



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

**Civil Suit 345 of 2004**

**EAST AFRICAN SAFARI AIR LIMITED.....**  
**PLAINTIFF**

**-V E R S U S-**

**ANTHONY AMBAKA KEGODE ..... 1<sup>ST</sup>**  
**DEFENDANT**

**ELIZABETH ANN KEGODE ..... 2<sup>ND</sup>**  
**DEFENDANT**

**R U L I N G**

By a suit commenced by way of a Complaint dated 28-06-2004, and filed on the same day, the Plaintiff herein sought orders for declarations and permanent injunctions against the Defendants herein, declaring **inter alia** that the Defendants herein, held certain monies which they had withdrawn from the Plaintiff company's account, and banked into their respective accounts, and to permanently restrain the defendants from utilizing or otherwise withdrawing those monies.

Simultaneously with the suit, the Plaintiff also filed under a Certificate of urgency a Chamber Summons in which it sought, and the court granted temporary orders of injunction restraining the Defendants and each of them whether by themselves or by their agents, servants or otherwise howsoever from withdrawing or disposing of any of the same monies deposited in these (Defendants) accounts at Charterhouse Bank Ltd (**Longonot Branch**), Standard Chartered Bank Ltd (**Langata and Karen Branches**) and any other accounts that may later be discovered.

According to the Affidavit of Service of Leonard Muendo Nthaku sworn on 5-07-2004, and filed on 6-07-2004 the Chamber Summons was served upon the respective Branch Managers of the affected Bank's on 29-06-2004, and upon the Defendant on 30-06-2004, who refused to sign but referred the Process Server to Lumumba & Mumma, Advocates, who are the 1<sup>st</sup> Defendants' Advocates on record. The 2<sup>nd</sup> Defendant is represented by the firm of Okoth & Kiplagat Advocates who filed their Memorandum of Appearance on 16-08-2004. The 1<sup>st</sup> Defendants Advocates, Lumumba & Mumma filed their Memorandum of Appearance on 12-07-2004 together with a Notice of Motion of the same date under a Certificate of urgency of the same date.

Although the Notice of Motion is purportedly signed by Lumumba and Mumma as "**Advocates for the Plaintiff**" this is obviously a mistake committed due to haste, and I shall take it that it was so committed as all other documents and in particular the Memorandum of Appearance shows that they are drawn by

the said firm as Advocates for the 1<sup>st</sup> Defendant. Apart from seeking the certification of the application as urgent, the 1<sup>st</sup> Defendant seeks the orders following-

- (a) that the Chamber Summons dated 28-06-2004 and purportedly filed by the Plaintiff be struck out,**
- (b) that the suit herein be struck out with costs to the Defendant.**
- (c) that M/S Walker Kontos Advocates, on record for the purported Plaintiffs be condemned to pay the costs of this application and the suit.**
- (d) that the court grant such other or further orders or relief as it may deem fair and just in the circumstances.**

The Chamber Summons was supported by the Affidavit of Anthony Ambaka Kegode sworn and filed on 19-07-2004 in reply to the Replying Affidavit of Adam Ogden sworn on 30-07-2004 and filed on the same day. The first Defendant's Chamber Summons aforesaid is also founded upon the grounds that –

- (a) the suit and the application seeking temporary injunction in this matter have been filed without any or any due authority from the Plaintiff company;**
- (b) there is no resolution or valid resolution of the Plaintiff company approving the institution of suit.**
- (c) there is no resolution or no valid resolution of the Plaintiff company appointing Walker Kontos Advocates to institute this or any suit for or on behalf of the Plaintiff company.**
- (d) the filing of this suit and the application for temporary injunction by Walker Kontos Advocates is unlawful for want of authority from the Plaintiff company;**
- (e) the Plaintiff company did not authorize Captain Elly Aluvale to swear the Affidavit in support of the Application for temporary injunction;**
- (f) the suit and the application for temporary injunction have been filed in total disregard of mandatory procedural requirements and in abuse of the due process of the court;**

