



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

Civil Suit 709 of 2004

1. Land and Environmental Law Division

2. Subject of main suit – Land LR 209/9099

i. *Contract/lease*

ii. *Tenant/Landlord – uncontrolled*

iii. *0.6689 ha; IR 34318; Land Survey Plan No.105620;*

LR 209/9099

iv. *Empty Plot of land between Kenya Re, International Life House and the Law Courts City Council parking*

v. *Plot used for parking*

vi. *Proprietors:- Koinange Investment & Development Co Ltd*

vii. *Share holders include the estate of the late Koinange Mbiyu (deceased) (70%) once a prominent politician*

viii. *Estate of deceased agreed “no member of family would manage any of properties”*

ix. *Issue of estate pending for 28 years*

x. *Sifa International Ltd took over management of car park*

xi. *Formal lease entered into on 1 February 2002 for 6 years*

xii. *Lease to expire on 1 February 2008*

xiii. *Option to renew lease 3 months before expiry of lease*

xiv. *Koinange Investment & Development Co Ltd change directorship*

(which is disputed)

xv. *Sifa International Ltd defaults in payment of rent of Kshs.250,000/=*

(which is disputed)

xvi. *Alleged new director/chair distrains for rent for non-payment of*

Kshs. 3 million

xvii. *Koinange Investment & Development Co Ltd files suit in 2004 seeking*

to evict Sifa International

xviii. *Reasons, that:-*

(a) the government has issued a public notice of repossession

of land not developed within stipulated time

(b) non-payments of rates to the city council of Nairobi

(c) solution to get another tenant for Kshs.600,000 rent per month

instead of 250,000/= . Develop the property or sell the property

xix. *Sifa International files HCCC 111/08 seeking injunction to restrain the*

Landlord, Koinange Investment & Development Co Ltd from evicting them

xx. *Claim by Sifa International that a new lease entered into of over 6 years*

(actually 15 years)

xxi. *Correct directors of Koinange Investment Development Ltd did not include*

one E.W. Koinange a widow/administratrix of the estate

xxii. *Two suits consolidated*

xxiii. *Two company Koinange Investment Development Co Ltd. One a defendant*

and another Plaintiffs which is the correct company?

3. Pre trial

(i) *suit consolidated*

(ii) *agreed issues to be determined:-*

- a. *whether tenancy agreement of 1.2.02 was valid*
- b. *whether there has been default of payment of rent by Sifa International?*
- c. *Who, are the directors of Koinange Investment Development Co Ltd?*
- d. *Are directors holding offices validly?*
- e. *Whether the proposed renewal of the tenancy agreement to Koinange Development Co Ltd to Sifa International Ltd on 3 February 2008 is valid or not?*
- f. *Whether eviction order prayed for should issue [to] evict Sifa International from premises or not?*
- g. *Whether outcome of dispute between directors would affect tenancy*
- h. *Whether outcome would affect the estate as share holders?*

4. Agreed/admission of facts

- (i) *That Koinange Investment Development Ltd is the registered owner of LR 209/9099*
- (ii) *Sifa International Ltd is currently in possession of the suit premises*
- (iii) *The estate of Mbiyu Koinange is majority share holder of Koinange Investment Development Ltd?*
- (iv) *That Salim Manji and the late father, Madataly Manji are and were share holders*
- (v) *That a tenancy agreement was executed between Sifa International Ltd and Koinange Investment Development Co Ltd with approval of estate of Mbiyu Koinange on 1st February 2002*

5. Hearing – Trial

- (a) *Transpired lease of 3 February 2008 questionable in execution*

6. Arguments by Plaintiffs 1 and 2

I. Plaintiffs No. 1

- (a) *The 1st lease was valid, therefore the 2nd lease of 3 February 2008 is also valid*
- (b) *Rents paid to meet costs of Land rates and rents; income tax as instructed by directors*
- c) Directors were
 - (i) *Isaac Njiru Mbiyu (now deceased)*
 - (ii) *Salim Manji*
 - (iii) *and Paul Mbatia Koinange*
- (d) *Lease No. 2 valid as all compliance by Plaintiff No. 1 met*

II. Plaintiff No. 2

- a. *Orders of eviction did not come from the company*
- b. *The director is Paul Mbatia whose intention was to renew the lease*
- c. *Legal directors are Madatally Manji (now deceased) Isaac Njiru Mbiyu (now deceased), Paul Mbatia and Salim Manji*
- d. *Contract by Sifa International (Def No. 1) and Koinange Investment Development & Co Ltd Plaintiff No. 2 valid*
- e. *Lease valid; seal of company attested agreement.*

