



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Case 582 of 2011**

**SIMON NGICHIRI MUKIRI .....1<sup>ST</sup> PLAINTIFF**

**GEORGE MUTURI MUNYUI KIGATHI .....2<sup>ND</sup> PLAINTIFF**

**- VERSUS -**

**SUMAC HOLDINGS LIMITED .....1<sup>ST</sup> DEFENDANT**

**CHARLES K. NJAI .....2<sup>ND</sup> DEFENDANT**

**PETR K. MUHORO..... 3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. Before the court there are two **Notice of Motion** applications dated **29<sup>th</sup> December 2011** and **10<sup>th</sup> February 2012** both filed by the Applicant seeking virtually the same orders and are based on virtually the same grounds. Because the prayers and orders sought in both applications are the same, I will for the sake of clarity and simplicity, use the latter application dated **10<sup>th</sup> February 2012** for any references in this Ruling, as the parties had agreed that both applications be determined together.

2. The Notice of Motion dated **10<sup>th</sup> February 2012** is filed under **Section 211** of the **Companies Act Cap 486** of the Laws of Kenya, **Section 7** of the **Arbitration Act**, **Order 46 Rules 5**, **Order 40 Rules 1, 2**, **Order 51** of the **Civil Procedure Rules, 2010** and **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Cap 21** of the Laws of Kenya.

3. The application seeks the following orders namely:-

1. That this application be certified urgent, deserving priority hearing and *ex-parte* in the first instance.

2. That a temporary injunction be and is hereby granted, prohibiting the Defendants by themselves, their agents, employees or anyone acting them from issuing, allotting registering any transaction with the Registrar of Companies or in any way dealing with the 1<sup>st</sup> Defendant Company's shares and specifically, the Plaintiff's and 1<sup>st</sup> Defendants shares in SUMA CREDIT LIMITED now incorporated as SUMA DTM LIMITED pending the hearing of this application *inter-partes*.

3. That there be a temporary injunction restraining the 1<sup>st</sup> Defendant company by its board of directors from participating in, or giving consent for the dealing of shares of the 1<sup>st</sup> Defendant Company or convening a meeting for that purpose on 14<sup>th</sup> February 2012 pending the hearing of this application *inter-partes*.

4. That there be and is hereby granted a temporary injunction prohibiting the Defendants by themselves, their agents, servants, employees or anyone acting under them from issuing, allotting registering any transaction with the Registrar of Companies or in any way dealing with the 1<sup>st</sup> Defendant company's shares and specifically, the Defendant's shares in SUMA CREDIT LIMITED now incorporated as SUMAC DTM LIMITED pending the hearing determination of the application *inter-partes*.

5. That there be a temporary injunction restraining the 1<sup>st</sup> Defendant company by its board of directors from participating in, or giving consent for the dealing of shares of the 1<sup>st</sup> Defendant company or convening a meeting for that purpose on 14<sup>th</sup> February 2012 pending the hearing and determination of this application *inter-partes*.

6. That this application be heard together with the application dated **29<sup>th</sup> December 2011**.

7. Costs of this application be provided for.

4. The application is based on grounds namely:-

1. That SUMAC CREDIT LIMITED now incorporated as SUMAC DTM LIMITED, has called a meeting on the **14<sup>th</sup> February 2012** with a view of dealing with the shares of the 1<sup>st</sup> Defendant Company in contravention of a court order issued on the **29<sup>th</sup> December 2012** which is still extant.

2. That the SUMA CREDIT LIMITED now incorporated as SUMAC DTM LIMITED is wholly owned by the 1<sup>st</sup> Defendant Company and its members and the shareholding is the subject matter of this dispute and the orders issued on the **29<sup>th</sup> December 2012**.

3. That the said meeting is to ratify the private placement of shares in a company wholly owned by the 1<sup>st</sup> Defendant Company and its members and to circumvent and pervert the court order issued on the **29<sup>th</sup> February 2012**.

4. That if the said meeting goes on and shares are issued to outsiders, it will defeat the purpose of the court order, the application pending for injunction and the suit as the same will dilute the shares of the company.

5. That it would meet the ends of justice to grant such orders as are just to sustain the sub-stratum of the application and suit.

