of the Arbitration Act, 1995** which provides:-

**“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection, and for the High Court to grant that measure.”**

12. The Plaintiffs have come to court before arbitral proceedings. By their application by notice of motion dated 24<sup>th</sup> June 2011 they have sought an interim measure of protection. Hearing of that application has been held up by the application and preliminary objection now under consideration in this ruling. But interim protection was granted pending hearing and disposal of the application.

13. The long and short of this is that the Plaintiffs’ suit as against the 1<sup>st</sup> Defendant is properly before court. It is not amenable to striking out. But after dealing with the notice of motion dated 24<sup>th</sup> June 2011 the court will stay this suit pending commencement and conclusion of arbitration proceedings. In that respect the 1<sup>st</sup> Defendant’s preliminary objection to the suit is overruled.

14. With respect to the 2<sup>nd</sup> Defendant, the plaint does not disclose a reasonable cause of action against her. The 2<sup>nd</sup> Defendant, as already seen is neither a director nor shareholder of the 2<sup>nd</sup> or 3<sup>rd</sup> Plaintiff. She thus bears no contractual obligation to either of them, or indeed to the 1<sup>st</sup> Plaintiff or the 1<sup>st</sup> Defendant. She also bears no duty or care to the Plaintiffs, particularly in regard to how the 1<sup>st</sup> Defendant might use or deal with the affairs, assets or funds of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in his capacity as a director thereof.

15. No contractual obligation or duty of care has been alleged as against the 2<sup>nd</sup> Defendant. I find no reasonable cause of action disclosed against her. The Plaintiffs’ suit against her is hereby struck out with costs.

16. Those will be the orders of the court.

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH 2012**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH 2012**