REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 450 OF 1999

MOHAMMED ELTAFF…….....……...1ST PLAINTIFF

SAGA SAFARIS LIMITED …….....……..2ND PLAINTIFF

SAGA TRAVEL AND SAFARIS A.B.....….3RD PLAINTIFF

TOURS AFRICA SAFARIS LIMITED.....4TH PLAINTIFF

- VERSUS-

DREAM CAMP KENYA LIMITED.....DEFENDANT

RULING

On 28th July, 2000 Kasanga Mulwa J delivered judgment in this suit. The material part of the judgment which is the subject of this application is contained at page 20 of the judgment. It states as follows:

"*It is quite clear that the relationship between the parties has deteriorated to the extent that it may not be possible for the plaintiff to work with the Defendant again. The situation is made worse by the fact that the plaintiffs are running competing business to that of the defendant. I noted that the Agreement for sale contains an arbitration clause. This dispute would have been best handled through arbitration rather than litigation. For some reasons litigation was preferred to Arbitration… The best way out of the existing situation which was made worse by this litigation is that the 1st plaintiff sells his shareholding of 10% to the other existing shareholders of the company at a fair market value to be determined by an arbitrator to be agreed by the parties, and if not to be appointed by the court. The plaintiff would then have to relinquish his Directorship in the Defendant Company. The existing shareholders will by an ordinary resolution reduce the 1st plaintiff shareholding to 10% of the issued shares."*

On 14th July 2008, the defendant moved the court by notice of motion purportedly made under the provisions of Section 3, 3A, 59 & 80 of the Civil Procedure Act and Orders XLIV Rules 1,3 & 4, XLV Rules 5(1) & (2) of the Civil Procedure Rules seeking to review the part of the judgment of the court that required the determination of the fair value of the 10% shareholding by arbitration. Instead the defendant proposes that the fair value of the said shares be determined by the court upon securing evidence for the auditor for the time being appointed by the defendant company. The defendant proposed this course of action because in its view the arbitration process would be expensive and further, according to the defendant, in view of the plaintiffs' reluctance to co-operate with the defendant in their appointment of an arbitrator to the view to resolving the outstanding issue. The application is supported by the annexed affidavit of Lars Lindkvist, a director of the defendant. A further affidavit in support of the application was sworn by Salah El-Din Amin.

The application is opposed. The 1st plaintiff, Mohamed Eltaff swore a replying affidavit in opposition to the application. He deponed that the application was incompetent; that the grounds put forward by the defendant did not satisfy the conditions for review; that the court was fuctus officio and therefore could not consider the application as it would amount to re-opening the suit; that the defendant was seeking to vary the judgment under the guise of making an application for review; and finally that the claim by the

defendant that the plaintiffs had failed to co-operate in the appointment an arbitrator to determine the true value of the shares was untrue since the plaintiffs have always been willing to have such arbitrator appointed.

At the hearing of the application, I heard rival arguments made Mr. Amin on behalf of the defendant and by Mr. Wangila on behalf of the plaintiffs. I have carefully considered the said submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. It is clear from the arguments presented to the court that the bad blood between the plaintiffs and the defendant is still at play. It appears that the plaintiffs and the defendant cannot reach consensus on the arbitrator to be appointed so as to give effect to the direction of the court for the determination of the fair market value of the 10% shareholding that was the subject of the suit. I agree with the defendant that the unresolved issue regarding the determination of the fair market value of the disputed shares has taken too long and therefore the court should intervene and give appropriate directions. I do not accept the proposal by the defendant that the court re-open the case and consider the evidence adduced by the auditor appointed for the time being appointed by the defendant company in his capacity as an expert witness. I am not persuaded that with the current state of affairs the plaintiffs and the defendants will agree on one person to determine the fair market value of the shares. This court will therefore give the following directions with a view to giving effect to the judgment of this court.

According to article 9(iv) of the articles of association of the defendant company:

"*In case any difference arises between the proposing transferor and the purchasing member as to the fair value of a share the Auditor (for the time being of the Company shall, on the application of either party, certify in writing the sum which, in his opinion, is the fair value, and such sum shall be deemed to be the fair value, and in so certifying the Auditor shall be considered to be acting as an expert and not as an arbitrator, and accordingly the arbitration Act (Chapter 49, of the Laws of Kenya) shall not apply.*"

The said article envisage that the auditor of the company would give a fair market value of the shares of the company. The presumption that the auditor would give a fair market value of the said shares is made on the assumption that the proposed transferor and the proposed purchaser would be negotiating on the price without compulsion of a court order. To resolve the dispute as to which auditor shall determine the fair market value of the shares of the company, I direct the plantiffs and the defendant to each nominate an auditor of their/its choice. The two auditors shall constitute the panel of arbitrators that shall determine the fair market value of the 10% shareholding that was the subject matter of the suit. Each party shall pay the appointed auditor. In the event of disagreement between the two auditors, the plaintiffs and the defendant shall propose the name of an umpire who shall be appointed by the court to determine the points of disagreement. So that the dispute does not further drag, the parties herein are ordered to appoint the said auditors within seven (7) days of today's date. The auditor shall determine the fair market value of the shares within thirty (30) days of their appointment. Thereafter, if need be, the parties shall move the court for the appointment of an umpire. For the avoidance of doubt, any partner in the firm of Manohar Lall Rai, certified public accountants, the current auditors of the defendant, shall not be appointed as auditors for the purposes of determining the true market value of the shares in question.

It is this court's hope that the outstanding issues between the plaintiffs and the defendants shall be resolved in the proposed audit to avoid escalation of further costs. There shall be no orders as to costs. Each party shall be at liberty to apply.

DATED at **NAIROBI** this **12TH** day of **JUNE 2009.**

L. KIMARU

JUDGE