To this application, and the several supporting and further Affidavits of Anthony Ambaka Kegode, Adam Ogden, who described himself as the Managing Director of the Plaintiff filed a Replying Affidavit sworn and filed on 16-07-2004 as already referred to above. The said Adam Ogden also filed a further Affidavit sworn on 20-07-2004 to which he attached **inter alia** the Plaintiff's Financial statements for the year 2003, which Mr. Adam Ogden contends in the further Affidavit do not show any indebtedness by the Plaintiff's company to the Defendants, and concludes on the basis thereof that by transferring the funds which were undisclosed at the time of the Sale of Shares Agreement, the Defendant acted in breach of their fiduciary relationship or duty to the company notwithstanding that they were the principal or majority shareholders.

The said deponent also attaches as Exhibit "A03" an extract of the Minutes of the Board meeting of the Plaintiffs directors held on 4-06-2004 at 11.00 am stating that the said Adam Craig Ogden was appointed a director of the company.

This extract is similar to Minute 3.1 of the Board Meeting held on 4.06.2004, at 2.30 (14.30 hrs) and at which it is again stated that the said Adam Craig Ogden, Kirankumar Chandubhai Patel and E. Alwale were appointed additional directors of the company.

According to Dr. Pritan Singh Panessar as per his letter of 26/00/2004) the meeting held at 11.00 am on 4.06.2004 was a shareholders meeting, and since he was not a shareholder he was not entitled to notice of

that meeting. He however complains that as he was still a director of the company upto the end of the Board Meeting of 4.06.2004 he was entitled to notice to the meeting of the same date held at 2.30 p.m. which was a Board meeting.

I have read these minutes of the separate meetings held at 11.00 am and 14.30 hours on 4.06.2004. Both are entitled "Minutes of a meeting of the Board of Directors of the Company held at Nairobi on 4<sup>th</sup> June, 2004 at 11.00 am. at East African Safari Air Limited Offices". In paragraph 10 of the further affidavit of Anthony Ambaka Kegode, it is alleged that "no or no valid meeting of the Board of Directors of the Plaintiff company took place at 2.30 pm on 4<sup>th</sup> June, 2004."

And at paragraph 6 of the same Affidavit, and on advice of his Advocates, the said deponent avers that **"nothing in the Memorandum and Articles of Association of the Plaintiff company empowers a meeting of the Directors to exercise all or any powers, authorities or discretions under the regulations of the Plaintiff company to appoint directors."**

If these were the sole issues raised, I would simply answer the question by stating that the Plaintiff company's Articles of Association do not empower a meeting of the Board of Directors, (or more simply, the Board of the Company) to exercise all or any powers, authorities, or discretions under the regulations, that is to say the Articles of Association of the company's to appoint directors. Under Article 27 of the company's articles, only the company (**not the Board**) may from time to time **in general meeting increase** or reduce the number of Directors, and may by special Resolution remove any director and may appoint another person in his stead. The directors have power to fill a casual vacancy occurring in the Board under Article 28 of the Plaintiff company's articles of association.

The appointment of the new or additional directors was not, in my reading to fill a casual vacancy, but created substantive appointments to the Board arising from the change of ownership of the Plaintiff company. This is a matter that was required by Article 27 of the Articles of the Plaintiff company to be transacted by the company in general meeting, not by the Board of directors. In consequence therefore, the appointment of the new directors that is to say, Adam Craig Ogden, Kiranrumar Chandubhai Patel, and Elly Aluvale as Directors of the Plaintiff company was *ultra vires* the company's Articles of Association.

The purported notification of change of Directors filed by Eversec, Associates as Secretaries is equally a nullity.

It also means that any subsequent board meetings held subsequent to 4-06-2004 without the previous directors of the Plaintiff company did not have the necessary quorum to transact any business on behalf of the company. I would in this regard refer in particular to the purported board meeting of 18-06-2004 and the purported resolutions ***"to authorize Mr. Adam Craig Ogden, the Managing Director to investigate the transfer of funds and to appoint Advocates and take such steps as may be necessary to investigate the same and recover the company's funds."***

Assuming for one moment that the said Board was quorate (which it was not, as the only lawful director was the 1<sup>st</sup> Defendant), there was no formal resolution passed by the Board at that meeting to institute suit against the Defendants or the 1<sup>st</sup> Defendant in particular.