7. III. Defendant No. 1

- (a) *lease not valid dated February 2002 because other directors of Sifa International Ltd were missing at its execution*
- (b) *Plaintiffs No. 1 defaulted in payment*
- (c) *Payments made direct to two directors*

- (d) *Agreement No. 2 allowed rental arrears of 2m.*
- (e) *Payment to lawyers*
- (f) *No rent payments made for February, March, April 2008*
- (g) *Isaac Njuno Mbiyu ceased to be director/chair E.W. Mbiyu now chair*
- (h) *Lease of 3.2.08 not valid having been executed by person no longer director*
- (i) *Salim Manji a director denied signing agreement*
- (j) *No company seal had been affixed*
- (k) *Sifa International Ltd had only one signatory signing agreement*
- (l) *Rose Waithera Mbiyu alias Rose Waithera Njoroge advocate High Court of Kenya affixed her seal as Commissioner of Oaths. None of the parties signed in her presence*
- (m) *Lease for 5, 10 years actually for 15 years changed from 6 years to 15 years without knowledge of advocate*
- (n) *Sifa International Ltd entitled to eviction*

8. Defendant No. 2 and 3

- (i) *Directorships of Sifa International Ltd invalid. PW1 a female adult director with two of her children*
- (ii) *Children minors aged 13 and 12 years old contrary to section 186(1) of the Companies Act Cap 486 Laws of Kenya*
- (iii) *Sifa International Ltd has been in default of payment of rent. Eg Kshs 2m in arrears under former lease of 1.2.02 to be paid to Income Tax*
- (iv) *No moneys/rent ever paid to Koinange Investment Development Co Ltd*
- (v) *Allegations payment of receipt to city treasurer not authorized by witness*
- (vi) *Directors of the Koinange Investment Development Co. Ltd are confirmed in letter of 24.6.08 to include E.W. Mbiyu section 83 Evidence Act*
- (vii) *Mutungi J confirmed in HCCC 3164/95 E.W. Mbiyu director*

- (viii) *S. Manji through A. Gwander confirmed E.W.Mbiyu's directorship*
- (ix) *Renewal of lease of 3.2.08 not valid*
- (x) *Agreement altered so much it ceased to be one with legal capacity*
- (xi) *Agreement forged. Salim Manji denied signing document*
- (xii) *Sifa International Co Ltd did not exercise option to renew lease*
- (xiii) *No legal capacity for a valid lease.*
- (xiv) *Eviction order to issue*
- (xv) *Tenancy agreement of 3 February 2008 to be nullified*

9. Interested party No. 1

- (i) *Clarifies directors of letter of 2004 Exhibit page 9 refers to years 1995 – 2007 where E. W. Mbiyu not director*
- (ii) *Costs at higher scale be awarded*

10. Interested Party No. 2

- a. *Lease agreement of 1.2.02 is not valid*
- b. *2nd lease denied by law*
- c. *No payment received by company and estate*

11. Held

- (i) *Agreement of 1 February 2002 expired in February 2008*
- (ii) *It transpired that directors were minors and contravenes section 186(1) of Companies Act*
- (iii) *Admission of facts by parties is that Koinange Investment Development Co Ltd is the registered owner and that Sifa International Ltd are in possession of the premises*
- (iv) *There is default of payment of rent by Sifa International*

- (v) *The directors of Koinange Investment Co. Ltd. not disputed:-
Salim Manji, late father Mdatally Manji now deceased, Paul Mbatia
and Edith W. Mbiyu*
- (vi) *New tenancy agreement of 3 February 2008 invalid*
- (vii) *R.W. Mbanya – advocate to be referred to advocate complaints commission*
- (viii) *Eviction order to issue against Sifa International Ltd from premises*
- (ix) *Directors confirmed by letter of 24.6.08, as Salim Manji, Paul Mbatia Koinange, Eddah Wanjiru
Mbiyu who are holding office validly*
- (x) *The renewal of lease of 3 February 2008 being invalid eviction to issue*
- (xi) *Estate still majority share holder of company*
- (xii) *HCCC 709/04 judgment entered in favour of M/s Koinange Investment Development Co Ltd
Defendant No. 1 and Defendant No. 2 and 3*

*Eddah w. Mbiyu and Kemte Sikinya Omwoma t/a Mumbo Auction Services dismissed for Plaintiff 1 and 2
against Defendant No. 2 and 3*

