REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 401 of 2006

JACOB ONDUNDO ……..…….....……1ST PLAINTIFF

MICHAEL CHRISTIE CARDOVILLIS …….....……2ND PLAINTIFF

MBINGWA BIG GAME LIMITED …….....…….3RD PLAINTIFF

VERSUS

KENNETH IRUNGU MWANGI …..…..…….....……..DEFENDANT

RULING

This is an application made by the plaintiffs pursuant to the provisions of Order 39 Rules 1,3 and 5 of the Civil Procedure Rules; Section 3A of the Civil Procedure Act: and Section 135 (1), 147, 148 157 and 158 of the Companies Act. The orders sought by the plaintiffs are as follows;

"3. THAT this Honourable Court do hereby grant an injunction restraining the Defendant from operating, leasing out, selling, alienating and in any other way dealing with the 3rd Plaintiff's Company's accounts, leased properties more specifically both ground and Mezzanine Shop at L.R. NO. 209/2357 – Biashara Street, and any other Plaintiff's interest thereof pending the hearing and determination of this suit.

4. THAT this Honourable Court be pleased to grant an order compelling the Defendant to call for an annual general meeting and provide accounts since the incorporation of the 3rd Plaintiff's Company.

5. THAT this Hourable Court be pleased to grant an Order for imprisonment of the Defendant for failure to keep books of accounts, provide profit and loss and balance sheet, Directors report and audit report to the plaintiffs."

When canvassing the application on 31st July 2006, Mr. Ojienda, advocate for the plaintiffs, notified the court that his clients were only pursuing the prayers numbered 3 and 4 above. As far as he was concerned the prayer number 5, as well as the prayer for costs of the application would be dealt with at the hearing of the suit.

It was the plaintiffs' case that the Defendant had refused to furnish them with Accounts for the 3rd Plaintiff (who will hereinafter be cited as "the Company"), over a period of two years.

The Defendant is also said to have blocked the audit of the Company's accounts, apart from refusing to call for either a meeting for the Board of Directors or even for the Annual General Meeting.

All those assertions invariably lead one to ask themselves what role or authority the Defendant had, in relation to the Company, so that he can wield such immense power over it.

According to the affidavit sworn by the 1st Plaintiff herein, the Company was registered on 21st April 2004. Both the 1st Plaintiff and Defendant were registered as Directors of the Company. Each of the said two directors was also a shareholder in the Company, and they held equal shares, at the time the company was registered.

The 1st Plaintiff went on to state, in his affidavit, that by a Board resolution passed on 28th May 2004, the Company granted 33% shareholding, directorship and attendant rights to the 2nd plaintiff. It is said that the 2nd Plaintiff then injected the sum of Kshs.400,000/- into the Company, thus increasing the total sum invested therein to Kshs.1,400,000/-.

By the 1st Plaintiff's own concession, the Defendant was, at all material times, the Managing Director of the Company. And in that capacity, the Defendant is said to have been entrusted with the day to day operations of the Company.

In order to facilitate its operations the Company opened a bank account at NIC Bank Kaunda Street, after the Board of Directors passed a resolution to do so. The said account was said to have been operated by the directors of the Company.

However, at some undisclosed date, the Defendant is said to have opened an account, in his own personal name, at Family Finance Society.

It is the plaintiff's contention that all the monies realised from the business conducted by the Company, which sums are estimated at about Kshs.300,000/- monthly, were all banked by the Defendant into his personal account at Family Finance Society.

In effect, the Defendant is said to be operating the Company as if it was a sole proprietorship. In other words, the Defendant is said to be carrying on activities without any regard to the absence of Board resolutions, which would have legitimized the said activities.

For instance, whereas the company is said to have entered into a Lease with Llyod Masika Limited, for premises on the ground and Mezzanine floor of the property on L.R. No. 209/2357, Biashara Street, Nairobi; the Defendant is said to have leased out the same said premises to First Lotto Limited. It is the plaintiff's case that the action of leasing the premises to First Lotto Ltd. was carried out by the defendant, without the approval of the Company.

When it is borne out from the lease, that the leased premises were supposed to be used by the Company for ***"electronic wagering on sporting events"*** and communication services, (or in other words for purposes of betting), the plaintiffs' fear that the Landlord may be justified to terminate the lease.

The plaintiffs' fear is further compounded by the fact that the Defendant had sub-divided other parts of the premises, (which had not been let out to First Lotto Ltd.), into stalls, which were also let out. That action was also said to have been carried out without the authority of the plaintiffs.

As the Defendant is said to be working outside the scope of his authority as the Managing Director, the plaintiffs' describe his action as ultra vires. Yet, as the actions were being carried out in the name of the Company, the plaintiff's fear is that if any of the parties to the leases were to lodge claims arising from the said leases, the claims would be brought against the Company.

It is for that reason that the plaintiffs now ask the court to issue injunctive reliefs which would put a check

on the defendants continued unauthorized actions.

