# REPUBLIC OF KENYA
# IN THE HIGH COURT OF KENYA
# AT MALINDI

## Civil Suit 76 of 2009

**GLOBAL REAL ESTATE LTD ……..PLAINTIFF**

**VERSUS**

**SCORPIO VILLA ENTERPRISES LTD ...…….DEFENDANT**

**R U L I N G**

The application dated 1st September 2009 is made by way of Notice of Motion under Order L Rule 1 Civil Procedure Rules and Section 17 of the Companies Act (Cap 486).

It seeks that the plaintiff's application dated 18th July 2009 be struck out for being an abuse of the Court Process. It is based on grounds that:

a) Applicant is not and has never been a director of the defendant company.

b) The defendant is not an entity capable of being sued

c) The defendant does not exist

d) The application is totally misconceived, devoid of merit and an abuse of the court process.

The same is supported by the affidavit sworn by Simone Mancini who is the person named in the plaintiff's application dated 18-8-09 seeking to commit him to civil jail purporting that he is a director of the defendant company. He avers that a search at the Companies Registry to establish whether he had been made share holder or director of the Defendant was not fruitful as no such company is registered by the Registrar of Companies – this is confirmed by a letter from the Registrar of Companies, marked A.

He denies being a director and thus the application against him is misconceived and malicious.

In response, the respondent states in the replying affidavit sworn by Bobby Cellini, that the affidavit by applicant is full of mala fides and intended to mislead the court as the applicant in his own previous affidavits refers to himself as the director of the defendant company – the affidavits are marked A.

That in any case the order said to have been disobeyed was served on the applicant, so he can't claim that he did not know about its existence. Further that the application referred to clearly identifies the construction under contention and he cannot feign ignorance. It is stated that applicant has a penchant for disobeying court orders or orders from the relevant authorities, and this court must act to uphold its dignity and authority (refer to order by NEMA marked B).

It is argued that the wording of the letter from the Registrar of Companies does not preclude the possibility that the defendant company could be in existence. Further that even if the defendant company does not exist, it may still be sued as that is the name they trade in as per photos showing defendant's property known as Scorpio Villas.

In a supplementary affidavit by the applicant he denies having any dealings with the defendant company which in any case he says does not

exist and the mere fact that he swore affidavits confirming that he was a director of the defendant, does not confer on him directorship as he has never been so appointed. He denies having a penchant for disobeying orders saying respondent just wants to paint a bad picture of him. He denies trading as Scorpio Villas Enterprise Ltd or Scorpio Villas.

At the hearing of the application, Mr. Kiarie submitted on behalf of the applicant that the defendant is not a company in existence as envisaged by section 17(1) of the Companies Act and that if a party wished to find out whether a company is registered, they simply go to the Companies Registry and make a search. He makes reference to the search by the applicant which shows that Scorpio Villa does not appear in the data base of the Registrar of Companies and urges this court not to let the plaintiff/respondent continue with the application seeking to have the defendant's director committed to civil jail saying applicant Simone Mancinni cannot be a director of the said company.

He has referred to section 177 of the Companies Act as regards who is a Director. That section reads as follows:

> ***"Every company (other than a private company) registered after the appointed day, shall have at least two directors and any company registered before the appointed day and every private company shall have at least one director"***

Mr. Kiarie also refers to section 182 which refers to how a person can be appointed a director and submits that there must be a consent in writing delivered to the Registrar of Companies by the person wishing to act as a director explaining that this is because one cannot be forced to be a director. He contends that respondent has not demonstrated his basis for claiming that applicant is the director of a company which has never been registered. Further that applicant or even the defendant is not sued as a sole proprietor or a partnership, but a limited liability company.

In opposing the application Mr. Osiemo submits on behalf of the respondent that the application is incurably defective as it only cites provisions of the Civil Procedure Act, Civil Procedure Rules and section 17 of the Companies Act (which only refers to a list of directors from the Companies Register being conclusive proof. Mr. Osiemo argues that none of the provisions cited on the application gives this court power to strike out pleadings and that such a provision is only found under Order VI Rule 13. Respondent relies on affidavits sworn by the applicant where he stated that he is a director of Scorpio Villas Ltd and says that where a party has made certain representation and another has acted on such representation, then they are estopped from denying those documents which have been filed in court and that Mancinni perjured himself in the affidavit sworn on 12-10-06 then suddenly shift four years later to say he has never had any dealing with the defendant company.

It is Mr. Osiemo's contention that, even if Scorpio Villas is not registered, Order XXIX Rule 1 clearly shows that one can sue in the name parties are trading in, pointing out that the name is emblazoned in very bold letters on the property and applicant had in his earlier affidavits even admitted to being resident of Scorpio Villas.