Costs to Defendant 1, 2, 3

12. Case Law

By Plaintiffs No. 1

(i) Parvi Holdings Ltd. v Nairobi City Council HCC Case No.708/05

(Ojwang J)

(ii) Central Kenya Limited vs Trust Bank Ltd. & 4 Others C.A. 215/96

(R.O. Kwach, P. Tunoi, G S Pall JJA)

By Defendant No. 1

(iii) Kanorero River Farm Ltd. & 3 Others v National Bank of Kenya Ltd (2002) 2

KLR 207

(iv) Charles Mwangi Kagoria v Dhaj D. Popat & 2 Others HCCC 96/2005

(J.L.A. Osiemo J)

(v) Mistry Omasugh v Kulubuya (1963) EA 408

Privy Council Appeal

(Viscount Radcliffe, Lord Morris of Borth-y-Gest, Lord Guest, Lord Peace &

Sir Kenneth Gresson

(vi) *Scott v Brown Doeringa Mcnah & Co (3) (1892) 26 B724*

Exturpi causa non oritur actio. (Lindley LJ at page 728

(vii) *Morjaria v Kenya Batteries (1981) Ltd. & 2 Others*

13. Statute

(a) *Law of Contract Act Cap 23*

14. Advocates

J. Thongori advocate instructed by Judy Thongori & Co. advocates for 1st Plaintiff

S. Gitonga instructed by M/s Githonga Mureithi & Co. advocates for the 2nd Plaintiff

L.M. Mbabu instructed by L.M. Mbabu & Associates for the 2nd and 3rd defendants

B. Kariuki advocate of Beatrice Kariuki & Associates for the 1st Defendant and leading

P. Waitere instructed by Kangethe & Co. Advocates for 1st defendant.

Interested Party No. 1 – David Njuno Koinange represented by S.K. Wandaka instructed by

Kinuthia M/s Kinuthia Wandaka & Co. Advocates – absent brief held by B. Kariuki

(P & A) 527 Nairobi in the estate of the late Mbiyu Koinange

Interested Party No. 2 – Eddah Wanjiru represented by A.W. Wahome instructed by

A.W. Wahome & Co. Advocates

(P & A) 527/81 Nairobi in the estate of the late Mbiyu Koinange

SIFA INTERNATIONAL LIMITED.....1ST PLAINTIFF

KOINANGE INVESTMENT DEVELOPMENT

CO. LIMITED (COMPANY NO. 1).....2ND PLAINTIFF

VERSUS

KOINANGE INVESTMENT DEVELOPMENT

CO. LIMITED (COMPANY NO. 2).....1ST DEFENDANT

EDDAH WANJIRU MBIYU.....2ND DEFENDANT

KENNETH SIKINYI OMWOMA

T/A MUMBO AUCTION SERVICES.....3RD DEFENDANT

ESTATE OF THE LATE MBIYU KOINANGE.....INTERESTED PARTY

J U D G M E N T

I. Subject

1. *The subject of this suit is land, LR 209/9099, an empty plot that is situated in the Central Business District of Nairobi between Kenya Re, International Life House and the Law Courts City Council of Nairobi Parking, Taifa Road.*
2. *The current use of the property has been utilization as a car park. The area consists of 0.6689 ha IR 34318; Land Survey Plan No.105620.*
3. *The dispute arises between the Landlord M/s Koinange Investment and Development Company Ltd and the tenant Sifa International Company Ltd. The premises are uncontrolled and therefore the Business Premises Rent Tribunal Act Cap 301 Laws of Kenya does not apply herein.*

II. Background of case

4. *The proprietors/landlord of the suit land is M/s Koinange Investment and Development Co. Ltd. The shareholder of this company include the Estate of the late Mbiyu Koinange (deceased) holding about 70% of the shares. Mr. Mbiyu Koinange was once a prominent politician in Kenya.*
5. *The estate of the deceased agreed, no member of the family of the late Mbiyu Koinange would manage any of the properties of the deceased due to past track record of family members on the issue for mismanagement. The estate has been pending on various issues, according to one witness, for 28 years.*
6. *M/s Sifa International Ltd took over the management of the “car park”. They entered into a formal lease on the 1st of February 2002 whereby the signatory to that lease was Sifa International and Development Ltd the Directors of Koinange Investment & Development Limited, namely;*
 - (i) *Mandataly Manji,*
 - (ii) *Isaac Njinu Mbiyu*
 - (iii) *Paul Mbatia Mbiyu on behalf of Koinange Investment & Development Ltd and*

- (iv) **Ruth Damaris Mbiyu**
- (v) **David Njuno Mbiyu**
- (vi) **Margaret Njeri Mbiyu**
- (vii) **Eddah Wanjiru Mbiyu**

(as administrators/administrix of the estate of the late Mbiyu Koinanage)

7. This lease was for six years and was to expire on the 1st of February 2008. If the tenant wished to review this lease, a three months notice would have to be issued by the tenant to apply for a further six years lease (with rent being Kshs.250,000/= per month).