In response to the application, the Defendant did not file any Replying Affidavit. However, he had filed a Defence and also Grounds of Opposition.

In the Defence, he denied the assertion that the Company was incorporated on 21st April 2004, by the 1st Plaintiff and the Defendant as directors and shareholders who held equal shares.

He also denied the plaintiffs' assertion that he only became a shareholder and director of the Company after the Board of Directors passed a resolution to enable that happen.

But he did admit having been the Managing Director of the Company at all material times.

Significantly, he denied being party to any resolution to open the Company's bank account at NIC Bank, Kaunda Street, or that such an account was thereafter operated by the 1st and 2nd plaintiffs, together with the defendant.

It is also significant that in the Defence, there is no denial to the plaintiffs' assertion to the effect that the Company's income was estimated at Kshs.300,000/- per month.

The Defendant however denies having refused, failed or neglected to furnish Statement of accounts for two years, or having blocked the plaintiffs from auditing the said account.

He also denied opening an account in his own name, at Family Finance Society, whereat, he was allegedly banking the Company's funds.

As regards the lease of the premises to First Lotto Ltd., the Defendant admits doing so, but asserts that he did not require the consent of the plaintiff's to do so. If anything, it is the defendant's case that the business which the company was carrying on upon the premises had collapsed, and that therefore, the decision to lease the said premises to First Lotto Limited was beneficial to the Company.

Following the alleged collapse, the 2nd Plaintiff disappeared altogether; only to reappear with these proceedings, which were said to have been instituted without any prior notice or demand upon the defendant.

All those matters were set out in the defence. Therefore inasmuch as the Defendant did not deem it necessary to file any replying affidavit, this court is obliged to find that the depositions in the affidavit sworn by the 1st Plaintiff were uncontroverted. That is so because all statements which are made in such pleadings as Plaints and Defences are deemed to be no more than the allegations of the party laying them out.

The plaintiffs did take the next step in the process of tendering proof to back their allegations. The said step was in the form of the supporting affidavit together with the annexetures thereto.

A perusal of the said documents does not however seem to back the plaintiffs own case. For instance, when the plaintiffs stated that the Company was formed by the 1st and 2nd defendant, he made available the Company's Memorandum and Articles of Association, to back their story. However on both the Memorandum as well as the Articles of Association, the only two people whose names are cited as being the subscribers to the Company were the 2nd Plaintiff and the defendant. Nowhere did the name of the 1st Plaintiff appear.

That being the case, I hold the view that the Company resolution dated 28th May 2004 is of doubtful authenticity. I say so because once the 2nd Plaintiff had been a subscriber of the Company from its inception, there cannot be any logic of the Board of Directors passing a resolution to enable the said 2nd Plaintiff be offered shares, so as to join the company more than a month later.

In any event "MCC2" which is the alleged resolution dated 28th May 2004, expressly states that the person who was being invited to join the Company, by buying 33% of the shares, was the 1st plaintiff, Jacob Odundo.

That would suggest that the 1st Plaintiff was not one of the original subscribers, as he has asserted in his affidavit.

Also, although the 1st Plaintiff did depone that the Company account was operated by him, the 2nd Plaintiff and the defendant, not a single document was adduced to back that statement. The plaintiffs should have easily made available copies of either cheques or even the mandate form which was issued by the bank when the account was opened.

The plaintiffs also failed to produce evidence to show that they had given the Defendant, notice to produce the Company's accounts or to allow the said accounts be audited. As the Defendant said that no notice was ever served on him, it was incumbent upon the plaintiffs to prove that the Defendant had failed to comply with such demand, request or requirement. It is only then that the court may possibly have considered giving an order to compel the Defendant to comply.

I have used the word "may" advisedly, because even if the plaintiffs had given notice to the Defendant prior to filing suit, the court may not necessarily have ordered the Defendant to comply, if the court was so asked through an application such as the one before me. In order to be satisfied on the need to give such an order, the court would need to be shown that it was the responsibility of the Defendant to keep accounts; to call Annual General Meetings; to make Directors reports; or to keep the company's books of accounts.

In this case, Article 17 of the Company's Articles of Association provides as follows;

" The Directors may entrust to and confer upon a Managing Director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit and either collaterally with or to the exclusion of their own powers and may from time to time revoke, withdraw, alter or vary all or any of such powers."

Had the plaintiffs demonstrated that the Defendant had been entrusted with powers to carry out various obligations and functions, but that he failed to do so, the court might then have been persuaded that there was need to consider compelling the Defendant to comply, through an order of this court.

But for now, the plaintiffs have failed to satisfy me that those matters about which the Defendant is accused, were supposed to have been undertaken by him, but that he failed to discharge his obligations.

The Defendant submitted, that the "Agency Agreement" dated 1.4.05, as between the Defendant and First Lotto Ltd. was not proved to have any nexus with the suit property.