Mr. Osiemo wonders that if Simone Mancinni is not a director, then, why is he accepting service and signing for entities that do not concern him. Mr. Osiemo invites this court to consider the provisions of Order 1 Rule 9 Civil Procedure Rules which states that:-

> ***"No suit shall be defeated by reason of the misjoinder or non joinder of parties, and the court may in any suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it"***

Mr. Osiemo submits that, the bottom line is that no one should be allowed to make a mockery of the court process due to a misjoinder or non joinder of parties and since Simone Mancinni knew of the existence of the court order and he decided to disobey it, then the court must act decisively to uphold its honour and dignity.

In reply, Mr. Kiarie states that the provisions cited in the application are valid because under the Companies Act, the applicant is not a director of the defendant company and that is why section 17 of the Companies Act is cited because it refers to consequences of incorporation and the issuance of certificate of incorporation.

He further explains that the inherent powers of the court under section 3A is the most appropriate provision to rely on so that the court may

make right, that is wrong. He urges the court to consider that

a) Applicant's merely referring to himself as a director of defendant in earlier affidavits, does not transform him into a director.

b) The affidavits under reference are not part of this case.

As regards acceptance of service, Mr. Kiarie submits that:

a) The affidavit of service is not an issue in this application and should not form part of the issues in the application for contempt.

b) Court orders are directed at parties not the world in general and the court order which is not subject of the contempt proceedings was not directed at Simone Mancinni so the question of his disobeying it does not even arise. He also argues that Order I Rule 9 does not even apply as the respondent does not say who was misjoined or not joined.

Several issues arise for determination:-

a) Is the application incompetent for citing wrong provisions of the law:
Would respondent be saved by Order I rule 9

(b) Is the applicant improperly named as a director in the citation for contempt?

(c) Is there evidence that applicant is a director of the defendant – does defendant have the legal capacity to be sued?

The application cites Order L Rule 9 which provides for the procedure to be used in filing applications, it reads thus:

> ***"All applications to the court, save where otherwise expressly provided for under these Rules shall be by motion…."***

I have already alluded to section 17 of the Companies Act, which basically addresses the steps one ought to take in establishing who is a director of a company. This application seeks to strike out an application made by the respondent. The provisions in the Civil Procedure Rules which deal with striking out are clearly provided for under VI Rule 13. The only challenge here is that Order VI Rule 13 deals with striking out pleading – is a notice of motion application a pleading? Section 2 (The Interpretation Section) of the Civil Procedure Act defines pleading "to include, a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto and the reply of the plaintiff to any evidence or counterclaim of a defendant". This then seems to leave out applications made by way of motions and this explains why applicant has cited Order L Rule 1.

My considered view is that the application is not incompetent. Applicant says he is not a director of the company and that defendant is not even registered as a company. The respondent did not present to this court evidence of search carried out to confirm the legal capacity of the said company or whether applicant is a director. If what is presented by applicant from the Registrar of Companies raises doubts, then the remedy lay with the respondent filing results of what it considers as genuine search from the Registrar of Companies confirming the legal status of the company and the applicant as the director. There are certain legal qualities that make a company a limited liability entity capable of suing and being sued. Certainly adding the word "Limited" after the name of an entity does not transform it automatically into a limited liability company.

Then there is the issue of the applicant's status, that he had in the past sworn affidavits describing himself as the director of the defendant, although now he completely does an about turn and denies ever dealing with it. From what has been presented to this court, I have no doubt that applicant has dealt with the defendant - the issue is in what capacity? Again no search document was presented –
Section 2 of the Companies Act defines a director to include any person occupying the position of director by whatever name called. The respondent has not presented any list of directors from the Registrar of Companies as anticipated under section 17 of the Companies Act, to persuade this court that the applicant is indeed a director of the said company.

Would Order I rule 9 come to the respondent's aid? I think not, because what is sought is so specific – it requires establishing the relationship the proposed contempnor has with the company and whether he should be held responsible for the purported acts – that has not been done, in fact respondent has made no effort whatsoever to demonstrate the nexus between the applicant with the activities complained of, so as to even show that the misjoinder should not be used to defeat the contempt proceedings. Of course one can sue an individual and cite the trade name, but that is not the case here, applicant is not being cited in his name trading as Scorpio Villas Enterprises, he is being cited as the director of Scorpio Villa Enterprises Ltd and one situation cannot remedy the other – not in the absence of evidence regarding applicant's

relationship with the defendant company. Is the applicant here a manger, director, proprietor, partner? Section 181 of the Companies Act provides that:

"The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification"

The problem here is that it has not even been established that the applicant was or is appointed as a manager of the defendant company. So really to proceed with the application dated 18th August 2009 will be going on wild goose chase and I am persuaded that the same ought and must be struck out as being incompetent with costs to respondent/defendant in the matter.

Costs of this application shall be borne by the respondent/plaintiff herein.

Delivered and dated this **1st** day of **December 2009** at Malindi.

**H. A. Omondi**
**JUDGE**