



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

Civil Case 358 of 2010

SAFINA PROPERTIES LTD. PLAINTIFF

VERSUS

MIGUI MACHARIA MUNGAI 1ST DEFENDANT
FLAVIA SUSAN KALANDE
(All trading as MUNGAI KALANDE
& COMPANY ADVOCATES) 2ND DEFENDANT

R U L I N G

This application is brought by a Chamber Summons dated 25th May, 2010, and taken out under **Order XXXIX Rules 1, 2 and 9** of the **Civil Procedure Rules**, and **Section 3A** of the **Civil Procedure Act**, and all enabling provisions of the law. The Applicant seeks from the Court two substantive orders –

1. *That pending the hearing and determination of this application inter partes, the Defendants by themselves or through their agents, assigns, employees, and/or any person claiming title under them be restrained from passing themselves off as the Plaintiff's lawyers and/or Advocates and/or representing the Plaintiff in any transaction whatsoever.*
2. *That pending the hearing and determination of the suit herein, the Defendants by themselves or through their agents, assigns, employees, and/or any person claiming title under them be restrained from passing themselves off as the Plaintiff's lawyers and/or Advocates and/or representing the Plaintiff in any transaction whatsoever.*

The application is supported by the annexed affidavit of John Bosco Muya Makumi, a Director of the Plaintiff Company, and is based on the grounds that –

- (a) *The Defendants have without any lawful authority and/or mandate appointed themselves as Counsel for the Plaintiff herein in Milimani CMCC NO. 12398 OF 2004 in which suit the Plaintiff herein has been sued.*
- (b) *The Defendants' firm of Mungai Kalande & Co., Advocates, has made several attempts to represent the Plaintiff herein in Civil Suit No. 12398 of 2004 and they still persist in their efforts to do so.*
- (c) *The Defendants have persistently continued to pass themselves off as the Plaintiff's Advocates by making enquiries into the affairs of the Plaintiff.*
- (d) *The said Defendants are not only passing themselves off as Counsel for the Plaintiff but they also continue to meddle, interfere, and harangue the Plaintiff and other third parties who are the Plaintiff's associates, agents without any authority whatsoever.*
- (e) *The Defendants have not been appointed the Plaintiff's Advocates at all, and their actions are illegal.*

In opposition to the application are three replying affidavits sworn by

Migui Macharia Mungai, Advocate, and the 1st Respondent herein; Kenyua Ngunjiri, a shareholder and the Chairman of the Plaintiff herein; and one Elkannah Mukundi Gatimu, also a shareholder and Director of the Plaintiff company. According to Migui Macharia Mungai, he

was instructed by Elkannah Mukundi Gatimu and Kenyua Ngunjiri to represent them in some five suits which include **NAIROBI CMCC NO. 12398 OF 2004, JAMES MWAURA MUYA & GEORGE MWANGI v. SAFINA PROPERTIES LTD.** On his part, Kenyua Ngunjiri deposes that to the best of his knowledge, the Directors of the Plaintiff are Elkannah Mukundi Gatimu and John Bosco Makumi Muya and further that there was no Board resolution passed by the Plaintiff herein authorizing the filing of the present suit against the Defendants herein. In his replying affidavit, Elkannah Mukundi Gatimu avers that to the best of his knowledge, the only Directors of the Plaintiff are himself and John Bosco Makumi Muya and that he did not authorize his co-director, the said John Bosco Makumi Muya, to file the present suit against the Defendants herein.

At the oral hearing of this application, Mr. Chahenza appeared for the Plaintiff while Mr. Mungai, the 1st Respondent, appeared in person for himself and also represented the 2nd Respondent. Mr. Chahenza basically submitted that the firm of Okongo Omogeni & Co., Advocates, was appointed as legal Counsels for the Plaintiff company and its subsidiaries by a resolution of the company dated 25th May, 2004. He referred to a copy of that resolution which was exhibited as an annexure in the Plaintiff's supporting affidavit. The said exhibit read as follows –

“PASSED

25th May, 2004

Extract of the minutes of the Shareholders Meeting of Safina Properties Ltd. held in the Boardroom of Safina (E.A. LTD.) on 6th Floor, Wakulima House on 8th January, 2004 –

‘It was unanimously resolved that the firm of Okongo Omogeni & Co. Advocates be and are hereby re-appointed to continue as legal Counsels for Safina Properties Ltd., and its subsidiaries and that they be issued with formal instructions to act for the company whenever a need arises.