8. In the year 2003, M/s Koinange Investment and Development Co Ltd changed the chair of the company from Isaac Njuno Koinanage to Eddah Wanjiru Mbiyu. The other directors are Salim Manji and Paul Mbatia. One Madatally Manji passed away and originally the Managing Director. This was as per the meeting finally held on 28th March 2003. (This change of directors was strongly disputed and more will be mentioned below on this).

9. The original chair, Isaac Njuno had requested the meeting be postponed from the 28 March 2003 to 30 March 2003 which request was not granted as there were pressing business required to be done. (Exhibit A1 page 7).

10. Those present at the meeting elected directors as follows:-

Koinanage Estate:- **Eddah Wanjiru Mbiyu**

Paul Mbatia Mbiyu

Manji Family:- **M. Manji**

Salim Manji

11. The chair, Eddah Wanjiru Mbiyu took over the running of the company and in 2004 filed HCCC 709/04 to evict the tenant, Sifa International Ltd because there was no remittance of rent. The intention was to terminate the tenancy and appoint new tenants whom they, the company, may have gotten paying Kshs.600,000/= per month. Alternatively, they would find a buyer for the property, as seen by the former chairs intention in their documentation.

12. The Ministry of Lands made matters more acute when a notice of intention to repossess land not developed within the stipulated time. The company was allocated land in 1976 and had never developed the property. Their intention to do so was therefore another option of dealing with the property.

13. The chair went further to issue a breaking order through the magistrates court for Kshs. 3 million, being non-payment of rent to the company.

14. Sifa International Ltd entered a new agreement of lease with Koinange Investment and Development Co. Ltd dated the 3rd of February 2008 extending the lease to 15 years. The advocate representing the company was

R.W. Mbiyu alias R.W. Njoroge.

15. She ceased acting for the directors whom she believe were

(i) **Paul Mbatia Mbiyu**

(ii) **Isaac Njuno Mbiyu**

(iii) **Salim Manji**

16. The advocate was later called as a witness to this court to explain this lease. (more of this later below).

17. Sifa International Ltd was invaded on the pretext from the company, that they had breaking down order. Sifa International Ltd then filed HCCC 111/08 seeking for orders of injunction against Eddah Wanjiru Mbiyu in her personal capacity and the directors Kenneth Sikinyi Omwoma T/A Mumbo Auction Services.

18. Mugo Ag J granted ex parte orders for an injunction whilst Ransley J declined to issue eviction orders on interlocutory application.

19. The Land and Environmental Law Division was established in the year 2007. This file was placed before me on the 7 April 2008.

20. Sifa International Ltd did not recognize

Eddah Wanjiru Mbiyu as a director of Koinange Investment & Development Co. Ltd.

III – Pre-trials

21. This court subjected the parties to a pretrial conference to which the following was agreed to:-

III – (i) Consolidation

(orders XI r 2 Civil Procedure Rules)

(a) **14 April 2008**

That HCCC 111/08

Be consolidated with

HCCC 709/04

Where the former sought orders of injunction to restrain M/s Koinange Investment Development Co Ltd from interfering with their quiet possession and the latter case, seeking orders to evict M/s Sifa International Ltd from the suit premises.

Order xir 2 Civil Procedure Rules applies

III – (ii) Koinange Investment Development Co Ltd.

21 April 2008

It was agreed as there were two set of directors claiming the same company. That the Limited Liability Company in HCCC 709/04 be named

Koinange Investment Development Co. Ltd. No. 1 and the company in HCCC 111/08 be named **Koinange Investment Development Co. Ltd. No. 2**

III - (iii) Representation and Parties

22. It was thereafter agreed that upon the two cases being consolidated, the parties would be referred to as follows:-

1. **Sifa International Ltd. (HCCC 709/04 original Plaintiffs)**

..... Plaintiff No. 1

represented by J. Thongori & Co. Advocates

2. **Koinange Development Co. Ltd. (HCCC 111/08 Original Plaintiffs)**

..... Plaintiff No. 2

represented by R.W. Mbanya & Co. advocates

Versus

1. **Koinange Investment & Development Co. Ltd. (HCCC 709/04 Original Defendant)**

