



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

**Civil Case 888 of 2004**

**BELGO HOLDINGS LIMITED..... PLAINTIFF**

**VERSUS**

**AKBER ABDULLAH KASSAM ESMAIL.....DEFENDANTS**

**RULING**

At the commencement of the application dated 11.3.2005 purportedly lodged by the Plaintiff, the Defendants Advocate took a preliminary objection thereto on the ground that the same had been made ex facie in deliberate defiance of a court order in HCCC No.454 of 2004 expressly restraining one Robert Kotch Otachi and one Wilson Birir from claiming to be directors of the Plaintiff or otherwise purporting to act on behalf of the Plaintiff or instructing any advocate to act on behalf of the Plaintiff or in any other manner claiming to have any authority to act for the Plaintiff.

I have had the opportunity of perusing the rulings and Orders made in HCCC No. 454 of 2004 and HCCC No.507 of 2003 (OS). I have further perused the record of this case. The pertinent background is as follows. In HCCC No.454 of 2004, the present Plaintiff sued one Robert Kotch Otachi and one Wilson Birir alleging that the said defendants are masquerading as the bonafide directors of the Plaintiff Company when in fact and in truth they are not. An injunction is therefore sought to restrain the Defendants from claiming to be directors of the Plaintiff or instructing any advocate to act on behalf of the Plaintiff or in any other manner claiming to have any authority to act for the Plaintiff and a declaration that neither of them is or has ever been a director of the Plaintiff.

Simultaneously with the filing of the suit, the Plaintiff filed an application under Order XXXIX Rule 2 of the Civil Procedure Rules seeking an interim order in terms of the prayers in the plaint. Hon Njagi J granted the temporary injunction pending the hearing of the application. Thus the defendants and each of them were restrained from claiming to be directors of the Plaintiff or otherwise purporting to act on behalf of the Plaintiff or instructing any advocate to act on behalf of the Plaintiff or in any manner claiming to have any authority to act for the Plaintiff. That application has not been heard. Instead M/S Getanda & Company Advocates on 9.3.2005 filed a Notice of Appointment of Advocates and purported to discontinue the suit.

Pursuant to an application filed by M/s Ochieng, Onyango, Kibet Ohaga, Advocates. Njagi J on 27.6.2005 granted the following orders.

1. That the Notice of Appointment of Advocates and the Notice of Discontinuance of suit dated 8.3.2005 and filed on 9.3.2005 by K. Getanda and Company Advocates be and are hereby set aside and expunged from the court record and that the suit herein do proceed normally as though the said Notice of Discontinuance of suit had never been filed.

2. That the interim orders issued by this court on 13.8.2004 be and are hereby extended until the hearing and determination of the application dated 12.8.2004.
3. That the costs of this application be borne by the Defendants and Kennedy Getanda Advocate in any event.

It is illustrative that Mr. Oyugi the advocate for the Plaintiff herein is the advocate who argued the above application before Hon. Njagi J.

In HCCC No.507 of 2003(OS), Raphael Karai Martha, Joyce Mutio Mutua, James Njuguna Miira and Eunice Njeri Kariuki sued Jays Syndicate Limited, Lakeview Development Company Limited, Belgo Holdings Limited, the present Plaintiff and Joseph S. M. Maina. The Plaintiffs sought orders that they had become legal owners of LR Nos.3859 and 3860 by adverse possession and obtained judgment on formal proof. Akber Abadullah Kassam Esmael the present 1<sup>st</sup> Defendant and one John MC Tough swore affidavits on behalf of the 3<sup>rd</sup> Defendant (**the present Plaintiff**) stating that the 3<sup>rd</sup> Defendant had not been served nor had he (**the present 1<sup>st</sup> Defendant**) been served with the Originating Summons. The 3<sup>rd</sup> Defendant sought to set aside the judgment that had been entered on formal proof.

However, on 8.12.2003 the matter came before Nyamu J and before him were the following: Mr. Kamere Advocate for the applicant, Mr. Nyagah Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, Mr. Getanda and Mr. Mwaniki Advocates for the 3<sup>rd</sup> defendant and Mr. Nyangau Advocate for the 4<sup>th</sup> defendant. The following consent order was recorded:-

**“By consent the 4<sup>th</sup> defendant’s application dated 22.10.03 and third respondent’s dated 4.11.2003 and interested parties’ application 3.10.03 be thereby marked as withdrawn with no order as to costs. The suit marked as settled.”**

On 2.3.2004, M/S Esmail and Esmail for the 3<sup>rd</sup> Defendant appeared before Hon.Lenaola J in two applications and before the applications were argued a preliminary objection was raised which was dealt with by the Learned Judge.

On 18.10.2004, Hon. Ransley J. made the following order:

**“In the result Mr. Getanda not having a practicing certificate was unable to come on record as an advocate by filing a Notice of Appointment. If he was not on record nothing he did thereafter would have been lawful or valid. In the result I allow this application as prayed with costs to the applicant.”**

The above consent order was therefore set aside.

The Learned Judge in addition to the above orders, also specifically found as follows on 6.3.2006.

**“Mr. Esmael has both in his affidavit and on oath in court maintained that he is a director of the applicant as well as a shareholder. Having heard his evidence on oath I am satisfied that he was telling the truth when he said he was a director of the applicant and as such accept that he had a right to file this application as well as swear the affidavit in support.”**

The Learned Judge also observed:

**“On the question of those also claiming to be directors of the Applicant even if they are correct, I cannot see that they also would not wish to have the ex parte judgment set aside. If indeed they succeed in their contention such an order would be for their benefit.”**

The present suit was filed on 16.8.2004 by the Plaintiff Company seeking an injunction restraining the Defendants from purporting to act as directors of the Plaintiff; a declaration that any acts done by the

Defendants since 11.7.1995 are illegal and a mandatory injunction requiring the Defendants to return to the Plaintiff any assets and other properties belonging to the Plaintiff.