Whereas it is acknowledged that the business of a limited company is managed by a Board of directors the cardinal rule or principle is that the board is in place in accordance with the rules prescribed by the regulations or articles of association of the company. That is the sum total of the principles laid out in all major works on company law as well as judicial precedent. So that where the articles delegate to the directors exclusively the power to appoint directors, a general meeting has no power to do so, since that would be usurping the directors' powers unless the general meeting by a special resolution decide to do so, and only this would override the power reserved to the directors in the articles.

In the current case, the articles having reserved the power to appoint directors in the company in general meeting, the directors could not usurp that power and the purported appointments as stated above is

therefore *ultra vires* the Company's Articles of Association, and therefore a nullity.

It means therefore that those directors so appointed, cannot and have no *locus standi* to manage the affairs of the said Plaintiff, cannot hold any meeting and pass any board resolution, and cannot instruct any counsel to act on behalf of the company. Any such resolutions remain a nullity unless first ratified by the company in general meeting. The ultimate issue then becomes, whether, in these circumstances the company can maintain an action against its directors for any wrong done by the Defendants to the company. This is the ultimate issue here, and the issue whether it can instruct an Advocate becomes a subsidiary issue.

The 1<sup>st</sup> Defendant's Notice of Motion, the subject of this Ruling was the object of lengthy affidavits in support, and in reply and also lively submissions by counsel for the 1<sup>st</sup> Defendant applicant, and by the Plaintiff's Counsel, Mr. Allan Gichuhi who even made some very helpful written submissions. My total view of the entire suit, the subject application, the submission by the 1<sup>st</sup> Defendants' Counsel as well as Counsel for the 2<sup>nd</sup> Defendant and the Plaintiff's Counsel are expressed in the following paragraphs.

The Plaintiff company was experiencing a lean period in cash receipts in respect of its operations. It found one Adam Craig Ogden who entered into discussions with representatives of the Plaintiff company, principally, the 1<sup>st</sup> Defendant, who agreed to sell his shares to a capital venturer represented by the said Adam Craig Ogden ("**Ogden**"). Ogden represented the capital venturer who acquired a majority stock in the Plaintiff company. An agreement was duly entered into. Securities were exchanged. There was some heated argument whether or not they were stamped. They were eventually stamped, and copies filed with leave of the court.

In law the Sale Agreement for the transfer of shares does not concern the company at all. It is an agreement between the existing shareholders and the prospective shareholders. The argument brought by "**Ogden**" in this suit is really about the breach of that Agreement. In my respectful opinion, and I entirely agree with the submission of Dr. Kiplagat for the 1<sup>st</sup> Defendant that a suit by the Company like in this case is not a proper vehicle to ventilate and articulate issues concerning the existing shareholders and the prospective shareholders.

The issue is that moneys were withdrawn by the shareholders or directors of the company in contravention of certain warranties under the Shares Sale Agreement. To articulate issues arising from that agreement, there is another suit namely H.C.C.C. No. 379 of 2004 between the shareholders of the Plaintiff Company against the purchasers of the Plaintiff company and its subsidiary East African Safari Air Express Ltd.

Essentially the suit at hand, is about a party who has negotiated a bad or poor bargain, and, now wishes the company to put right that bargain. The complaints in this suit happened when the only shareholders of the Plaintiff Company were the Defendants and no one else. No complaint can be raised by persons who were not members of the company regarding those transactions. I am afraid that this is one of those rare cases of failure by a prospective investor to carry out what is commonly referred to as "*due diligence study*" of all the entity's operations before penning his signature on the dotted lines of the Sale Agreement. That burden lies entirely upon the prospective investor and not the seller or as in this case, the defendants. This suit cannot, therefore be employed as a vehicle to put right that failure, fundamental as I think, it was.

