

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO. 611 OF 2004

ELIKANA MUKUNDI GATIMU:::::::::::::1st PLAINTIFF

KENYUA NGUNJIRI :::::::::::::::2nd PLAINTIFF

VERSUS

JOHN B. M. MUYA :::::::::::::::1st DEFENDANT

MRS R.W. KINYIHA :::::::::::::::2nd DEFENDANT

SATIMA REGISTRARS:::::::::::::3rd DEFENDANT

RULING

On 9th November, 2004 the Plaintiffs filed suit against the Defendants claiming *inter alia* declaratory reliefs that a meeting of a company called Sagina Properties Ltd held on 25th May 2004 was convened contrary to its Articles of Association and the resolutions passed thereat are null and void.

At the time the suit was filed, the Plaintiffs lodged an application by way of Chamber Summons expressed to have been brought under Order XXXIX Rules 2, 3 and 9 of the Civil Procedure Rules, Sections 132 and 133 of the Companies Act and other enabling Provisions of the Law. By this Application, the Plaintiffs seek orders to restrain the 2nd and 3rd Defendants from representing themselves or acting as director and secretary of the said Safina Properties Ltd and holding or attending meetings of the said company as such director or secretary. The Application further seeks to restrain the Defendants from disposing any properties, shares stocks or from withdrawing any money from the bank accounts of the said company or passing any resolutions to alter the shareholding of the said company pending the hearing and determination of the suit.

Before the commencement of the hearing of the Plaintiff's said Chamber Summons, Counsel for the 1st Defendants took a preliminary objection to the propriety of the application and the suit itself. The Preliminary Objection was based on the grounds that as the Plaintiffs have not sought injunctive reliefs in the action, they cannot seek the same in this Chamber Summons. Counsel for the 1st and 2nd Defendants is also of the view that the Plaintiffs' complaints should have been made in a Petition under the Companies Act and in originating these proceedings by way of plaint the Plaintiffs have goofed and the Plaint should be struck out. Reliance was placed on several authorities for the position taken by Counsel for the 1st and 2nd Defendants and I was urged to strike out the Plaint and Chamber Summons.

Counsel for the Plaintiffs was of a contrary view. He submitted that the Preliminary Objection was not a proper or valid preliminary objection as a decision cannot be made upon the same without considering the facts and in any event the facts are disputed. Counsel further submitted that the Plaintiffs have not offended the Companies Act by instituting these proceedings by way of Plaint. Counsel also saw nothing wrong with seeking injunctive reliefs in the Chamber Summons even though none is sought in the action. It was also Counsel's view that the orders sought in the Preliminary Objection cannot only be granted in a formal application. He urged me to dismiss the Preliminary Objection as not having been well taken.

I have now considered the rival submissions of Counsel. Having done so, I take the following view of the matter. The position in Law is that for a Preliminary point of Law to be allowed, the facts as stated by the other side ought to be presumed to be correct. As the Court of Appeal for East Africa said in Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) E.A. 696, a preliminary objection in law is argued on the assumption that all the facts pleaded by the other side are correct. This is

not such a case.

On the argument that an interlocutory injunction should not be granted in the absence of a prayer for permanent injunction in the suit I have this to say: There is no such rule in our Rule book. In my view it depends on the nature of the claim. Indeed in my view the remedy of an interim injunction is so handy that it is even available to a Defendant under certain circumstances. I have read the Plaintiffs' Complaint and the amended version. There is nothing in it, that would prevent the Plaintiffs seeking the orders sought in this Chamber Summons. I should be careful not to say more on this point as I am dealing with a Preliminary Point of Objection.

Regarding the challenge made against instituting these proceedings by way of Complaint I say as follows:-

The 1st and 2nd Defendants admitted the jurisdiction of this Court in their filed defence. Their Preliminary Objection must therefore be an afterthought. Be that as it may the provisions of the Companies Act relied upon by Counsel for the 1st and 2nd Defendants do not in my view oust the Court's jurisdiction to adjudicate upon the dispute between the Plaintiffs and the Defendants. Again, I should be careful not to go beyond what I have said as both the suit and the Chamber Summons still have to be heard. I have no doubt however that the Preliminary Objection has not been well taken and I dismiss the same with costs to the Plaintiffs. The Plaintiffs should argue their Chamber Summons on merits.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9th DAY OF MAY 2005.

F. AZANGALALA

JUDGE