5. The application is supported by affidavit of the Applicant of **SIMON NGICHIRI MUKIRI** dated **10<sup>th</sup> February 2012** with its annexure and another affidavit dated **29<sup>th</sup> December 2011** which was filed in support of the Notice of Motion application dated **29<sup>th</sup> December 2011**. The applications are further supported by Statement of Facts by **SIMON NGICHIRI MUKIRI** and **GEORGE MUTURI MUNYUI KIGATHI** (the Plaintiff herein) both dated **29<sup>th</sup> December 2012**.

6. The applications are opposed vide a replying affidavit by **PETER MUHORO KIMANI** dated **12<sup>th</sup> January 2012** with its annexures.

7. The brief history of the application as I glean from the pleadings is that SUMA HOLDINGS LIMITED, the 1<sup>st</sup> Defendant Company was formed in the year 2002 with objectives *inter-a-alia* of

pooling resources and investing in projects and assets for the benefit of all its members. Soon thereafter, in 2003 the members signed a Memorandum of Understanding to govern their relations in so far as the conduct of the business of the company is concerned save where the Memorandum and Articles of Association of the said company provide otherwise. The 1<sup>st</sup> Defendant Company operated smoothly until 2005 when it started experiencing problems especially on members' contributions which was not upto date. Various meetings were held by the company to attempt to address these issues. Under the said Memorandum of Understanding each member was to make investment contribution of such sum, and at such average rate as may be determined, and which was set at **Kshs.10,000/=** per month payable by the last day of each month. A late payment penalty of **10%** was to accrue for any investment contribution that may be outstanding for more than a month.

**8.** That the issue of penalties becoming problematic for the company is clear from the minutes of **23<sup>rd</sup>** monthly meeting of the members of the company held on **27<sup>th</sup> July 2004**.

Under *Minute 32:2* *"It was resolved that the issue of penalties for delayed payment of contribution be clarified as follows:-*

- The penalty and/or interest is chargeable on arrears each month and the same would be levied cumulatively until the arrears are cleared.*
- If any change of this rule is desired a substantive motion should be brought seeking to amend the Memorandum of Understanding. In this case any changes that may be made will not apply retrospectively."*

**9.** The issue of accumulated interest persisted and in their **41<sup>st</sup>** monthly meeting held on **19<sup>th</sup> June 2005** it was resolved under **Minute 40:6** as follows:-

*"The issue of penalties was revisited and upon thorough and exhaustive discussion it was resolved as follows:-*

- All members with outstanding penalties would be given a rebate of **50%** across the board for the period ending **30<sup>th</sup> June 2005**.*
- The **50%** penalties due shall be paid on or before **31<sup>st</sup> August 2005**.*
- It was further agreed and resolved that in default the Finance Director be at liberty to recover those penalties from the defaulting member's uncapitalised contributions/deposits.*

The Defendant submitted that it is this resolution that has guided the Board together with Company's office and or its members in the computation of accounts arrears and that the Plaintiffs and the Defendant have from time to time cleared their account arrears on the basis of the said computations or resolutions.

**10.** This was not the end of the matter. The Finance Director raised the issue again in an acrimonious company **93<sup>rd</sup>** monthly meeting held on **28<sup>th</sup> September 2010** where it was noted as follows:-

**"It was noted that the member's contributions to be harmonized. It was then agreed that Mr. Joseph Muigai, Mbugua Muiruri, and Duncan Mwaniki, and the Chairman were to ensure that the harmonization was completed and agreed upon within the next seven days and copies of the statements circulated to the members."**

A meeting of the said team, excluding Duncan Mwaniki, was thereafter held at the company's offices, where it was agreed on rules of computation of the accounts, which were reduced into writing. Based on these rules, the members account statements were then duly recomputed and circulated to the members.

The disagreements were thereafter addressed by the Board of the Company, in its meeting held on

29<sup>th</sup> November,2010 when it was resolved *inter-a-alia*:-

1. “That Mr. Kimani C. Njoroge would be requested to recommend the appointment of any independent investigator to the Board to:-

i. Look at the two computations alongside the provisions of the Memorandum of Understanding and any relevant minutes and prepare an independent computation for each member.

ii. The independent investigator to apply June 2008 as the cut-off date and report within 30 days.