Finally there were issues regarding the transfer of the shares at a par value of Kshs.5/= whereas the same were valued at Kshs.51/75, and not more than Kshs.52/= and whether there was therefore *a bona fide sale*. There was also a dispute and argument about who were the company secretaries at time of the execution of the Debenture dated 5<sup>th</sup> December, 2003 and consequently cast doubt upon the validity of the said Debenture upon which the Receiver/Manager were appointed and purported to ratify the suit herein and the appointment of the Plaintiff's Advocates on record.

These issues, and the other issues whether the Sale Agreement was properly stamped and whether there

was a genuine or *bona fide* sale and whether or not the other director of the Plaintiff company Pritam Singh Panessar was entitled to notice, are matters which, in my respectful view are properly justiciable either in the suit under the Sale Agreement, for the breach of that agreement, or subject of a separate suit by the Receiver and Manager in the name of the company, and I therefore make no finding on those issues.

There is however one issue upon which I must express an opinion, and make a finding. The issue is the resolution purporting to appoint the firm of Walker Kontos Advocates to institute suit.

On this question, Mr. Gichuhi learned Counsel for the Plaintiff relied upon the Minutes of the Board Meeting of the Plaintiff company held on 4-06-2004 whether at 11.00 am or at 2.30 pm at which the purported appointment of the new directors was made. Counsel argued that once the Sale Agreement for the transfer of shares was executed, and the Appointment of the new directors resolved, the management of the affairs of the Plaintiff company passed to the new directors. As such directors, they were competent in their body to pass appropriate resolutions, including the appointment of legal advisers, and to resolve the institution of any suit in the interests of the company. This is of course all correct in situations where the Board respects its constitution governing the method of appointment of directors, and therefore, of management of the company.

Where, like in this case, as is shown above, the Board ignores, whether deliberately or not, the application of its own constitutive documents regarding the appointment of directors it does so at its own peril. The Board's actions contrary to its constitutive documents and in particular, its decisions, will upon challenge be annulled by the court as being *ultra vires* the Articles of Association.

The purported appointment of the Advocates was made at a meeting held on 18-06-2004 at which a proposal was made to investigate the withdrawal of the funds by the 1<sup>st</sup> Defendant before the Sale Agreement was executed by the parties thereto. Even if the 1<sup>st</sup> Defendant had not objected to it, and he did object, the proposal remained a proposal even though it was supported by one other director, or a majority of the Board. Even assuming that the Board was validly constituted and I have held above that it was not, there was however no formal resolution firstly, that a suit be instituted against the Defendants or that one Captain Elly Aluvale be authorized to swear the Verifying Affidavit. It is of course trite law that so far as a corporation is concerned, its agent for purposes of litigation is an officer authorised under its seal. That is the requirement of Order III rule 2 (c) of the Civil Procedure Rules. Where the authority of an agent is challenged like in this application, it behoves the corporation to show such authority; the mere fact of appointment as a director does not constitute one an agent for purposes of suit.

If the issue were merely the lack or absence of due authority to swear the Verifying Affidavit, I would simply strike out the offending affidavit, and direct that a compliant affidavit be sworn. The issue here goes beyond the Verifying Affidavit, and is confounded by the lack of such authority to swear the Verifying Affidavit.

I have demonstrated above that the appointment of Ogden, Kirankumar Chandubhai Patel and Elly Aluvale was *ultra vires* Article 27 of the Plaintiff Company's Articles of Association which clearly states, and therefore intended to vest the power to appoint directors of the company upon the general meeting of the company and not the Board. The purported appointment of Ogden and two others was *ultra vires* the company's articles of association and any subsequent decisions or resolutions by such Board, and in particular the decision of 18-06-2004 purporting to authorize the filing of action against the Defendants was a nullity. There was also no demonstration that any such powers were delegated to the said Ogden or Elly Aluvale to swear the verifying Affidavit.