..... Defendant No. 1

represented by Beatrice Kariuki & Co. advocates

with M/s Kangethe Waitere & Co. advocate

2. **Edda Wanjiru Mbiyu**

(HCCC 111/08 Original Defendant No. 1)

..... Defendant No. 2

L.M. Mbaabu & Co. advocates

3 **Kenneth Sikinyi Omwoma t/a Mumbo Auctioneer Services**

(HCCC 111/08 original Defendant No. 2)

..... Defendant No 3

L. M. Mbaabu & Co advocates

23. There were two interested parties who were permitted to participate in this matter namely,:-

(i) **Interested party No. 1**

David Njuno Koinange

(The estate of Mbiyu Koinange)

(HCCC P & A 527/81 Nairobi)

represented by M/s Kinuthia Wandaka & Co Advocates (30.10.08)

(ii) **Interested party No. 2**

Eddah Wanjiku Mbiyu

(The estate of Mbiyu Koinange)

(HCC P & A 527/81 Nairobi)

represented M/s A. W. by Wahome Co. advocate

III – IV Agreed Issues

24. *Parties also came up with the issues they wished this court to determine. This was subject to any parties who would further be joined in these cases.*

25. *The agreed issues are as follows:-*

25.1 *Whether the tenancy agreement dated 1 February 2002 was valid or not?*

25.2 *Whether there has been default in payment of rent/mesne profits by Sifa International Ltd or not?*

25.3 *Who are the directors of Koinange Investment Development Ltd?*

25.4 *Are the directors therein holding office validly?*

25.5 *Whether the proposed renewal of the tenancy agreement of Koinanange Investment Development Ltd to Sifa International Ltd on 3rd February 2008 is valid or not?*

25.6 *Whether the eviction order prayed for should issue evicting Sifa International from the suit premises or not?*

25.7 *Whether the outcome of the dispute between the directors effect the tenancy and, if so, to what extent*

25.8 *Whether the outcome of the dispute between the directors the estate as shareholders?"*

26. *No further parties were enjoined to this case.*

III – V Admissions of facts

27. *The parties admitted the following facts:-*

27.1 *"That Koinange Investment Development Ltd is the registered owner of LR No.209/9099.*

27.2 *That Sifa International Ltd. is currently in possession of the suit premises.*

27.3 *That the estate of Mbiyu Koinange is the majority shareholder of Koinange Investment Development Co Ltd*

27.4 *That Salim Manji, the late father Madataly Manji are share holders.*

27.5 *That a tenancy agreement was executed between Sifa International Ltd and Koinange Investment and Development Ltd with approval of the estate of Mbiyu Koinange on [the] 1st February 2002."*

III – VI Consents

28. Pending the determination of this case, the parties agreed further that the rents payable by M/s Sifa International Ltd be Kshs.400,000/= per month being the purported rent for 5 May 2008 and to be paid every 5th day of a month until further orders of the court.

29. The sum was and is held in an interest earning account at **Equity Bank** in the joint names of Beatrice Karuki Associates and M/s R.W. Mbanya and Co advocates being the advocates for M/s Koinange Investment Development Ltd 1 and 2 respectively.

30. R.W. Mbanya was replaced by M/s Asiema & Co advocates but later and finally by M/s Gitonga Murithi & Co advocates. The consent changed likewise to accommodate the new and latest advocate for Koinange Investment Development No. 1 (Plaintiff No. 2 in these proceedings).

31. Any claim by the Kenya Income Tax/revenue authority was to be referred to Koinange Investment and Development Company and not to the Income Tax Authority by Sifa International Ltd.

III – VI - Discoveries

32. Parties then agreed on the documents to be relied on. They came up with

Bundle A – all documents agreed upon to be put in without calling the maker thereof.

Bundle B – documents by Defendant No. 1.

Bundle C – documents by Defendant 2 and 3.

Bundle D – documents by Plaintiff No. 1.

The bundles not agreed on, the maker of the document would required to be called to give evidence. Section 35 Evidence Act applied.

IV. The Trial

33. Parties agreed the order of the trial would be the party begging to be

Plaintiff No. 2.

Then

Defendant No. 1;

Defendant No. 2 and 3

Then

Plaintiff No. 1

34. All the parties called a witness each, save Plaintiff No. 1 who then called a witness to prove some documents.

35. Plaintiff No. 1 had failed to attend court on grounds she was indisposed. After a lengthy query she did attend court.

