



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

**Civil Case 261 of 2007**

**TWO NINETY INVESTMENTS LIMITED .....PLAINTIFF**

**VERSUS**

**EAST AFRICAN SAFARI AIR LIMITED (In Receivership) ....1<sup>ST</sup> DEFENDANT**

**HARVEEN GADHOKE (in his capacity as**

**Receiver of East African Safari Air Limited) .....2<sup>ND</sup> DEFENDANT**

**RULING**

The application for my determination is the one dated 24<sup>th</sup> May 2007 and two prayers had been already dealt with as there is an interim order of injunction. The prayer that was canvassed before me is prayer No.3 in the application which reads as follows;

**“That the first and 2<sup>nd</sup> defendants jointly and severally whether by themselves or their officers, servants or agents be and are hereby restrained pending the hearing and determination of this suit from doing the following acts or any of them that is to say;**

**(a) Selling parting with, dealing or disposing in any manner whatsoever 75% of the shares in East African Safari Air Express Limited otherwise than to the plaintiff.**

**(b) Registering the transfer of 75% of the shares in East African Safari Air Express Ltd to any person other than the plaintiff.**

The application is grounded on the following;

**(1) Pursuant to an agreement for purchase of shares dated 20<sup>th</sup> February 2002 the plaintiff purchased 75% of the shares in East African Safari Air Express Limited.**

**(2) The plaintiff is the beneficial owner of the said shares.**

**(3) In breach of the agreement, the defendants have threatened to sell and transfer the shares in which the plaintiff has beneficial ownership.**

**(4) The plaintiff has invested vast sums of money in East African Safari Air Express Limited and**

**has built goodwill in the company since it purchased the shares.**

**(5) Unless the defendants are restrained from selling the shares and transferring them to a 3<sup>rd</sup> party, the plaintiff is likely to suffer irreparable harm and damages.**

The applicant also relies on the supporting and further affidavits of **Mr. Adam Graig Ogden** who is a director of the plaintiff company. He states that the 1<sup>st</sup> defendant was the holder of 99% of the shares of a company known as **Flying Jet Pet Limited**. That by way of an agreement dated 20<sup>th</sup> February 2002 the plaintiff purchased 75% of the shares in flying **Jet Pet Limited** and as a result the said company changed its name to **East African Safari Air Express Limited**. It is contended that it was a term of the agreement that the plaintiff would not dispose the shares without prior consent of the 1<sup>st</sup> defendant.

The plaintiff then paid the purchase price of the shares to the 1<sup>st</sup> defendant but the amount was transferred into the account of the plaintiff's director, chairman, Chief Executive Officer and majority shareholder, **Mr. Anthony Kegode**. And despite having been paid the full purchase price for the shares, the 1<sup>st</sup> defendant failed to deliver up certificates, shares and transfers to the plaintiff. It is alleged that the 1<sup>st</sup> defendant at all times acknowledged that the plaintiff was the beneficial owner of the shares.

The deponent further contends that since the 1<sup>st</sup> defendant received the purchase price for the shares and was not denying the plaintiff had the beneficial ownership of 75% in Express even though the 1<sup>st</sup> defendant had failed to effect the transfer as it was obliged to do under the agreement. That subsequent to acquiring 75% shareholding in **Express**, the plaintiff claims to have invested substantial funds in the said company.

On or about September 2004, the 1<sup>st</sup> defendant was placed in receivership by **Chase Bank (Kenya) Limited** and the bank appointed the 2<sup>nd</sup> defendant as receiver. The plaintiff then instructed its Advocates to demand the immediate removal of the receiver on the basis that the receiver had been appointed pursuant to a void debenture and the appointment was therefore void. In a letter dated 10<sup>th</sup> September 2004 the plaintiff's Advocates also sought a confirmation that the bank or the 2<sup>nd</sup> defendant would take action as may be necessary to ensure that the shares in Express were properly vested in the plaintiff.

According to **M/S Malik** Advocate the plaintiff is claiming specific performance of the agreement for the transfer of shares, so that the shares may be registered in the names of the plaintiff. And that while the suit for specific performance is pending, the plaintiff has brought the present application for injunction to stop the receiver and the company from transferring or selling those shares. **M/S Malik** Advocate contended that the agreement was signed by **Mr. Anthony Kegode**, who later varied the agreement to give the plaintiff a free right to dispose the shares or transfer the same. There is evidence that the plaintiff paid for the shares and pursuant to purchasing 75% shares, the plaintiff took control of **Express** and invested substantial sums of money in **Express**.

The situation continued until **East African Air** was placed under receivership by **Chase Bank Limited**, when the present dispute arose.

The defendants opposed the application and relied on the replying affidavit by **Mr. Harveen Gadhoke** who is the receiver manager of the 1<sup>st</sup> defendant company. He states as follows: that there is no board resolution for sale of 75% of shares in **Flying Jet Limited (East African Safari Air Express)**. Secondly **East African Safari Air Express** is a distinct and separate legal entity from **East African Safari Air Limited**, the 1<sup>st</sup> defendant. Thirdly the agreement is not binding on the 1<sup>st</sup> defendant because it is ultra vires the Articles of Association of **East African Safari Air Express Limited** in particular clause No.32. That the transfer of ?68,520 relates to purchase of 75% of shares in **East African Safari Air Express Limited** and not the 1<sup>st</sup> defendant. And more importantly the funds were transferred to **A. A. Kegode** and not to the first defendant or for and on behalf of the first defendant.

In short the deponent states that there is no evidence to show that the sum of ?68520 was paid to the 1<sup>st</sup> defendant being the purchase price.