The issue whether there was a valid resolution appointing the firm of Walker Kontos Advocates to act for the Plaintiff must therefore be answered in the negative. This conclusion has important consequences on the question of costs. The 1<sup>st</sup> Defendant prayed that the Advocates acting for the Plaintiff company be condemned to pay costs. Dr. Mumma learned counsel for the 1<sup>st</sup> Defendant relied upon the cases of .....**BUGERERE COFFEE GROWERS LTD –Vs- SEBADUKA AND ANOTHER** (1970) E.A. 147 where, Youds J, applying the holding in **DANISH MERCANTILE –Vs- BEAUMONT [1951] I Ch.**

680, held that where an advocate has brought legal proceedings without authority of the purported Plaintiff, the Advocate becomes personally liable to the Defendant (s) for the costs of the action. The situation here is not dissimilar to that obtaining in the case of MITCHELL & HOBBS (U.K.) LTD – Vs- MILL 1966} 2 BCLC 102 where it was held that the power to manage the affairs of a company is conferred upon the body of the directors as a board, and not upon any one director. The action initiated by Ogden in the name of the company against the Defendants should be struck out because Article 27 of the Articles of association was intended to vest power to appoint directors of the company upon general meeting of the company and not the Board.

The purported appointment of Ogden and two others was *ultra vires* the company's articles of association and any subsequent decisions by such board, and in particular for the purposes of this case, the decision made at such Board Meeting on 18<sup>th</sup> June, 2004 purporting to authorize the filing of action against the Defendants were a nullity vis-à-vis the said article of association. There was similarly no delegation by the general meeting of any such powers to the Board.

For all those said reasons, the 1<sup>st</sup> Defendant's Notice of Motion dated and filed on 12-07-2004 succeeds, subject to the following variation on the question of costs. Although the authorities cited by Dr. Mumma supported by Dr. Kiplagat are very persuasive, they are not binding upon this court. The general and statutory principle as set out in Section 27 (1) of the Civil Procedure Act (*Cap 21, Laws of Kenya*), is that costs are at the discretion of the court or the judge who is vested with full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The proviso to the said Section 27 (1) enjoins that costs of any action cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. I have no good reason for ordering otherwise. The defendants shall have the costs of the suit, and the application.

In matters where orders of costs are to be made against an Advocate or firm of Advocates personally, the court must be satisfied that indeed the Advocate or the Advocate's firm had no authority to institute suit against the Defendant or Defendants.

In practice, an Advocate may have general instructions to act for or on behalf of a client, and receive an agreed retainer as his fees. When an Advocate is however instructed to file a suit, particularly against current or sitting directors or immediately former directors of a company, special care is required on the part of the Advocate or his firm that necessary authorizations by way of clear resolutions of the Board have been taken to institute suit.

The reason for this is quite simple. Where the necessity of filing suit against a director or directors of a company has risen it should trigger alarm bells in the mind of an Advocate that serious disputes in the company have arisen or that serious mischief is afoot. These ringing bells will alert the Advocate concerned to ensure that all necessary steps have been taken to authorize the institution of the proposed suit. Where counsel fail to pay heed to such warning bells, they do so at their own or their firm's peril as to costs.

In the matter at hand the Plaintiff's Counsel ignored or misread those warning bells and thereby invited upon themselves the peril of incurring the costs of not only the application but also the suit itself.

This peril should not however be suffered entirely by the Advocates alone, the persons or directors who purported to instruct the Advocates also carry the heavy responsibility for costs as they are the persons who purport to give such instructions without first ascertaining their own status and therefore the lawfulness or legality of their instructions to the Advocate or firm of Advocates concerned.

In the result therefore the firm of Walker Kontos Advocates shall be responsible for the costs of the application and the suit herein. The said firm shall however be indemnified personally, by Adam Craig Ogden, Kiran Chandbhai Patel, and Captain Elly Aluvale, jointly and severally as they were the authors of the instructions to the said Advocates to file suit.

There shall be orders accordingly.

Dated and delivered at Nairobi this 2<sup>nd</sup> day of March, 2006.

**ANYARA EMUKULE**

**JUDGE.**