On 18.8.04 Hon Angawa J granted a temporary injunction restraining the Defendants from purporting to act pass or in any other way associate themselves as directors of the Plaintiff Company pending interpartes hearing on 2.9.04. On that day on an application made on behalf of the Defendants Hon. Kamau J set aside the ex-parte orders made on 18.8.04.

On 20.1.2005 M/S Kipkalia Lilan & Company filed a Notice of Appointment of Advocates and a Notice of discontinuance of suit. This is what provoked the present application purportedly filed on behalf of the Plaintiff Company and it is this application that objection has been raised against.

Having set out the background of this matter, I can now consider the said objection in the light of the said background. The Notice of Motion dated 11.3.2005 and filed on the same date has been lodged by the firm of Oyugi and Company Advocates purportedly acting for the Plaintiff Company. It is supported by an affidavit sworn by the said Robert Kotch Otachi on 11.3.2005. Mr. Otachi depones that he is one of the directors of the Applicant Company and has authority to make the affidavit on his own behalf and on behalf of the other co-director. He has annexed to the said affidavit what purports to be a resolution of the Plaintiff Company witnessed by Mr. Otachi and Mr. Wilson Birir described as directors. The resolution purports to appoint M/S Oyugi and Company Advocates to act for the Plaintiff Company. It is also deponed that Mr. Wilson Birir is a co-director of the Plaintiff Company. It is also deponed that the defendants are not directors of the Plaintiff Company as they resigned on 11.7.1995.

In view of the Rulings and orders of Hon. Njagi J and Hon. Ransley J quoted earlier in this ruling, can this application be sustained? At the risk of repetition, I again quote the ruling made by Hon. Njagi J on 13.8.2004:

**“That pending the hearing and determination of this application the defendants and each one of them be and are hereby restrained from claiming to be directors of the Plaintiff or otherwise purporting to act on behalf of the Plaintiff or in any manner claiming to have authority to act for the Plaintiff.”**

Hon. Njagi J found in HCCC No.454 of 2004 that the said defendants: Mr. Robert Kotch Otachi and Wilson Birir **“have deliberately breached it (the order) in every material particular”**. The Learned Judge further found that Mr. Otachi’s deposition in an affidavit in that case that he and his co-defendant are directors of the Plaintiff having been appointed on 5.6.1995 flies in the face of the first limb of the order of 13.8.2004 . The Learned Judge also found that M/S Otach and Birir were in breach of the second limb of the said order which restrained them from purporting to act on behalf of the Plaintiff or instructing any advocate to act on behalf of the Plaintiff Company. The Learned Judge in no uncertain terms found that the said M/s Otachi and Birir were in contempt of the order of 13/8/2004. On 27.6.2005, he expunged the Notice of Appointment of Advocates and the Notice of Discontinuance of suit filed on 9.3.2005 by K. Getanda & Company Advocates and ordered that the suit do proceed normally as though the said Notice of Discontinuance of Suit had never been filed. The interim orders of 13.8.2004 were extended until the hearing and determination of the application dated 12.8.2004.

Hon. Ransley on his part was satisfied that Akber Abdullah Kassam Esmael the first Defendant in this suit was a director of the Plaintiff Company. Mr. Ransley’s ruling was delivered on 6.3.2006.

The rulings of Njagi J and Ransley J have not been set aside or reviewed. In view of the rulings of my Learned brothers, the application at hand can only be incompetent and has been filed in blatant breach of the order of Hon. Njagi J of 13.8.2004 and restated on 27.6.2005. Like my brother Njagi J, I find the averments of Robert Kotch Otachi in his affidavit in support of this application contemptuous of the order of Njagi J. In view of the Ruling of Njagi J aforesaid Robert Kotch Otachi and Wilson Birir could not appoint M/s Oyugi & Company Advocates to act for the Plaintiff Company. The conduct of Otachi and Birir is worrying. They appear to have little regard for court orders. The conduct of Mr. Oyugi in my view is even more disturbing. He prosecuted the application before Hon. Njagi J at the inter partes

hearing. Yet without batting an eyelid submitted that the present suit has been filed on the instructions of the said Otachi and Birir as directors of the Plaintiff Company and the present application was filed when HCCC No.454 of 2004 had been discontinued and the orders of Njagi J had lapsed. The Learned Counsel completely missed the revulsion expressed by my Learned brother Njagi J.

In the premises, I allow the defendants' preliminary objection and strike out the application dated 11.3.2005 purportedly filed on behalf of the Plaintiff Company as the same was filed in deliberate defiance of the order of Hon. Njagi J in HCCC No.454 of 2004.

With regard to the submission that M/s Otachi and Birir and their advocates be punished for contempt, I would hesitate to do so on a preliminary objection as such a finding would require compliance with certain prerequisites not ordinarily achievable when considering a preliminary objection.

With regard to costs I order that the same be borne by the said M/s Robert Kotch Otachi, Wilson Birir and their advocate Mr. Oyugi in any event.

Orders accordingly.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY, 2006.**

**F. AZANGALALA**

**JUDGE**

**19.5.2006**

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF MAY, 2006.**

**M. KASANGO**

**JUDGE**

**19.5.2006**

Read in the presence of:-