36. Part of the trial was held in the High Court of Kenya at Kericho and partly in Nairobi due to logistics and unforeseen circumstances. To this, I am most grateful to all the parties and their advocates

for accommodating the court in order to finalize this matter.

V. Opinion/arguments by Parties

37. The main issue herein is whether

Sifa International are legally on the premises. Namely, **is the tenancy agreement of 1 February 2002 valid or not?**

38. The Plaintiff No. 1 Sifa International Ltd argues that this lease was valid. It was a lease that was signed, sealed and delivered. The parties are bound by their pleadings. The lease terminated by flexuous of time.

39. Indeed the admission of facts states that this lease had been entered into by parties duly executed including the estate of the deceased Koinange.

40. It was only during the trial that it transpired that M/s Sifa International had no capacity to have entered into an agreement. This argued Defendant 2 and 3's advocate, was due to Section 186(1) of the Company's Act requiring that:-

“no person shall be capable of being appointed a director of a company which is subject to this section if at the time of his appointment he has not attained the age of twenty-one or he has attained the age of senerity”.

41. PW2, the director of Sifa International is known as Lennah Koinange. She gave evidence where she admitted that her co-directors were her children. At the time of incorporating the company, they were 12 and 13 years respectively. This meant that having no adult in the company the said company is an illegality.

42. The minors therefore, it was argued, could not execute the agreement.

43. As a result of the first agreement being null and void the right to exercise the option to renew the lease cannot now be exercised.

44. In law, Sifa International Ltd has no capacity to exist on grounds that the directors at the inception were minors and actually do not participate in the activities of the company.

45. When the director Lennah Koinange failed to attend court, no substitute director could attend as they were either minors or away in school and or out of the country.

46. A policy was formulated that no family runs the family estate properties. It was very late in the day that it was discovered that Sifa International Ltd belonged to Lennah Koinange, the daughter to Mbiyu Koinanage. It was also disclosed by the same witness that Isaac Njuno Mbiyu, the former chair was her brother. This was a conflict of interest.

47. I would rule that technically and according to law, Sifa International was precluded into entering into a formal contract in 2002 due to lack of capacity.

48. The lease tenancy agreement of 1st February 2002 is invalid in law and therefore null and void. Parties by admission held that the lease was validly executed.

49. Nonetheless, if per chance the first lease was lawfully executed, **whether there was default in payment of the rent?** The Plaintiff No. 1 argued that she did pay rent. That this rent, was directed to be paid for rates at the city council of Nairobi, to pay advocates, to pay for income tax of the estate and to pay the directors themselves. She held Kshs. 2 million belonging to the company on grounds of such requests being made to her to so hold the sum.

50. Although the subsequent lease stated she owned Kshs. 2 million. She infact had the moneys in her possession that she holds.

51. In reply, the Defendants claim that not a single sum, apart from the deposit into a specific account was paid to the Koinange Investment and Development Co. Ltd.

52. Arguments by Plaintiff No. 1 that she was following the mandate given to her by the directors she knows, Paul Mbatia Mbiyu and Isaac Njuno Mbiyu; no instructions could be taken from Isaac Njuno as he was not a director after 28 April 2003. Any anomaly on the directors in 2004 does not mean that he had a mandate to give Sifa International Ltd instructions to pay them.

53. In the meeting at 24 April 2003 it was understood that all funds collected should be deposited into an account and not paid to third parties.

54. I would hold that the Sifa International was in arrears of rent of Kshs. 2 million.

VI. Directors

55. In this case having two companies it is clear that there are two sets of conflicting alleged directors.

56. From the evidence of Plaintiff 1 and 2, the directors are said to be Salim Manji, Isaac Njuno and Paul Mbatia.

57. The meeting of the 24 April 03 shows that meeting of the shareholders that included the 1st and 2nd interested parties were then:

(i) Eddah W. Mbiyu

(ii) Paul Mbatia Mbiyu

(iii) Salim Manji

(iv) Madatally Manji (who has since passed away)

58. Shareholders included Charles Koinange, a brother to the late Mbiyu Koinange holding shares of 3,000 and the estate of Mbiyu Koinange Shs.3,200. The estate of Madatally Manji holding 7,500 shares and Salim Manji 7,500.

59. In her evidence, Lennah Koinange argued that she has preserved her fathers wealth by being proactive with the intention of saving other properties from being auctioned.