On the face of the document, one cannot help but agree with the defendant. I say so, because the premises which was the subject matter of that agreement was said to be registered in the name of the defendant, as the owner thereof. Yet, as is common ground between the parties herein, the premises which the Company had leased from "Building Your Own Investments Ltd.," belonged to that said landlord. They did not belong to the defendant.

But, at the same time, at paragraph 11 of the Defence, there is an admission by the defendant, that he had, **"in his capacity as the Managing Director of the 3rd Plaintiff leased part of the premises, as Business which the company was carrying on in the premises collapsed."**

From the foregoing inconsistent positions assumed by the defendant, it is not clear whether or not the premises which he let out to First Lotto Ltd. was the same one, which was earlier been occupied by the Company. But it would appear to be more probable than not, that the property is one and the same. And

that being the position, the unresolved question would be whether or not the Defendant needed the prior authority or concurrence of the plaintiffs, before he could let the premises to First Lotto Ltd.

I have already held that the Defendant failed to demonstrate that there was such a requirement. It cannot therefore be presumed by the court.

The Defendant faulted the verifying affidavit, as failing to comply with Order 1 rule 12(2) of the Civil Procedure Rules. Rule 12 provides that where there were more than one plaintiff, any one of them could be authorised by any other of them, to appear, plead or act for such other, in any proceedings. However, when one Plaintiff authorises another, the said authority has to be in writing signed by the party giving it, and it has to be filed in the case.

In relation to that submission, I am in agreement with the plaintiffs that rule 12 is only applicable to representative suits, which this case is not. In this case, all the three Plaintiffs are parties in their own right. They do not purport to be also acting, appearing or pleading for any other plaintiffs.

The defendant did also submit that the whole suit ought to fail because the verifying affidavit in support thereof had been sworn by a stranger. I am afraid that there is not sufficient material before me from which the court can reach the conclusion that the 1st plaintiff was a stranger to the company. That is a matter which will be appropriate for determination only by the trial judge.

It was also contended by the defendant that the suit was a nullity. The basis for that contention was the fact that whilst in the body of the Plaint, the advocates for the plaintiffs were identified as being Ojienda & Company Advocates, the firm of lawyers who signed the Plaint were Otieno-Odek & Company Advocates.

Obviously, the Plaint is messy. However, I cannot fathom how it would be rendered a nullity simply because the plaintiffs appear to be represented by two firms of advocates, in the same case.

For the reasons set out above, I hold that the plaintiffs have failed to satisfy me that they have a prima facie case with a probability of success.

Meanwhile, if the Company continues to make about Kshs.300,000/- monthly through the actions of the defendant, I do not see how the said actions cause the plaintiffs to suffer irreparable loss, which could not be compensated in damages. At any rate, the plaintiffs did not prove any such loss.

The law does empower the directors of the company to limit the powers of the company's managing directors. They could even remove him. And, they could take steps to ensure that an Annual General Meeting was convened, even without court sanction. If anything, the directors who are the plaintiffs are two in number, whilst the defendant is one. Therefore, the said plaintiffs should have little difficulty, if they are so minded to take steps to convene meetings and to pass appropriate resolutions.

All I can say is that I hope that in whichever way they should choose to use their authority, it would be for the good of the company.

My said comment, which has had some bearing on the decision I have already pronounced, is informed by the fact that if the defendant were to be stopped from leasing the premises to First Lotto Ltd., the said lessor or sub-lessor (as the case may turn out to be) would have been condemned unheard.

In that regard, the following words of DENNING L.J. (as he then was) in the case of **H. L. BOLTON (ENGINEERING) CO. LTD. –VS- T. J. GRAHAM & SONS LTD. [1957] 1 Q. B. 159 at page 173**, come into play;

"So here, the intention of the company can be derived from the intention of its officers and agents. Whether their intention depends on the nature of the matter under consideration, the relative position of the officer or agent and other relevant facts and circumstances of the case."

In this case, the plaintiffs concede that the defendant was the managing director of the Company. Therefore, it would be reasonable to presume that when First Lotto Ltd. contracted with him, in that capacity, they were entitled to assume that the defendant had authority to bind the Company. If therefore, the court were to order the defendant to terminate the tenancy, without giving First Lotto Ltd. a hearing, that would be most unjust. It may indeed invite litigation against the Company. Yet, in the present prevailing circumstances, the Company is said to be making money.

In my considered view, the balance of convenience favours a denial of the injunctive reliefs sought.

In any event, an order directed at the defendant, requiring him to stop leasing out the premises, or to call an Annual General Meeting, or to provide the plaintiffs with accounts, are all of a mandatory nature. The plaintiffs have not satisfied me that they should be granted such mandatory reliefs at this stage of the proceedings.

For all of those reasons, the application dated 25th July 2006 is dismissed, with costs to the defendant.

Dated and Delivered at Nairobi this 27th day of October 2006.

FRED A. OCHIENG

JUDGE