The issues in dispute between the parties herein is fairly complex for there is ample evidence to show the parties herein, and some directors and/or shareholders related in a manner which contravenes the law. The central players in this dispute is **Mr. Adam Ogden** and **Mr. Anthony Kegode** who appear to have had several huts in the transaction.

In the agreement dated 20<sup>th</sup> February, 2002 **M/S East African Safari Air** and **Two Ninety Investments** entered into a transaction for the purchase of 75% shares and/or ownership in the 1<sup>st</sup> defendant. The said company is now under receivership and the receiver/manager empowered to deal with the assets of the said company. It is pertinent to note that **East African Safari Air** was the registered owner of 100% shares in the capital of **Flying Jet Pet Limited**. And the shares were sold for Kshs.7 million.

It is also necessary to understand that on 14<sup>th</sup> May 2002, Flying Jetpet **Kenya Limited** changed its name to **East African Safari Air Express Limited**. In a letter dated 20<sup>th</sup> February 2002, **Mr. Anthony Kegode**, who claims to be the Executive director of **East African Safari Air** wrote to **M/S Two Ninety Investments** giving consent to dispose their shares to any other person.

In essence the transfer and sale of shares was in **East African Safari Air Express (Flying Jetpet)** to **Two Ninety Investment**. The funds for the purchase of the said shares by the plaintiff was transferred into the account of **Mr. Kegode**, under his instruction through a fax mail dated 28<sup>th</sup> May 2002. The instructions transferring the purchase sum into the account of **Mr. Kegode** was made through a letter dated 29<sup>th</sup> May 2002 in the letter head of **Ogden group** of companies.

Having gone through the documents filed by the parties herein one gets the impression that the relationship and transaction between the parties herein and others not before court involves rather complex and intricate web, which can only be unraveled through oral evidence. It is clear that when the present dispute arose, the plaintiff entered into fresh negotiation with the receiver manager. In a letter dated 2<sup>nd</sup> April 2007 the plaintiff's advocates made an offer to the receiver to re-purchase the shares at Kshs.7,800,000/= in full settlement and being the purchase price in full.

The plaintiff further made payment in the names of **East African Safari Air Limited** in receivership and forwarded the cheque to the receiver. According to the plaintiff the said payment was strictly conditional upon immediate delivery of the shares and signed transfer in accordance with the agreement of transfer. The payment was also made on without prejudice to the plaintiff's right to recover the sum paid in the event that it should transpire that **Mr. Kegode** did account to the defendant for the payment for the shares which he received.

The plaintiff further made it clear to the receiver that the payment was made without admission on the part of the plaintiff who reserves the right to assert that the shares are already the property of **Two Ninety Investments Limited** as the beneficial owner of the shares now paid for. The receiver in a letter dated 4<sup>th</sup> April 2007 acknowledged receipt of the cheque of Kshs.7.8 million but it is not clear how he dealt with the matter.

The plaintiff claim to be the beneficial owner of 75% of the ordinary shares in **Express** has to be sufficiently and properly proved. On his part, the receiver/manager claims that there is no basis to support the transfer as demanded by the plaintiff. There is evidence that the receiver/manager is negotiating for a sale of **East African Safari Air** its entire shareholding in **Express** to **Mr. Anthony Kegode** allegedly in line with the provisions of the Articles of Association and in particular Article 32 which offer him with pre-emptive rights.

It is said that a sale to a 3<sup>rd</sup> party will only be considered if **Mr. Kegode** fails to exercise his rights. As stated **Mr. Kegode** is at the centre of the web, that the plaintiff finds itself. One may also advance that the company being a separate legal entity from **Mr. Kegode**, he is far from the centre of the complex

issues alluded to by the plaintiff.

In my humble view any sale of the shares without apportioning liability between the central players will amount to fraudulent conversion of the plaintiff's property. It must be understood a company though a distinct, separate, and independent legal entity acts through its authorized agents. In reality a company has no legs, has no brain, has no mouth and has no ability to make decisions on its own without the participation of its lawful agents. In determining the rights of the parties herein, it is essential to determine the role, duties, powers, obligations and liabilities of **Mr. Ogden** and **Mr. Kegode** who appear to be the brain behind this dispute. I am not in any way saying that they are personally liable at this stage but it is essential to determine whether they exercised their powers and authority properly and to the best interest of the various companies under their watch and/or command.

It is my position that, it is extremely inequitable if the bank through the receiver would be allowed to seek profits twice against the plaintiff. The 1<sup>st</sup> defendant as stated is under receivership and once the receiver concludes his mandate as entrusted to him by the bank, the plaintiff would have no fall back position. The assets of the 1<sup>st</sup> defendant may be no more if the receiver is allowed to deal with the company in the manner he deems fit.

This is a court of equity and I do not think a court of equity would countenance the action the receiver intends in dealing with the assets of the 1<sup>st</sup> defendant. The interests, rights and obligation of the plaintiff has to be ascertained before the receiver can be allowed to proceed with his mandate. I am therefore satisfied that the plaintiff has fulfilled all the requirement for the grant of an injunction.

**ORDER: The application dated 24<sup>th</sup> May, 2007 is allowed. Costs shall be in the cause. I appreciate the 1<sup>st</sup> defendant is under receivership and in order to determine the rights of all parties, it is essential that the dispute be determined expeditiously. I therefore order the parties to complete all pre-trials within the next 30 days and list the suit for hearing on priority basis in the registry but not later than 60 days from today's date.**

Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of February 2008.

**M. A. WARSAME**

**JUDGE**