



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Suit 611 of 2004.

ELKANA MUKUNDI GATIMU.....1ST PLAINTIFF

KENYUA NGUNJIRI2ND PLAINTIFF

VERSUS

JOHN B.M. MUYA1ST DEFENDANT

MRS R.W. KUNYIHA2ND DEFENDANT

MRS R.W. KUNYIHA3RD DEFENDANT

RULING

This case surrounds a company called **SAFINA PROPERTIES LTD**, hereafter called the company, which was registered on 12th July 1988. The original subscribers of the company were **JOHN MUYA**, the 1st defendant, and **ELIKANA MUKUNDI**, the 1st plaintiff hereof.

The plaintiff's case is that the other shareholders of the company were **KENYUA NGUNJIRI**, the 2nd plaintiff and **GEOFFREY KUNYIHA** (deceased) who died on 12th November 1988.

That the 2nd plaintiff was elected as a chairman of the board of directors but no minutes of the board could be traced since the death of the then secretary to the board **JOSEPH KIMANI CHEGE** (Deceased).

That the plaintiff's learnt with shock, that on 25th May 2004, the defendants held a board meeting of the company whereby they resolved as follows: -

- That Mrs R.W. Kunyiha, the 2nd defendant, was appointed a director of the company;
- That Satima Registrars were appointed as the secretaries of the company.
- That the 1st defendant was allotted 13, 000 shares, and the Estate of G.K. Kunyiha (deceased) was allotted 3 290 shares of kshs 100 each.

- That all the shares in the company called SAFINA Ltd, where the 1st plaintiff and 1st defendants are the subscribers, be sold to any willing buyer at any price.

The plaintiffs state that the aforesaid allotted shares to the 1st and 2nd defendants were not paid for by any of them contrary to article No. 5 of the company.

The plaintiff state further that they were not notified of the date of the meeting and that a letter sent to them by the 1st defendant failed to state the date of the meeting. In their absence the plaintiffs said that the said meeting had certain shortcomings; that the company's articles of association required that the 1st plaintiff and the 1st defendant convene any board meeting since the two were the only directors of the company, others only being shareholders; that the meeting that followed was an illegal meeting and the resolutions passed only meant to benefit the 1st and 2nd defendants; that the participation of the meeting by the 2nd defendant was illegal since the shares of the company had not been transferred to the person appointed administrator of the Estate of G.K. Kunyiha.

The plaintiffs argued that the irregular allocation of shares to the 1st and 2nd defendant was with the intention of them taking control of the company unprocedurally and that the resolutions of that meeting were a nullity because the meeting lacked quorum as per Articles of Association of the company.

That the 3rd defendant filed annual returns and the resolution passed at the meeting, at the Registrar of companies.

The plaintiff's application before court is for injunctive order to stop, the 1st and 2nd defendant from acting as directors and secretary of the company; to stop the 1st, 2nd and 3rd defendants from holding board meetings of the company, and that the defendants be stopped from disposing properties or withdrawing money of the company.

The plaintiff's application is opposed.

The defendant's case is that the 2nd plaintiff is not the chairman of the board, nor was he a shareholder at incorporation, of the company.

That the 2nd defendant, on the death of G.K. Kunyiha, was appointed secretary of the company and that the plaintiffs were estopped from questioning her share holding.

The 1st defendant, in his replying affidavit stated that on 5th April 2004 he requisitioned a directors meeting by giving the 1st plaintiff 21 days notice. That on 3rd May 2004 he sent a notice to the 1st plaintiff convening of shareholders and directors meeting to be held on 25th May 2004. That the plaintiff acknowledged the receipt of the notices. That the resolutions passed and the returns filed by the 3rd defendant were properly filed.

The defendants further argued that the shares allotted to them were as a result of the company's indebtedness to them.

Defence counsel in support of the defendant's case argued that the plaintiffs case must fail for having not included the company and the registrar of companies as parties, since the returns of the meeting of 25.5.2004 had already been filed with the Registrar of Companies.

In support of the defence argument that the plaintiff had been served with notice of meeting, defence counsel submitted that even if the plaintiff was not served with such a notice, such lack of service would not invalidate the meeting. Counsel relied on 'Table C' of the Companies Act Article 8, which states: -

“The accidental omission to give notice of a meeting to, or the non – receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings at that meeting.”

In support of the defence contention that on 2nd defendant being appointed executor that the company recognised her to be rightfully entitled to the deceased shares; defence counsel relied on provision of First schedule to the companies Act Article 29 which states:-

“In case of the death of a member the survivor or survivors where the deceased was a joint holder, and the personal representatives of the deceased where he was a sold holder, shall be the only person recognised by the company as having any title to his interest in the shares.....”

Counsel also relied on the case RE JERMYN STREET TURKISH BATHS Ltd [1970] 3 ALLER 57, which case held that: -

“even if the petitioners were not registered as members of the company personal representatives of the deceased must be regarded as members of the company.....”

Counsel finally submitted that the plaintiffs had previously filed a similar suit namely HCCC 471 OF 2004, which case was dismissed on 2nd November 2004 and accordingly the plaintiffs were not entitled to file the present suit, but rather that the plaintiffs should have appealed against the dismissal.

Those are the highlights of the parties arguments. On my analysis of the argument it is important to point out that I will not consider certain arguments raised by the defence because those very arguments were subject of preliminary objection raised before Hon Justice Azangalala and which the judge delivered a ruling. Those issues relate to the point that the plaintiff having not sought injunctive orders, the plaintiffs could not pray for such orders in their chamber summons; and that the plaintiffs suit, in view of the fact that it sought rectification of the register, ought to have been by way of originating summons.

