



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 401 OF 2011**

**TORINO ENTERPRISES LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**ABENAQUI DEVELOPERS LIMITED .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENNETH KIPTOO BOIT.....1<sup>ST</sup> DEFENDANT**

**JAMES CHERUIYOT BOIT .....2<sup>ND</sup> DEFENDANT**

**PATRICK KIBAGENDI OSERO .....3<sup>RD</sup> DEFENDANT**

**FRED OREGO .....4<sup>TH</sup> DEFENDANT**

**BERNARD KOYYOKO .....5<sup>TH</sup> DEFENDANT**

**JULIET MUKAMI NDUNG’U .....6<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES .....7<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiffs have presented a notice of motion dated 26<sup>th</sup> March 2012. They pray that the court do define the terms of its order of *status quo* issued on 2<sup>nd</sup> March 2012. The plaintiffs also pray for a stay of all proceedings relating to the plaintiff save for the prompt and expeditious hearing of this suit. The motion is expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act. An affidavit sworn by Anthony Kegode is annexed in support.

2. At the heart of this suit is a contest over who are the lawful directors or shareholders of Torino Enterprises Limited, the 1<sup>st</sup> plaintiff. By a petition numbered 38 of 2001 filed at the Constitutional and Judicial Review Division of this court *Torino Enterprises Limited Vs The Attorney General*, a decree was issued. That decree made on 4<sup>th</sup> July 2011 provided as follows;

1. **THAT** it is declared that the acquisition of the suit property by the Respondent was done in contravention of Article 40(3) of the Constitution of Kenya and the Land Acquisition Act and thus the occupation, retention, detention any continued occupation of the said portion of the suit land amounts to

*compulsory acquisition, without compensation contrary to Article 40(3) of the Constitution of Kenya.*

2. **THAT** the Respondent shall therefore within the next thirty days, restore the possession of the said land to the Petitioner in the same condition as it was when it was unlawfully acquired or alternatively to pay to the Petitioner the sum of Kshs.1,530,000,000/- being the current market value of the said land as per valuation report produced in court, which valuation and figure was not disputed by the Respondent.

3. **THAT** interest shall accrue on the award at court rates till payment in full.

4. **THAT** the prayer for mesne profits be and is hereby declined.

5. **THAT** the Petitioner shall otherwise have the costs of this cause.

3. In the meantime, persons claiming to be directors acting for and on behalf of Torino Enterprises Limited instituted a Miscellaneous Civil Application number 65 of 2012 (now renumbered as Judicial Review No 45 of 2012) Torino Enterprises Limited Vs Permanent Secretary Ministry of State for Defence and The Attorney General seeking to enforce payment of the decree by committal proceedings against the respondents for contempt.

4. The plaintiffs in this suit directed by the mind and will of Anthony Kegode, one of the persons alleging to be a director of the 1<sup>st</sup> plaintiff, sought a declaration by this court of the lawful directors or shareholders of the 1<sup>st</sup> plaintiff. It was alleged that the parties who filed the petition and committal proceedings are acting fraudulently and that those suits are irregular. It was also alleged that the sum of Kshs 1,530,000,000 in the decree in Petition number 38 of 2011 would be received fraudulently by persons who are not the lawful directors and to the detriment of the public. As the present proceedings would then be compromised, the present plaintiffs sought preservative orders. After hearing all the parties on 2<sup>nd</sup> March 2012, the court *suo moto* issued an order that the *status quo* be maintained.

5. The present plaintiffs now allege that on 19<sup>th</sup> March 2012, the Judicial Review application No 45 of 2012 came up for hearing before the Judicial Review Court. The respondents in the present suit urged the latter court to proceed as the *status quo* ordered by this court did not bar those proceedings. That is the genesis of the present notice of motion to ring fence the order of *status quo* or to stay all other proceedings.

6. The motion is contested by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have also presented a counterclaim against the 2<sup>nd</sup> plaintiff, Anthony Kegode and Voltaire Kegode. In particular, the 1<sup>st</sup> defendant avers that he is a promoter and shareholder of the 1<sup>st</sup> plaintiff. It is averred that this motion is the 4<sup>th</sup> time in a row that the applicants are praying for a stay. A similar application had been made in petition number 38 of 2011 on 12<sup>th</sup> August 2011, another was presented on 20<sup>th</sup> September 2011 in this suit and abandoned and again orally on 1<sup>st</sup> March 2012. In the replying affidavit of Kenneth Boit sworn on 26<sup>th</sup> March 2012, it is deponed at paragraph 17 that the present suit and motion are meant to force the parties to share the decretal sum. It is also submitted that the decree in petition 38 of 2011 is valid and has not been impeached by the court. Lastly, it is submitted that the present applicants are not custodians of the public interest.

7. The 5<sup>th</sup> and 6<sup>th</sup> defendants, now represented by Mr. Kipngeno relied on grounds of opposition dated 26<sup>th</sup> March 2012. The gist of the objection is that this court cannot stay proceedings in other courts of concurrent jurisdiction. The 5<sup>th</sup> and 6<sup>th</sup> defendants' interpretation of the *status quo* order is that no party should interfere with the records at the Companies Registry relating to the 1<sup>st</sup> plaintiff but it was not a bar to other proceedings in other courts of concurrent jurisdiction.

