



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

Civil Case 454 of 2004

BELGO HOLDINGS LTD PLAINTIFF

VERSUS

ROBERT KOTCH OTACHI 1ST DEFENDANT

WILSON BIRIR 2ND DEFENDANT

RULING

(1) In the Plaint dated and filed on the 12th August, 2004, Belgo Holdings Ltd. (“**the Plaintiff**”) contend that Robert Kotch Otachi and Wilson Birir (“**the Defendants**”) are not and have never been directors of the Plaintiff and that a Company Form Number 201A dated the 4th August 1995 and filed with the Registrar of Companies on the 7th August 1995 in which the Defendants are shown as directors of the Plaintiff was altered and forged by the first Defendant or the second Defendant by adding their names thereto after the said form had been duly filed.

The Plaintiff therefore prays for judgment against the Defendants for an injunction restraining them from claiming to be such directors; a declaration that neither of the Defendants is or has ever been a director of the Plaintiff; and damages.

(2) The Defendants filed a joint Defence on the 21st September 2004. They denied the averments made in the Plaint and asserted that by virtue of a resolution and Notification of Change of Directors dated the 4th August 1995 and filed at the Companies Registry on the 7th August 1995, they were duly appointed directors of the Plaintiff and continue as such. They challenged as illegal, null and void a resolution alleged to have been passed on the 10th May 2004 and ask the court to dismiss the suit with costs.

(3) On the 21st January 2008, the Plaintiff took out a Notice of Motion under Order 10 rule 20 and Order 12 rule 6 of the Civil Procedure Rules seeking orders to strike out the Defence and/or judgment in favour of the Plaintiff on the grounds that the Defendants have failed to make discovery of all documents which are or have been in the Defendants’ possession within the period of thirty days from the 22nd June 2007 as ordered by the court (Warsame, J). The application is made on the further ground that the Defendants have also failed to produce for inspection by the Plaintiff the original documents of Title relating to Plots L.R. Nos.3859 and 3860 referred to in the first Defendant’s affidavit sworn on the 20th July 2005 in further breach of the said order of court.

(4) The Plaintiff relies on two affidavits in support of the application. The first is sworn by James Ochieng’ Oduol, learned counsel for the Plaintiff, in which he states that the Defendants’ failure to make

discovery and produce the said Title documents is deliberately intended to delay trial of the suit. Mr. Oduol further depones that on the 25th October 2007 and 27th November 2007 he caused to be served upon the Defendants Notices to Admit documents and the Defendants having failed to inspect the documents in question or to give notice specifying such of them as they did not admit, the Defendants are deemed to have admitted the authenticity of all such documents which, Mr. Ochieng' contends in paragraph 11 of his affidavit –

“clearly show that the Defendants were not at any time Directors of the Plaintiff; that the Defendants were imposters who conspired with the Applicants and others in a related case namely HCCC 507 of 2003 (OS) to fraudulently deprive the Plaintiff of its assets. Further, the Defendants had forged the Company Form Number 203A by inserting their names therein.”

The second affidavit was sworn by Akber Abdullah Kassam Esmail on the 12th August 2004. He says that he is a Director of the Plaintiff and that he and his mother, Shirin Esmail, have been the sole shareholders of the Plaintiff since the company was incorporated on the 14th December 1994. In paragraph 14 of his affidavit he says that –

“14. Both the Defendants are imposters and perjurers; they are not and have never been Directors of the Plaintiff nor have they ever had any connection with the Plaintiff. I dont even know them. They certainly do not have any authority whatsoever to act on behalf of the Plaintiff or to instruct K. Getanda & Company or any other advocate to act on behalf of the Plaintiff.”

(5) The first Defendant, Robert Kotch Otachi, swore the replying affidavit dated the 10th April 2008 on behalf of the second Defendant and also on his own behalf. The Defendants had thitherto been represented by counsel until the 26th February 2008 when Oyugi & Company, Advocates, were granted leave of the court to cease from acting for them. The Defendants accordingly appeared in person on this application.

The Defendants lament over a somewhat sour relationship between them and their said former Advocates since March 2007. In paragraphs 15 – 18 of their replying affidavit, they explain their failure to comply with the orders of the court for discovery and inspection thus –

“15. THAT, I and my Co-Respondent pray that the entire process be started afresh as I and my Co-Respondent were not aware of the plaintiff's actions and further from the court record the time the order was made by the Honourable justice Warsam [sic], Mr Onkoba Advocate held brief for Mr. Oyugi and indicated that he was instructed to apply for an adjournment to enable Mr. Oyugi to apply to cease acting and yet the court proceeded to grant the Plaintiff the orders as prayed in the application despite the clear indication that Mr. Oyugi did not have instructions to represent us in the said application.

16. THAT, at no single time I and my Co-Respondent were served with the order made by the Honourable justice Warsam [sic] requiring I and my Co-Respondent to produce documents for inspection. The Plaintiff has no evidence of service of the Court order upon myself and/or my Co-Respondent.

17. THAT, the entire supporting affidavit clearly shows that all service was effected upon the firm of Oyugi & Company Advocates which firm had an application on record to cease acting and as such I and my Co-Respondent cannot be condemned for failure to take action in the circumstances.

18. THAT, it is in the interest of justice and fairness that the Honourable court do dismiss the Plaintiff's application and allow I and my Co-Respondent an opportunity to be heard in court on merit.”

(6) The court's jurisdiction under Order 10 rule 20 of the Civil Procedure Rules should not be exercised

except in extreme cases and as a last resort and then only where the court is satisfied that a party to the suit is avoiding a fair discovery or is guilty of wilful default. As I have already observed, Oyugi & Company, Advocates, ceased to represent the Defendants by order made on the 26th February 2008 but even before that date, the Defendants say that their Advocates failed to inform or advise them with regard to the orders made on the 22nd June 2007. Given the apparent acrimony between the Defendants and Mr. Oyugi, it is not inconceivable that he would have failed to act on such orders to the detriment of the Defendants. In these circumstances, and given that the Defendants are not now represented by counsel, I cannot say with any certainty that the Defendants are avoiding a fair discovery or that they are guilty of willful default. I am therefore, inclined to give the Defendants the benefit of doubt in declining to allow the application.

(7) With regard to the Plaintiff's assertion that judgment should be entered on the basis that the Defendants are deemed to have admitted the documents specified in the Notices to Admit respectively dated the 24th October 2007 and 27th November 2007, it is clear, even from the two supporting affidavits, that the facts in this case are contested and in issue. The Plaintiff's allegations that the Defendants are imposters as its directors and that they forged certain documents are denied in the Defence and also in the first Defendant's affidavit sworn on the 20th July 2005. To determine the truth, it seems to me that evidence must be led before the trial judge.

(8) In the result, the Notice of Motion filed on the 21st January 2008 fails and it is hereby dismissed with no orders as to costs.

Orders accordingly.

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

P. Kihara Kariuki

Judge.