

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL 82 OF 2004

ALI K. AHMED t/a SKY CLUB RESTAURANT.....APPELLANT

- Versus -

KABUNDU HOLDINGS LTD.....RESPONDENT

R U L I N G

This is an appeal seeking to upset the ruling of the Chief Magistrate given on 21st July 2004 in Mombasa CMCC No. 2711 of 2004. The appeal is pending. Several applications have been filed in the appeal by both parties amongst which are the Chamber Summons by the Appellant dated the 11th February 2005 for injunction and the Notice of Motion by the Respondent dated the 26th April 2005 seeking, inter alia, to set aside or vacate the order of injunction granted to the Appellant on 17th February 2005 pursuant to his said chamber summons.

When the two applications came up for hearing before me on 12th May 2005 Mr. Malombo, counsel for the Appellant, raised a preliminary objection notice of which he had given arguing that Mr. Kabundu who has been appearing in this appeal on behalf of the Respondent company and has filed several applications on its behalf lacks capacity to act for the Respondent. He argued that for one to institute legal proceedings and or act on behalf of a company one requires a resolution of the company to that effect. In this case, he contended, Mr. Kabundu not having had any such a resolution whatever he has done and continues to do in this appeal is illegal and that he should not only be debarred from purporting to further act for the Respondent but whatever application he has filed on behalf of the Respondent, including the one dated the 26th April 2005, should be struck. He rubbished the resolution dated 14th March 2005 a copy of which is exhibited by Mr. Kabundu's affidavit sworn on the 26th April 2005 as being of no consequence as it was passed and signed by Mr. Kabundu himself and one Jacob Mwongo purporting to be but are not directors of the Respondent company. The two, he further argued, are shown by a letter dated the 29th November 2004 from the Registrar of Companies to have no shareholding in the Respondent and cannot therefore be directors of the Respondent. According to counsel one cannot be a director of a company unless one holds at least one share in the company.

On his part Mr. Kabundu argued that he is a shareholder and therefore a properly appointed director of the Respondent. He said that by virtue of a Power of Attorney dated the 14th March 1997 and registered on 21st March 1997 annexed to his affidavit sworn and filed herein on 25th January 2005 authorising him to act generally for and on behalf of shareholders with 699 shares in the Respondent company he is a bona fide shareholder.

Mr. Malombo's preliminary objection, if I understand it well, hinges on the argument that one cannot be a director of a company if one does not hold at least one share in that company. He referred to section 183 of the Companies Act in support of that proposition.

With respect to counsel that argument is not entirely correct. Whether or not a director is required to possess any shareholding at all in the company depends on the provisions of the articles of association of that company. It is when the share qualification requirement is provided for in the articles that section 183 comes into play. When there is no such requirement in the articles, one need not hold any shares in a company for one to be a director. See **Halsbury's Laws of England, 4th Ed. Vol.7 par. 471**. Under the Companies Act Article 77 of Table A on the First Schedule the shareholding qualification for directors may be fixed by the company in a general meeting and unless so fixed no qualification is required.

It is a cardinal principle of our law that he who alleges a fact has the burden of proving it. In this case

counsel for the Appellant alleges that Messrs Kabundu and Mwongo having no shareholding in the Respondent Company are not directors of the company who could have passed and signed the resolution dated 14th March 2005. The Appellant has, however, not provided any proof that the Articles of Association of the Respondent require any shareholding qualification for its directors. I therefore find that the Respondent passed a proper resolution allowing Mr. Kabundu to appear on its behalf.

Consequently the preliminary objection fails and it is hereby overruled with costs to the Respondent.

DATED and delivered this 10th day of June 2005.

D.K. MARAGA

JUDGE