



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 575 of 2008 & 588 of 2008

SIMON CHARLES BARKAS PLAINTIFF

VERSUS

OL JOGI LIMITED 1ST DEFENDANT

HITESH PINDORIA 2ND DEFENDANT

EQUATORIAL SECRETARIES & REGISTRARS 3RD DEFENDANT

HCCC NO. 588 OF 2008

OL JOGI HOLDING SA PLAINTIFF

VERSUS

ALEC WILDENSTEIN 1ST DEFENDANT

OL JOGI LIMITED 2ND DEFENDANT

RULING

(1) This ruling covers two applications. The first one is the “Notice of Motion” dated the 29th September 2008 brought in Case No.575 of 2008 (“No.575”). The second application is the Chamber Summons dated the 9th October 2008 taken out in Case No.588 of 2008 (“No.588”). Both these applications are brought under Order XXXIX rules 1 and 2 of the Civil Procedure Rules though the application in No.575 is described as a “Notice of Motion.” In both applications, the Plaintiffs are seeking orders of temporary injunction against the respective Defendants.

(2) In No.575 the Plaintiff, Simon Charles Barkas, (“Barkas”) seeks three orders against the three Defendants (Ol Jogi Ltd., Hitesh Pindoria, and Equatorial Secretaries and Registrars) restraining them from:

- a) convening, holding or conducting the meetings of the Board of Directors of Ol Jogi Ltd. without giving him notice.
- b) conducting the business of Ol Jogi Ltd. or its Board of Directors in his absence or without his presence.
- c) an order compelling the second and third Defendants to withdraw the Notification of Change filed by them at the Companies Registry purporting that Barkas had resigned as a Director of Ol Jogi Ltd. with effect from the 26th August 2008.

The application is supported by the affidavit of Barkas dated the 29th September 2008, and the grounds enumerated in the Notice of Motion.

(3) In No.588, the Plaintiff, Ol Jogi Holdings SA, seeks orders restraining the first Defendant, Alec Wildenstein (“Wildenstein”) from interfering with the management and operations of Ol Jogi Ltd.; entering Ol Jogi Ranch or interfering with the management of the company or staying at the Ranch.

The Plaintiff also asks for an order allowing it to institute and prosecute the proceedings on behalf of Ol Jogi Ltd. (the second Defendant) as a derivative action.

(4) Like in No.575, the supporting affidavit in this application is also sworn by Barkas. It is dated the 9th October 2008, the date of which the Plaintiff was filed. The Plaintiff, a company incorporated in Switzerland, claims to own 50% of the shares in Ol Jogi Ltd., the second Defendant. The Plaintiff alleges in paragraph 7 of the Plaintiff that on the 8th August 2008, without any colour of right, the Defendant went to the Ranch and threatened to take over the management and all the operations of the company. The Plaintiff further alleges that the managers at the Ranch have refused to respond to inquiries for information from its representative on the Board of Ol Jogi Ltd., on the instructions of Wildenstein.

(5) Barkas’ case, (the Plaintiff in No.575) is that until his resignation from the position in August 2008, he was employed as the General Manager of Ol Jogi Ltd. pursuant to a service contract dated the 29th June 1995. He contends that his resignation as the General Manager did not affect his position as a Director of the Company, and he continues to be a Director entitled to sit on the Board of Directors and to attend all its meetings.

(6) The replying affidavit in No.575 was sworn by Dennis Banda Aroka, a partner in Equatorial Secretaries and Registrars, the third Defendant herein. He deposed that Barkas resigned as the General Manager of Ol Jogi Ltd. on the 24th April 2008. He also says that Barkas’ Service Contract dated the 29th June 1995 provided that on the termination of his appointment as General Manager for whatever reason, he shall upon request also resign as a Director without claim for compensation. He further said that Barkas was on the Board only because he was the General Manager of the Company. And because he had resigned as General Manager, he can no longer continue as a Director of the Company.

(7) In paragraph 9 of his affidavit, Mr. Aroka confirmed that there was a Board meeting on the 30th September 2008 to which Barkas was not invited as the Directors no longer considered him to be a Director of the Company. In his opinion, the exclusion of Barkas from the Board meeting and other matters in connection with the Company are neither irregular nor unlawful or an infringement of his (Barkas’) rights.

(8) The relevant clause in Barkas’ Contract of Service dated the 29th June 1995 is paragraph 14(d) which states:

“If the General Manager shall be a director of the Company on the date of termination of his employment, for whatsoever reason, he shall, upon the request of the Company, resign without claim for compensation from such office and from all, if any, other offices held by him in the Company and in any companies which are subsidiary to or associated with the Company and in the event of his failure to do so the

Company is irrevocably authorized to appoint some person in his name and on his behalf to execute any documents and do all things requisite to give effect thereto.”

