



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 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

SATIMA REGISTRARS.....3RD DEFENDANT

RULING

1. On 10th February 2006, Kasango J, determined a Chamber Summons application dated 9th November 2004 in which the Plaintiffs/Applicant were granted orders of injunction to restrain the 2nd and 3rd Defendants from representing themselves or acting as Directors and secretary of the company known as Safina Properties Ltd. The 1st and 2nd Defendants were also restrained from holding a Board meeting of the Company or from operating the bank accounts for a period of six (6) months. The parties were supposed to fix the matter for hearing as soon as possible due to the conditional nature of the order of injunction.

2. On 2nd February 2010, the same applicants filed a similar application seeking for similar orders on the grounds that the orders by **Kasango J**, lapsed and the 2nd Defendant has issued a notice of the shareholders meeting be held on 5th February 2010. According to the supporting affidavit by **Elkana Mukundi Gatimu** the notice does not comply with the provisions of the Companies Act, and it was issued by a person who is not a member or director of the company. The applicants are therefore seeking for an order of injunction to prevent the 1st and 2nd Defendants from holding a meeting on 5th February 2010.

3. The Defendants raised a preliminary objection on the grounds that the issues raised in

this application were the same issues that were raised in the previous application. It was argued that those issues are *resjudicata* because they were canvassed and ruled on by **Kasango J**, when the Judge granted a conditional injunctive relief. The foremost issue for determination is whether the matter is *resjudicata* and offends the provisions of the **section 7** of the **Civil Procedure Act** which provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

4. In the celebrated case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696**. Law, J.A. At page 700 letters D-E delivered himself as follows:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which is argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

I have gone through the issues raised in the Chamber Summons that was determined by **Kasango J**, as well as the present application, I find the issues raised in the two applications are similar.

5. The Plaintiffs were given six months within which to fix the matter for hearing. The court record does not show any serious efforts on the part of the Plaintiffs to set this matter for hearing. They have merely engaged in the work of changing lawyers. I am not inclined to exercise my discretion to grant any further interim orders because the issue of whether or not to grant the plaintiffs an injunction has already been determined and they were granted a conditional order, there are no good reasons that have been demonstrated as to why the plaintiffs did not comply with the condition.

6. The Chamber Summons dated 2nd February 2010 is a duplication of the one dated 9th November 2004 which was determined. It is therefore an abuse of the court process and I hereby struck out with costs to the Respondents.

RULING READ AND SIGNED ON 30TH APRIL 2010 AT NAIROBI.

M. K. KOOME

JUDGE