Dated

25th May 2004

Signed

.....

John Bosco Makumi Muya (Chairman)

.....

Mrs. Rosalind Wanjiru Kunyihia (Director/Secretary)’.”

On the other hand, Mr. Mungai relied on his own affidavit and those of Kenyua Ngunjiri and Elkannah Mukundi Gatimu.

It is instructive that in his replying affidavit, Kenyua Ngunjiri testifies that to the best of his knowledge, there was no Board meeting held on 28th May, 2004 appointing Okongo Omogeni & Co., Advocates, to continue as the legal Counsels for the Plaintiff herein. He further contends that the purported ordinary resolution referred to hereinabove is unknown to him both as a shareholder and as a Chairman of the Plaintiff herein. He also maintains that there was no shareholders meeting held on 8th January, 2004 whereby the firm of Okongo Omogeni & Co., Advocates, were appointed as legal Counsel for the Plaintiff herein as no copy of the purported minutes showing the resolution was unanimously passed has been annexed with his signature appended thereto.

This evidence is partly corroborated by the replying affidavit of Elkannah Mukundi Gatimu when he avers in paragraph 6 of his replying affidavit that to the best of his knowledge, there was no Board meeting held on 28th May, 2004, appointing the firm of Okongo Omogeni & Co., Advocates, to continue as the legal Counsels for the Plaintiff. He further swears that the purported ordinary resolution is unknown to him, both as a shareholder and as a Director of the Plaintiff herein. It is his further deposition that there was no shareholder meeting on 8th January, 2004, whereby the firm of Okongo Omogeni & Co., Advocates, were appointed as legal Counsel for the Plaintiff as no copy of the purported minutes showing that the resolution was unanimously passed has been annexed with his signature appended thereto. This deposition is almost a replica of that by Kenyua Ngunjiri.

After considering the pleadings and the submissions of Counsel, the two issues for determination are, firstly, which of the two firms of Advocates, Okongo Omogeni & Co., Advocates, or Mungai Kalande & Co., Advocates, is the legitimate legal Counsel to the Plaintiff; and, secondly whether the firm of Okongo Omogeni & Co., Advocates, had instructions to institute this suit. From the evidence before this Court, there is an extract from the minutes of a meeting of the Plaintiff's shareholders held on 8th January, 2004, at which it was unanimously

resolved that the firm of Okongo Omogeni & Co., Advocates, be re-appointed to continue as Counsel for the Plaintiff company. The said extract is dated 25th May, 2004, and duly signed by John Bosco Makumi Muya as Chairman, and Rosalind Wanjiru Kunyiha, as Director and acting Secretary. On the basis of that extract, the resolution contained therein is *prima facie* evidence that the firm of Okongo Omogeni & Co., Advocates, were re-appointed as legal Counsels for the Plaintiff company and its subsidiaries. No similar resolution has been exhibited in respect of Mungai Kalande & Co., Advocates.

Unfortunately, the replying affidavits sworn by Kenyua Ngunjiri, who is a shareholder and Chairman of the Plaintiff herein, and Elkannah Mukundi Gatimu, who is a shareholder and Director of the Plaintiff, have cast some clouds in what would have hitherto been a relatively clear sky. Paragraphs 8 and 9 of Kenyua Ngunjiri's affidavit are couched in the following words –

“8. That there is a long standing dispute as to shareholding and directorship of the Plaintiff company between myself and a Director called Elkannah Mukundi Gatimu against the other Director called John Bosco Makumi Muya, and one Rosalind Wanjiru Kunyiha who is the wife of a deceased shareholder called Geoffrey Kirunda Kunyiha.