60. The legally registered directors as of 24 June 2008 as per the letter for the Registrar of Companies (Section 83 of the Evidence Act) is:

61.1 Salim Manji

61.2 Paul Mbatia Koinange Mbiyu

61.3 Eddah Wanjiru Mbiyu

61. These are the directors with shareholders of the estate of those predeceased namely

(i) Mbiyu Koinange

(ii) Mandatally Manji

62. Isaac Njuno Mbiyu fell ill. He has been indisposed for a considerable time. He had by the year 2003 been replaced as the chair and director. His appointment together with Paul Mbatia was originally on the representation. They held no shares as shareholders as this was invested in the estate.

63. I hold that Isaac Njuno Mbiyu is not and was not a director of the said company with effect from the year 2003. He had no capacity to enter into any agreement on behalf of the company in the year 2008.

64. Eddah W. Mbiyu is currently holding a valid office as director/chair of Koinange Investment Development Company.

VII. Lease 3 February 2008

65. The tenancy agreement of 3 February 2008 was prepared with the directors allegedly being Paul Mbatia (Plaintiff No. 2). Isaac Njuno Koinange Mbiyu and Salim Manji.

66. Isaac Njuno Koinange Mbiyu passed away and did not give evidence.

68. The Plaintiff No. 1 argued that it was not upon Sifa International to in fact question, of whom the directors were. The evidence before court should show, one

Rose W. Mbanya alias Rose Njoroge prepared the said lease. At all times she took instructions from Paul Mbatia Mbiyu.

69. No due diligence was conducted by this advocate. She prepared the lease then gave it to Paul Mbatia and Lennah Koinange. She did not witness their signature but stamped her name alias Rose Wathera Njoroge as Commissioner of Oaths. She explained this name as her maiden name. She used it as the ‘**Commissioner of Oaths**’ and was informed that the Law Society would have no objection if this was so done by her.

70. This advocate drew the documents then used her maiden or alias name to stamp the Commissioner of Oath document to witness the signature of parties.

72. She came and gave evidence to court. On cross examination she admitted she never saw any of the parties sign her documents except for Paul Mbatia Mbiyu. She gave out the document to be signed and brought back.

71. The general rule for advocates is that you do not prepare a lease document then attest it yourself. This must be done by an independent advocate.

72. When shown the document duly registered upon being stamped, she found that the document had been altered. This was on the aspect that the lease was reflecting 15 years instead of 10 years that she had prepared.

73. This advocate ceased from acting and became a witness to court. She informed the court that she did no attesting of the documents. Cap 23, being the Law of Contract requires the witness be present when attesting a document. See Section 3(3)(b) that refers.

74. It is quite clear that Rose Wanjiru Mbanya failed in her duties as an advocate of the High Court of Kenya.

75. I say so as Salim Manji who came to identify, in evidence, his signature on the agreement, categorically denied that the signature on the lease agreement was his and alleged it was a forgery. He also denied that Isaac Njuno Mbiyu was a director chair. He was not privy to the lease agreement of 3 August 2008.

76. The lease agreement had a very different signature. The Plaintiff No. 1's advocate stated we can continue with the lease of 3 February 2008. That we can omit Salim Manji's signature or it can "**be severed**" from the lease and the lease can then remain valid.

77. The arguments put forward is that the internal affairs of the directors should not concern the Plaintiff No. 1 (see the case law of **Morjaria v Kenya Batteries** (1981) Ltd. HCCC 701/02 Ringera J.

78. The agreement besides being altered and not being attested to was forged. The advocate herself was said to have been surprised by the changes.

79. I do not think Rose Waithera Mbanya is being truthful. I say so because when she originally filed suit HCCC 111/08, she also filed an application for an injunction. She annexed the same lease agreement before it was stamped, sealed and registered with the Registrar of documents at the Lands Department.

80. She was aware at all times of this document which the parties had and which deponed to an affidavit that she states dated 19 March 2008:-

(1) **"That ---- I am competent to swear this affidavit**

(2) **That I am the one who had prepared this application and I confirm the same is very urgent."**

(Emphasis supplied)

Para 11 of Isaac Njuno's affidavit reads:-

"That on the 3rd February 2008 a new lease contract was signed between the directors of the company and Sifa and the same was subsequently registered, annexed hereto and marked JNM 7 is a copy of a new, lease agreement." (Emphasis supplied).

81. I therefore do not believe that the advocate, Rose W. Mbanya was ignorant of the document as an advocate. She should respectively have been diligent.

82. I would ask and order that a report to the Advocates Complaints Commission be preferred against the said Rose W. Mbanya alias Rose W. Njoroge.

83. I hold that the lease agreement is a sham. It was drafted irregularly leaving the Estate of Mbiyu Koinange out of its agreement.