2. Pending receipt of the investigators report all further monthly contributions be frozen.”

11. To date it is clear that the outstanding issues bedeviling the company have really never been resolved. I have looked at the application, the supporting affidavit and statement of facts filed by the Plaintiff. I have also noted exhibit number 5 to the Applicant’s affidavit being a letter dated **June 2, 2011** by Kigathi N. Associates, together with a letter dated **1<sup>st</sup> November 2010** addressed to Peter M. Kimani (the 3<sup>rd</sup> Defendant) by J. W. Muigai the Finance Directors. These letters evidence disputes which to date have never been resolved and mainly on the issue of outstanding penalties and interests.

12. Now, in this application the Applicants allege that the company, without resolving the above issues, is in the process of holding a general meeting whose sole interest is to deal with the shares of the 1<sup>st</sup> Defendant Company in contravention of the order of this court issued on **29<sup>th</sup> December 2012**. This is alleged to be done through SUMAC DTM LIMITED, which is wholly owned by the 1<sup>st</sup> Defendant Company and its members and the shareholding is the subject of this dispute and the orders issued on **29<sup>th</sup> December 2011**. The Applicants now allege that they are being oppressed by the majority members of the company and are entitled to protection under **Section 211** of the **Companies Act**.

13. All these allegations have been denied by the Respondents who argue firstly that the application is incompetent having been filed through a Plaint instead of through a Petition. Secondly, the Defendants submitted that the court has no jurisdiction to intervene on internal management of the company, and that in any event the actions by the directors to determine a way for levying penalties and determining shares are done in good faith and for the good of the entire membership.

14. I have considered the entire application and the opposing submissions of the parties. I raise only three issues to help me determine the matter at hand:-

1. Whether by filing a Plaint instead of a Petition this application and suit is defective.

2. Whether there exists a dispute which is recognized under the company Memorandum and Articles of Association as arbitratable.

3. Whether the Applicants’ suit has a probability of succeeding.

15. Regarding the 1<sup>st</sup> issue, it is true that under the **Companies Act, Cap 486**, the Applicants, alleging oppression by majority shareholders, ought to have moved the court by way of Petition rather than by way of Plaint. However, under the Constitution especially under **Article 159 (2) (d)**, this court cannot now rely entirely on a technicality to dismiss a matter which otherwise has merit. I will therefore proceed to determine the substantive issues I have raised.

16. As regards the second issue, **Article 44** of the **1<sup>st</sup> Defendant Company Memorandum and Article of Association** states in part as follows:-

“Whenever any differences arise between the company on the one hand and any of the members . . . relating . . . to any of the affairs of the company . . . every difference shall be referred to the decision

**of an Arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators, of whom one shall be appointed by each of the parties in difference.”**

The issue to determine then is whether the current dispute between the parties is one envisaged under the said **Article 44**.

The issue involves issuance of shares, valuation of the same, interest and penalties to be levied e.t.c. Clearly this is a dispute between the company and the two Plaintiffs and is therefore covered under the said **Article 44** of the **Memorandum** and **Articles of Association** of the Company. It follows that there is a mechanism for solving the dispute. That mechanism should be exhausted before the parties may resort to court or other tribunal.

The allegation that the Defendant intends to trade in shares, allocate or transfer the same in violation of the law is a grave one and this court cannot shut its ears to such allegations. This, then, answers issue number three above. I believe the Applicants have a case capable of succeeding and have satisfied the principles laid in **Giella – Vs – Cassman Brown** for grant of a temporary injunction.

**17.** In the upshot I allow both Notice of Motion applications dated **29<sup>th</sup> December 2011** and **10<sup>th</sup> February 2012** as prayed. As for the appointment of the Arbitrator the parties shall do so under **Article 44** of the Company Memorandum and Article of Association. The court will only intervene if the parties are unable to agree on an arbitrator and for that purpose the said Arbitrator must be appointed within **14 days** of this Ruling failure of which this suit will be mentioned on **11<sup>th</sup> October 2012** for directions on appointing an Arbitrator.

**18.** The costs of the application shall be for the Plaintiff/Applicant

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2012**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*Gitonga Mureithi for the Plaintiffs*

*M/s Gicheru H/B for Muniallo for the Defendants*

*Teresia – Court Clerk*