9. That due to the said disputes which are based on resolutions passed by an illegal and unlawful meeting held on 25th May, 2004, I and the Director called Elkannah Mukundi Gatimu filed a suit at the High Court of Kenya (Milimani Commercial Courts) being HCCC No. 611 of 2004 against the other Director called John Bosco Makumi Muya and the said Rosalind Wanjiru Kunyiha.”

These averments are reproduced, *mutatis mutandis*, in paragraphs 9 and 10, respectively, of Elkannah Mukundi Gatimu's replying affidavit. The force and effect of those averments is to expose the fact that there is a serious division among the Directors of the Plaintiff company, and that the Board of Directors of that company is, in all probability, not functional. This observation is strengthened by the fact that whereas the resolution re-appointing the firm of Okongo Omogeni & Co., Advocates, is supported by John Bosco Makumi Muya, who signed the same as Chairman, it is opposed in paragraphs 7 and 8 of the replying affidavits of Kenyua Ngunjiri and Elkannah Mukundi Gatimu, respectively, wherein both deponents state that there was no shareholder meeting held on 8th January, 2004, whereby the said firm were appointed as legal Counsel for the Plaintiff. Their reason for taking this stand is that no copy of the purported minutes showing the resolution was unanimously passed was annexed with the signatures of the deponents. On the other hand, Kenyua Ngunjiri expressly acknowledges that there was a meeting on 25th May, 2004, but labels the same “illegal and unlawful” without explaining how the illegality arose. One cannot come across a more classic case of a Kingdom at war against itself which, according to the Bible, cannot stand. It is clear that the leadership of this company is split right in the middle. It will not be possible to sort out the contradictions between the two factions of the company without calling oral evidence. Until then, the evidence on record gives the firm of Okongo Omogeni & Co., Advocates, an edge over anyone else in the context of representing the Plaintiff company as it is, *prima facie*, backed by what has been held out by John Bosco Makumi Muya, in his capacity as the company's Chairman, to be a resolution of the company.

The next issue is whether the firm of Okongo & Co. Advocates, had instructions to institute this suit. As a general rule, it is imperative that a company passes a resolution authorizing a particular firm of Advocates to institute any suit in the name of the company. That practice was captured in the very resolution re-appointing Okongo Omogeni & Co., Advocates, wherein the said resolution expressed that the said firm “...**be issued with formal instructions to act for the company whenever a need arises.**” This, in essence, means that the said firm would have to obtain instructions before commencing suits in the company's name as and when the need arose. No resolution authorizing the commencement of this suit has been pleaded or produced before the Court, and the only conclusion that the Court can draw is that in the absence of such a resolution, there was no authority to do so.

It is unfortunate that matters between Advocates and their appointing clients should be coming to Court, since the decision as to who should or should not represent a company in Court should be taken by the company itself, and not by the Court. To borrow a leaf from the words of Scrutton L.J. in the case of **SHUTTLEWORTH v. COX BROTHERS & CO. LTD. [1927] 2 K.B. 9** at page 22 –

“... to adopt that view would be to make the Court the manager of the affairs of innumerable companies instead of the shareholders themselves ...”

It would be wise and advisable for the company to exercise its appropriate powers through the appropriate organ to clean up its house. Appointment of the company's Advocates is a domestic affair for a company and a company's Board of Directors would be abdicating its duty to the company by failing to exercise that power. And when they fail to exercise that power either due to wrangling and squabbling, the company's affairs are bound to come to a stand still which itself is a potential recipe for the company to be wound up.

In sum, I find that the disputed resolution appointing Okongo Omogeni & Co., Advocates, is the only *prima facie* evidence on record to show who the company's Advocates are. The Plaintiff company should therefore take the cue and organize early elections in order to appoint those that will keep its heart beating. Should they fail to do so, it is the company itself which will be at the receiving end. The application before the Court partly succeeds to the extent that there is a resolution on the record appointing Okongo Omogeni & Co., Advocates, while there is no similar evidence for the appointment of Mungai Kalande & Co., Advocates. At the same time, however, there is no evidence that the firm of Okongo Omogeni & Co., Advocates, were specifically instructed by similar resolution to commence this action. That was improper. On that note each party will bear its own costs of this application with a *caveat* that the ball is in the company's court.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of June, 2010.

L. NJAGI
JUDGE