

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 323 of 2007

FOUR NINETY INVESTMENTS LIMITED PLAINTIFF

VERSUS

ANTHONY AMBAKA KEGONDE 1ST DEFENDANT/APPLICANT

ELIZABETH ANN KEGODE..... 2ND DEFENDANT/APPLICANT

UHAI LIMITED 3RD DEFENDANT/APPLICANT

RULING

- (1) By a Plaint dated the 19th June 2007 and filed on the 22nd June 2007, Four Ninety Investments Ltd. (“**the Plaintiff**”) sued the three Defendants to recover the sum of USD2,000,000 and Sterling ?191,886 from the Defendants and damages for fraudulent misrepresentation or alternatively as damages for breach of contract.
- (2) The dispute arose out of an agreement for sale of shares in a company called East African Safari Air Ltd. [“**EASA**”] of which the first and second Defendants were directors. The first and third Defendants were Directors and shareholders in EASA.
- (3) Following negotiations involving the Plaintiff and first and third Defendants, the Plaintiff was induced to buy 90% shareholding in EASA. The decision to purchase the shares was taken on the basis of representations made to the Plaintiff by the first Defendant.
- (4) As pleaded in paragraph 9 of the Plaint, the Plaintiff paid the Defendants USD2,000,000 and Sterling ?191,886 on the 4th June 2004 and 20th August 2004. The Plaintiff subsequently discovered that the representations made by the Defendants were false and untrue and that the accounts which the Defendants had forwarded to the Plaintiff were not those of EASA. The Plaintiff also claims that the first and second Defendants failed to disclose the full liabilities of EASA.
- (5) The Defendants filed a Statement of Defence on the 10th August 2007 and denied the Plaintiff’s claim. They have in turn made allegations of fraud against Adam Craig Ogden, a Director of the Plaintiff.
- (6) The Plaintiff has now filed the Chamber Summons dated the 30th August 2007 under order XXXVIII rules 1 and 2 of the Civil Procedure Rules seeking (*inter alia*) orders against the first and second Defendants to show cause why they should not deposit their passports in Court and in the alternative that they be ordered to furnish security in the sum of US\$2,000,000.
- (7) The grounds upon which these orders are sought are set out in Mr. Ogden’s affidavit sworn on the 30th August 2008. He claims that the first Defendant has no property in Kenya but owns shares in numerous companies formed for speculative purposes. That the second Defendant, who is the first

Defendant's wife, is a foreigner and can abscond from Kenya at any time.

(8) The Plaintiff has given a list of some seventeen companies in each of which he alleges the first Defendant has shares. The Plaintiff asks the court to attach the first Defendant's shares in those companies. The companies in question are not parties to this suit.

(9) This is a purely civil matter and I can see no justification in interfering with the first and second Defendant's freedom of movement by confiscating their passports. This case was filed in June 2007 and if the first and second Defendants had any intention of leaving jurisdiction, they would have done so by now. The way the application is framed gives me the impression that the real intention is to force the Defendants to submit to judgment before trial. That cannot be a legitimate purpose for an application for security.

(10) By now the pleadings must have been closed and the best way to go in my view would be to set the case down for hearing so that there can be a decision on the merits. On the material before me I can find no justification at all to require the first and second Defendant to furnish security for their appearance. In the circumstances, the Plaintiff's Chamber Summons filed on the 30th August 2007 fails and it is hereby dismissed but with no order as to costs.

So ordered.

Dated and delivered at Nairobi this thirtieth day of May 2008.

P. Kihara Kariuki

Judge.