(9) My reading of paragraph 14(d) of Barkas’ Contract of Service is that his directorship was tied to his position as the General Manager. I think the directorship was attached to his position to enable him to perform his duties effectively but in every and all other respects, he was purely an employee of the Company. Consequently, I am satisfied that the position that has been taken by the Defendants is the correct one. Barkas is not even a shareholder in the Company and once his employment therein comes to an end, he has no right to claim a seat on the Board. If he believes that the Company committed a breach of his contract by removing him from the Board, that would be a case of breach of contract for which he can bring a claim for damages if so advised. He has no right to interfere with the smooth operations and management of the Company.

(10) For the reasons I have given, Barkas has not established a *prima facie* case with a probability of success. His application in No.575, being the Notice of Motion filed on the 29th September 2008 accordingly fails and it is hereby dismissed with costs. Consequently, the interim orders of stay granted on the 30th September 2008 be and are hereby vacated and discharged.

(11) As I have already said, supporting affidavit in No.588 was sworn by Simon Barkas. In paragraph 1 of the affidavit dated the 9th October 2008, he claims to be the appointed Representative of the Plaintiff in Kenya. In paragraph 7, he says Alec Wildenstein is not a Director of the Company although his father, Nathan Wildenstein was a Director until his death. In paragraph 8, he complains that since around the 8th August 2008, the Managers at the Ranch have refused to respond to his inquiries for information regarding the operations and management of the Ranch. Barkas concedes that he is not a shareholder in the Company.

(12) In the Plaint dated and filed on the 9th October 2008, the Plaintiff seeks amongst other reliefs a declaration that the Defendant being neither a shareholder or director of the Company has no right whatsoever to interfere with the management, running or operations of the Company and the Ranch unless lawfully authorized by the Company.

(13) Wildenstein’s position as explained in his lengthy replying affidavit dated the 7th November 2008, is simply that he is on the Ranch to protect the interest of his late father who held 50% of the shares of the Company. As earlier observed, Barkas claims to be the appointed Representative of the Plaintiff in Kenya. It is also his contention that notwithstanding his resignation as the General Manager, he is still a Director of the Company. I have already pointed out that in my reading of Barkas’ Contract of Service, once he ceased to be General Manager he could not continue as a Director.

(14) The Plaintiff in No.588 is perfectly entitled to file a suit in Kenya to protect its investment in the Company. But what the Plaintiff appears to be doing in this case (No.588) is to impose Barkas on the Board of Directors of the Company. This is clear from his affidavit in support of the application dated the 9th October 2008. He deponed, *inter alia*:

- “1. I am an appointed Representative of the Plaintiff in Kenya duly authorized to make this affidavit.
2. The Plaintiff owns 50% of the issued shares in the Ol Jogi Limited the 2nd Defendant (“the Company”). A copy of an extract from the Share Register of the Company showing this is the exhibit annexed hereto marked “SBI”.
3. I am a director of the Company. A copy of the Register of Directors listing previous and current Directors of the Company is in the exhibit.
4. On the list the name Alec Nathan Marcel Wildenstein appears as that of a Director. That name refers to the 1st Defendant’s (“the Defendant”) father who until his demise early this year was a Director of the Company.”

(15) Barkas does not hold any shares in the Company. He was once the General Manager but he resigned from that position. He was appointed a Director during his tenure as the General Manager but it was made clear in his Contract of Service that if he ceased to be General Manager, he would be required to relinquish his directorship. But after resigning as General Manager, Mr. Barkas dug in and has insisted all along that he is still a Director of the Company. Indeed, that is the main plank of his case in No.575.

(16) In paragraph 9 of his replying affidavit dated the 7th November 2008, Alec Wildenstein explains his presence in the Ranch as follows –

“THAT as regards paragraph 7 of Barkas’ Affidavit, I am now a director of the Second Defendant (see paragraph 8 above). I find it surprising that this Application is brought by the Plaintiff having been filed on the 9th October last, 10 days after the Plaintiff through its director on the Board of Directors of the Second Defendant, Me Dante Canonica, knew of my appointment as a director as he was present at that meeting. Further, my sister Diane and I are the beneficiaries of the Wildenstein family trust which is the owner of OJHE. I am authorized by OJHE to ensure that its investment is being properly managed and respected.”

In paragraph 3 of his said affidavit, Mr. Wildenstein explain that Ol Jogi Holdings Establishment (OJHE) is a company incorporated in Liechtenstein and is owned by the Wildenstein Family Trust.

(17) As of now, and as between Alec Wildenstein and Simon Barkas, I think Alec Wildenstein has a legitimate reason to be on the Ranch and to be involved in the affairs of the Company and its operations and management. Simon Barkas is nothing more than a meddler. I suspect that he may well be the Plaintiff’s stalking – horse. Having resigned as the General Manager of the Company, he has no business staying on the Ranch or continuing to pose as a Director because, clearly, he is not. Being a mere representative of the Plaintiff is not enough to transform him into a Director.

(18) It must follow from what I have said so far, that the Chamber Summons filed on the 9th October 2008 in No.588, must also fail. It is accordingly dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this Thirtieth day of January, 2009.

P. Kihara Kariuki

Judge.