Defence argued that the plaintiffs having failed to join the company in this suit the claim against the defendants cannot stand. The plaintiffs stands is that the meeting convened on 25th May 2004 was a nullity in law. My finding is that if indeed the meeting, the resolutions passed by the defendants were ultra vires, the provisions of the Articles of Association of the company there would be no reason to join the company since what is challenged are those acts of the defendants. Article 16 of the company provides: -

“A resolution in writing signed by every member of the board shall have the same effect and validity as a resolution of the board duly passed at a meeting of the Board duly convened and constituted.” (Underlining mine)

It is clear that for a resolution to pass the test of the company’s articles it had to be either signed by all members or be the product of a board duly convened or constituted. It is clear the parties accept that all board members were not signatory to the resolutions passed, since the 1st plaintiff did not attend the meeting. The question then to consider is was the board duly convened as required. The court is aware that at this stage it cannot make a final finding since what is before court is an interlocutory application for injunction. It is however questionable whether the notice of the meeting was indeed received by the 1st plaintiff and at the full hearing of this cause, that is a burden the defendant will have to bear. I reject the defendants argument in respect of the provisions of Table C and First schedule of the Companies Act because these provisions do not relate to a private company such as the one the subject of this suit. I however find that it is probable that the notice was not served on the 1st plaintiff particularly when one considers that there was a letter and a notice that is two different documents. Were both documents received? I find I am unable to state so categorically.

The company articles require that the quorum of any meeting be two. The 1st defendant, accepted

in documents exhibited by the plaintiffs that the directors of the company were only the 1st plaintiff and himself. That being so can the court accept that the quorum requirement was satisfied. I find I cannot find for the defendant on the evidence produced at this interlocutory stage. The defendants will have the burden to prove quorum was satisfied at the full hearing.

The 2nd defendant was appointed joint executor of the Estate of G.K. Kunyiha (deceased) with another person. The 2nd defendant failed to demonstrate to the court that the allotment of the shares, belonging to the Estate of G.K. Kunyiha, to her to the exclusion of the other executor was right. Additionally I find I am wholly persuaded by the case of HC Winding up cause No. 23 of 2002 IN THE ESTATE OF KAHAWA SUKARI LIMITED AND IN THE MATTER OF THE COMPANIES ACT, in regard to Section 28 Companies Act. The court found in part that: -

“.....it is apparent that a member of the company is such person as has been entered in the companies register of members. Accordingly a personal representative of a deceased member cannot ipsofacto be regarded as a member of the company. He must first get his name into the register.”

The judge proceeded to refuse to follow the dicta of the case RE JERYRN STREET TURKISH BATHS Ltd (Supra)

I do therefore find that the 2nd defendant did not sufficiently prove that she had been admitted as a member of the company, since such admission could only be undertaken by a proven quorum.

The defendant's counsel argument that the plaintiffs previous suit HCCC No. 471 of 2004 was dismissed does not find favour with me. The pertinent parts of the ruling delivered in that previous suit on 2nd November 2004 is as follows: -

“.....I hereby strike out the plaint as totally defective. It is trite that a suit is founded on the plaint, and once the latter is struck out, the former cannot exist. The suit is accordingly dismissed as a non- suit.”

My find is that the judge clearly struck out the plaint. Having struck out the plaint, the same was not available for dismissal and I find that the statement that suit is dismissed is superfluous. If one accepts my argument that by striking out the plaint, the plaint was put to death, one cannot put the same document to death twice. The courts finding is that the plaint was struck out and the plaintiff was entitled therefore to file this fresh suit.

The courts finding is that the plaintiffs have proved a prima facie case with probability of success and indeed have proved that they are in danger of suffering irreparable loss for if indeed the defendants do put into effect their resolution they could possibly sell the company without resulting to the plaintiffs. The prayers sought by the plaintiffs are of far reaching effect and could ground to a halt the company, which cannot be healthy for the company. For that reason the court will grant an interlocutory injunction for a limited period within which the parties must endeavour to fix this case for full hearing.

The orders of the court are: -

- (1) That an order for temporary injunction do issue restraining the 2nd and 3rd defendants either by themselves or by their servants, employees, or agents from representing themselves or acting as director and secretary of the company known as SAFINA PROPERTIES Ltd.**
- (2) That an order for temporary injunction do issue restraining the 1st defendant from holding any board meeting with the 2nd defendant as directors of the company known as SAFINA PROPERTIES Ltd and 3rd defendant is restrained from attending such meetings as the secretary.**

(3) That an order for temporary injunction do issue restraining the defendant by themselves or by their employees, servants or agents disposing any properties, shares stocks or from withdrawing any money from the bank accounts of SAFINA PROPERTIES Ltd or passing any resolution to alter the shareholding of SAFINA PROPERTIES Ltd or do any act that affect the plaintiff's rights in the said company SAFINA PROPERTIES Ltd.

(4) That the orders granted in 1 – 3 herein above shall subsist for 6 months from the date of this order.

(5) That the parties will be given a mention date at the reading of this ruling for the court to ascertain that discovery has been undertaken in readiness of fixing the case for hearing.

(6) That the costs of the chamber summon dated 9th November 2004 shall be in the cause.

Dated this 2nd February 2006

MARY KASANGO

JUDGE

Delivered this 10th February 2006

MARY KASANGO

JUDGE