8. The Registrar of Companies, the 7<sup>th</sup> defendant, relied on its grounds of opposition dated 27<sup>th</sup> March 2012. It was submitted that the court lacks jurisdiction to grant the order of stay and that the motion is an abuse of court process.

9. I have heard the rival arguments. Torino Enterprises Limited is a distinct legal entity from its directors and shareholders. See Salomon Vs Salomon [1897] AC 22, Dadani Vs Manji and others [2004] 1 KLR 97. That is the true nature of a company incorporated under section 4 of the Companies Act. Being inanimate legal persons, companies are directed by the minds and will of their directors. The true beneficiary of the decree issued in petition number 38 of 2011 is thus the company. When there is then an all out contest between human persons claiming to be the lawful directors or shareholders of the company, the true loser is the company which should be the ideal plaintiff in this court. Doubt is then cast about the presentation of these proceedings in this court, those in the Judicial Review Court in JR No 45 of 2012 and the original petition number 38 of 2011 in the Constitutional Court. Has Torino Enterprises Limited brought all these proceedings and through whose mind and will? That is the elephant in the room. The carrot or sweetener would seem to be the sum of over 1.5 Billion contained in the decree in the petition. Is that sum truly due to Torino Enterprises Limited and if so under whose control and direction? Are the present plaintiffs truly acting for the 1<sup>st</sup> plaintiff's interests or public interest or their own selfish interests? I entertain doubts whether the present applicants are acting in the public interest. But they may be. In my view, the answer to all of those questions lies in a final determination of this suit. That is why the court had ordered that the suit be expedited to hearing and that the *status quo* be maintained. Only this court sitting as a company or commercial court can unravel the lawful directorship or shareholding of the 1<sup>st</sup> plaintiff.

10. If the other suits proceed or the decree is met now, these proceedings will be an academic exercise and rendered nugatory. True, if an order of stay of proceedings is granted it will have the effect on proceedings in other courts of concurrent jurisdiction. But in my view, that does not of itself amount to abuse of court process of the nature dealt with in Hunter Vs Chief Constable [1981] 3 ALL ER 727. There Lord Diplock had stated at page 733;

*“The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purposes of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision of the court by which it was made. The proper method of attacking by Bridge J ..... would have been to make the contention that the judge's ruling that the confession was inadmissible had been erroneous, a ground of appeal ..... ”.*

But the circumstances here are different. A judgment has already been delivered in petition number 38 of 2011 issuing, in part, the decree of 1,530,000,000. The present applicants appeared in that petition. It could be argued that that was a good forum to contest the decree. But I see the present proceedings as aimed at unravelling who are the true directors or shareholders of the 1<sup>st</sup> plaintiff. The companies court or the commercial court is best placed for that task. I do not see the prejudice the 1<sup>st</sup> plaintiff will suffer merely by staying execution to determine who the mind and will of the company, the decree holder, is. I would venture to think that the balance of convenience and dictates of justice require that the *status quo* be maintained. With regard to proceedings in Judicial Review 45 of 2012, I note that the tenor and purpose is to enforce payment of the decree by committal of the respondents for contempt of court. If a committal order is issued on the merits or payment of the decree is made *in lieu*, there will linger the key question of who is in control of the 1<sup>st</sup> plaintiff. And there remains the additional question whether those proceedings in both cases are brought by and for the benefit of the 1<sup>st</sup> plaintiff.

11. This court is now enjoined to do substantial justice to the parties. That is the letter and spirit of article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act. In Harit Sheth T/a Harit Sheth Advocate Vs Shamas Churania [2010] Eklr (Civil application No 68 of 2008, Court of Appeal) the learned judges delivered themselves thus;

*“We have also taken into account the provisions of section 1A and 1B of the Civil Procedure Act and section 3A and 3B of the Appellate Jurisdiction Act, which provisions came into force on 23<sup>rd</sup> July, 2009. By these new concepts of jurisprudence the courts, including this Court, in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or in exercising any power must take into consideration the overriding objective as defined in the two Acts. The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. See E. Muriu Kamau t/a Muriu Mungai & Co. Advocate vs. National Bank of Kenya Ltd Civil Application No.Nai. 258/2009 (unreported).”*

12. In my considered opinion, and considering the nature of cases

in court and the reliefs sought in this suit, the interests of justice dictate that all proceedings in court by or relating to Torino Enterprises Limited over the subject matter of LR No 22524 Embakasi, or relating to the decree issued in petition No 38 of 2011 or its enforcement be stayed pending the determination of this suit.

13. I thus order that there shall be a stay of any and all proceedings, actions, conduct or dealings in the affairs of or all matters relating to Torino Enterprises Limited or the subject matter of LR No 22524 Embakasi or relating to execution of the decree issued in petition No 38 of 2011 Torino Enterprises Limited Vs Attorney General or any other civil suit thereof pending the hearing and determination of this case.

Costs shall be in the cause.

**DATED and DELIVERED at NAIROBI** this 24<sup>th</sup> day of April 2012.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Dr. Kiplagat for the Plaintiffs.

Mr. Karanja for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

Mr. Kipngeno for the 5<sup>th</sup> and 6<sup>th</sup> Defendants.

No appearance for the 7<sup>th</sup> Defendant.