84. I accordingly find that the lease agreement of 3 February 2008, is null and void as the alleged directors had no capacity to enter such agreement.

85. The Plaintiff No. 1 infact also signed the lease alone. The purported second signature was of her accountant and not a director.

86. I find that there was no valid lease.

87. I further hold that an EVICTION Order should issue. That Sifa International Ltd must vacate the premises as being there illegally.

88. From past authorities it is important to note that where there is a lease, a tenant who is unprotected does not automatically become a protected tenant under the Business Premises Rent Tribunal Act.

89. I therefore grant the prayer of EVICTION from the said premises.

90. The submissions by the Interested Parties have been noted by this court and any authorities relied by

parties.

VIII In Summary

(a) HCCC 709/04

91. Judgment be and is hereby entered in favour of M/s Koinange Investment and Development Co. Ltd, Defendant No. 1, Defendant No. 2 Eddah W. Mbiyu and Defendant No. 3 Kenneth Sikinyi Omwoma T/O Mumbo Auctioneers Services.

92. That Eviction Order against Plaintiff No. 1 do issue. The delivery of vacant possession of the suit premises/Land to issue with costs.

IX Obiter Dictum

93. The conduct of the auctioneers in enforcing court order should be done with dignity and respect. The holiqasm of pouring stones and using undue force to evict a person should be discouraged and not permitted by courts.

94. That the HCCC 111/08 seeking a permanent injunction by Plaintiff No. 1 restraining Defendant No. 1 agents and or auctioneers from interfering with Plaintiffs' No. 1's is rights is rejected.

95. The contract tenancy agreement was a forgery null and void. **"EXTURPI CAUSA NON ORITUACITO"** means that

"no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the [party] proves the illegality the court ought not to assist him"

Scott v Brown, Dooring, Mcnahu & Co. (3) (1893)2 QB 724 at page 728 Relied on in case of Mistry Amar Singh v Kulabuya (1963) EA 408 at page 414.

X - Conclusion

96. The lease relied on by the Plaintiff No 1 is an illegality. The suit is dismissed with costs to the Defendants 1 and 2.

97. Plaintiff No. 2 Koinanage Investment Development Co. Ltd. who purport the directors are Paul Mbatia Mbiyu, Isaac Njuno Mbiyu (now deceased) and Salim Manji are incorrect directors. Isaac Njuno Mbiyu was removed on

24 April 2003 as chair and director. Salim Manji recognizes Eddah W. Mbiyu as a director and NOT Isaac Njuno. Paul Mbatia is a director but his action as Plaintiff No. 2 is null and void and having no rights to so act and be paid directly moneys belonging to the company without a resolution of the company.

98. Mutungi J (as he then was) recognized, in another matter E.W. Mbiyu as the lawful director of the company.

99. I, accordingly dismiss the case for Plaintiff No. 2 with costs to the Defendants 1, 2.

100. I will not grant costs in favour of Defendant No. 3 due to the irregular manner in which the auction/eviction was carried out. He bears his own costs.

Delivered and Dated this 17th day of August 2009 at Nairobi under the Vacation Rules, Judicature Act Cap 8 Rule 3.

M.A. ANG'AWA

JUDGE

Advocates

J. Thongori advocate instructed by Judy Thongori & Co advocates for 1st Plaintiff

S. Gitonga instructed by M/s Githonga Mureithi & Co advocates for the 2nd Plaintiff

L.M. Mbabu instructed by L.M. Mbabu & Associates for the 2nd and 3rd defendants

B. Kariuki advocate of Beatrice Kariuki & Associates for the 1st Defendant and leading P. Waitere instructed by Kangethe Waitere & Co Advocates for 1st defendant.

Interested Party No. 1 – David Njuno Koinange represented by S.K. Wandaka instructed by M/s Kinuthia Wandaka & Co Advocates – absent brief held by B. Kariuki

(P & A) 527 Nairobi in the estate of the late Mbiyu Koinange

Interested Party No. 2 – Eddah Wanjiru represented by A.W. Wahome instructed by A.W. Wahome & Co Advocates

(P & A) 527/81 Nairobi in the estate of the late Mbiyu Koinange

17th August 2009

Coram: Hon. Lady Justice M.A. Ang'awa

Kevin Goga – court clerk

COURT:

Judgment delivered in open court under the vacation rules, judicature act cap 8 rule 3.

DATED this 17th day of August 2009 at **Nairobi**.

M.A. ANG'AWA

JUDGE