



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 116 of 2004

KABUNDU HOLDINGS LTD.
PLAINTIFF

VERSUS

ALI AHMED t/a

SKY CLUB RESTAURANT
DEFENDANT

Coram: Before Hon. Justice Mwera

Director, Kabundufor the Plaintiff
Malombo for the Defendant
Court clerk –Sango

RULING

The plaintiff company filed this notice of motion dated 28-9-04 under O.35 r. 1 Civil Procedure Rules and S. 3A Civil Procedure Act desiring to have vacant possession of a certain property called MOMBASA/BLOCK XX/47A said to be in the occupation and use of the defendant/tenant. That the quest to recover this land is because the tenant has breached the (tenancy) contract dated 28-6-94. It was also sought that the defendant does pay any rent arrears due.

One Patrick Kabundu describing himself in the application as the plaintiff company's attorney swore the supporting affidavit and was about to argue the said application when Mr. Malombo for the defendant rose to present his preliminary objection first.

The preliminary objection was basically two-pronged in that the said Patrick Kabundu who claimed to be a director and shareholder in the plaintiff company had not at any time since the proceedings here started presented a resolution passed by the company shareholders or directors authorizing him to represent and act for it in these proceedings. That he only claimed to hold a power of attorney allegedly from the company, which power could not be a substitute for a resolution at all. And that the ownership of the subject property was still in question in Nairobi HCCC 649/1996. That Ojuang J delivered a judgement in that suit in effect saying that this plot belonged to the plaintiff company but that the decree thereof was and is still stayed. Accordingly, so the court was told, the plaintiff company even if it was properly being represented here by

Patrick Kabundu as an agent, it cannot purport to evict the defendant from the plot. Patrick Kabundu

responded that he had a power of attorney grounded in a certain shareholders' or company resolution of 20-1-97. That therefore he was properly before this court on behalf of the plaintiff company. He added that in any case under S.121 of the Evidence Act (Cap.80) the defendant cannot be seen to impeach the title of his landlord who is the plaintiff company. Both sides referred to some authorities which may be reverted to in the cause of the ruling to follow.

The court heard both sides and appreciated the authorities. The material placed before it were given due attention. It was noted that before this suit was filed on 30-4- 2004 the plaintiff company had an EXTRA ORDINARY GENERAL MEETING on 20- 1-1997. This minute was presented to the court as Mr. Patrick Kabundu was arguing in opposition. It is not suggested that those present, Patrick Mukiri Kabundu as proxy of Jacob Mwongo, Janson Kiamba and Bishop Lawi Imanthiu were not competent to hold such a meeting and conduct its affairs as it was done. There were 2 invitees and that does not concern us here. Of course, one can say that the proxy Patrick Kabundu was the only member or so of the plaintiff company, who attended the meeting and passed the resolution of that day because the invitees could not engage in the plaintiff company's affairs as such. So Patrick Kabundu conducted the extra ordinary general meeting, wrote the minutes and signed them himself. All that aside this court is not asked or is it an issue before it – whether that meeting was irregular, invalid or otherwise. However it transpired that MIN. 7/97 had this:

“Pursuant to regulation 81 of Table A in the First Schedule of the Companies Act as adopted by the Company's Articles of Association, the new director appointed here before do and hereby resolve to give powers for directing and managing the affairs of the company to Patrick Mukiri Kabundu by way of power of attorney with provision prohibiting the said Patrick Mukiri Kabundu from selling or transferring the assets of the company to any third party or to himself without calling a general meeting of the member of the company who may deliberate upon the same”.

That copy of minutes was signed by a POWER OF ATTORNEY, who seemed at the hearing of this point of objection to be the very Patrick Mukiri Kabundu. If that Min. 7/97 is looked at again as to:

“..... the new director appointed here before”,

not much can be gleaned from it. Perhaps one has to look at Min 6/97 where the company resolved to appoint as its director:

“..... Jacob Mwongo, one of the trustees on behalf of the trustees holding the majority shares in the company on behalf of the beneficiaries”

Following all the above, this court should clearly state that it has no authority unless it is asked/moved to look into the manner in which a given limited company runs its affairs. But at the beginning of this meeting of 20-1-97, Jacob Mwongo is not a director. He is listed as a trustee; he is not present but Patrick Mukiri Kabundu who conducted the meeting with himself and wrote the minutes which he himself signed, described himself as representing by proxy this very Jacob Mwongo (with other trustees) at that meeting. Can it be said that even before Jacob Mwongo was appointed a director (see MIN 6/97) Patrick Kabundu was already acting as his proxy? How, when and by what authority or course? Is it not the practice that a person is first appointed a director and at the same time or later appoints his proxy? Is Patrick Mukiri Kabundu's position as a whole, so clear as to lead this court to accept that the company passed a resolution in MIN. 7/97 whereupon he was appointed agent to validly act for the company? In this whole saga where minutes speak of “unlawful appointments” “fraudulent transfers of the company's property” etc this court is not satisfied that the way Patrick Mukiri Kabundu went about everything here himself is all without any breach of the law. All this without further clarification does not look right. And breaches of the law could as well be brought up by the court itself. How could a trustee Jacob Mwongo, not present at a meeting, resolve even if he was a majority shareholder to give powers of attorney to his proxy?

In sum this court is not satisfied that it was presented with a resolution of the company authorizing Patrick Kabundu to act as its agent here. He furnished a power of attorney but that cannot do for a

company resolution (see **Hallsbury's Laws of England 4th Edn. Vol. 7 para 715, NRU HCCC 649/1996) KABUNDU HOLDINGS LTD. & ANR. VS. PATRICK MUKIRI KABUNDU & OTHERS**) As for the defendant questioning the title of his landlord, there is a contract between him and the plaintiff company dated 27-6-94 by virtue of which the two are linked . It was submitted that the property belongs to a 3rd party but there was no evidence that the plaintiff is not the defendant's landlord but another party is. That should rest there.

All in all the preliminary point regarding locus standi is upheld. Patrick Kabundu has not satisfied this court that he has it in order to proceed now – seemingly not even from the beginning. All seems obscure.

Costs to the defendant.

Delivered on 9th March 2005.

J.W. MWERA

JUDGE