



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

Civil Case 244 of 2004

BELGO HOLDINGS LIMITED..... PLAINTIFF

VERSUS

AKBER ABDULLAH KASSAM ESMail..... DEFENDANT

RULING

1. The Application dated 24th March 2004 by Mr. Akber Abdullah Kassam Esmail seeks that this court, invoking its inherent jurisdiction should dismiss the instant suit with costs to be paid by M/S K. Getanda & Co., Advocates for the Plaintiff.

2. The sole ground on which the Application is brought is that "*this suit is not the act or deed of Belgo Holdings Limited and neither the Directors nor the Shareholders of this company have authorized K. Getanda & Co. Advocates to file the same*".

3. I should, I think, give a brief background to the issues arising from the Plaintiff because it would be a good starting point to the disposal of the matter before me. In a Plaintiff filed on 15th March, 2004, M/S Belgo Holdings Ltd. as represented by M/S K. Getanda & Co. advocates seeks a number of prayers, chiefly those of injunctions to restrain Mr. Esmail from holding himself out as a director or shareholder of the Plaintiff company and to compel him to release all documents in his custody that relate to the company. Of interest at this stage are two other prayers [(c) and (d) of the Plaintiff] namely: -.

"c) An order declaring as null and void and of no effect any affidavits, pleadings, documents or howsoever, signed, executed, sworn, drawn or in other way done by the defendant and purporting to be on behalf and under the instructions of the Plaintiff, and a further Order that the said Affidavits, pleadings, documents or howsoever, be expunged from any record where they have been used particularly in HCCC No. 507 of 2003 (OS).

d) An order that the Applications filed by the Defendant in HCCC No. 507 of 2003 (OS) be stayed pending the hearing and determination of this case."

4. As regards HCCC No. 507 of 2003 (O.S.) it is averred in paragraphs 6, 7, 8, 9 and 11 of the Plaintiff that, that suit was filed by "*some persons who had acquired ownership*" of titles L.R. No. 3859 and 3860 by adverse possession. The two titles were registered in the name of the Plaintiff Company and it is said that Mr. Esmail having received summons thereto "*fraudulently and unlawfully received and retained*" the same and did not defend the suit. The High Court allowed the orders sought in that suit and Belgo Holdings filed an Application to set aside the final orders made but subsequently withdrew the same. Mr. Esmail has filed Applications in HCCC No. 507 of 2003 challenging the compromise made on the same grounds as in this Application; that M/S K. Getanda & Co. Advocates had no authority to act for the company and all their actions in that suit should be set aside. Those Applications are to my knowledge

undetermined.

5. Counsel in submissions before me raised a number of issues but I shall restrict myself to a discussion of only these issues: -

i) Are the acts in this suit those of Belgo Holdings Ltd. and is the firm of M/S K. Getanda & Co. Advocates properly instructed? ii) Whatever my finding on (i) above, should I oblige the Defendant and strike out the suit? iii) If I should strike out the suit, should I punish M/S K. Getanda & Co. Advocates by condemning them to pay costs personally?

6. On the first point, it is submitted and deponed by Affidavit that Belgo Holdings Limited has had a rather unfortunate history. Whereas it is not denied that the founding directors at its incorporation were James Isabirye and Akber Abdullah Kassam Esmail, subsequent changes are in contention. The more contentious one however, is that of changes purportedly made on 5th June 1995. Two documents (company forms 203 A) were presented by parties: -

i) By the Defendant wherein it is indicated that Samvir Trustees Limited were appointed sole director of the company and Mr. Akber Abdullah Kassam Esmail and Shirin Esmail resigned as directors, ii) By the Plaintiff as represented by M/S K. Getanda & Co. advocates wherein it is indicated as in (i) above but with additional information to the effect that Robert Kotch Otachi and Wilson Birir were appointed directors of the company.

7. The Defendant says that the last document is a forgery but a letter dated 19th February 2004 from the Registrar of Companies to M/S K. Getanda & Co. Advocates shows that the last Annual Return of the Company filed in 1995 bears out the position in (ii) above. Conversely, the Affidavit of Diamond Jamal sworn on 24th March 2004 says otherwise. At paragraph 6 of his Affidavit he depones as follows: -

"I do not know the deponent (Robert Otachi) or anyone called Wilson Birir; neither of them has ever been in touch with me or Samvir Registrars; neither I nor Samvir Registrars nor Samvir Trustees Limited are aware of any resolution or decision by the Directors or Shareholders of Belgo to appoint either of them as

Directors of Belgo we have not taken part in any such resolution or decision nor were I or Samvir Registrars even instructed to prepare or file a company form No. 203 A or an Annual Return of Belgo in which the deponent or said Wilson Birir were to be named as Director of Belgo."

8. Similarly in the Affidavit of Azim Virjee sworn on 22nd March 2004 it is deponed that *"between 11th July 1995 and 4th August 1999 my company (Samvir Registrars) was the sole Director of Belgo"* and *"neither I nor my company have ever authorized K. Getanda & Co. Advocates to file this suit or act for Belgo in HCCC No. 507 of 1999"*.

9. On this hotly contested issue, matters are not made better by the fact that whereas K. Getanda & Co. Advocates were served with the instant Application, they filed no substantive response to it. Mr. Getanda relied on Affidavits filed in support of his Application for injunction. Had Mr. Ochieng Oduol for the Defendant pressed the point, I would have invoked Order 50 Rule 16 (3) of the Civil Procedure Rules and asked that the Application be argued ex-parte.

He did not and I think wisely so and I allowed Mr. Getanda to address me on the evidence contained in his previously filed affidavit and on the basis of any applicable law.

10. As things now stand, there are two very unclear issues and neither the Affidavits filed nor submissions have cleared them: -

a) Mr. Azim Virjee, and this is borne out by both form 203A's referred to earlier, depones that Mr. Esmail and Shirin Esmail resigned as directors of Belgo sometime in June or July 1995 (Virjee says 11th July

1995, form 203 A indicates 5th June 1995). It is not indicated when he was re-appointed although a resolution to that effect is attached but is not apparently filed with the Registrar of Companies and the same has been attacked as an afterthought by Mr. Getanda. To that extent therefore, and taking the records of the Registrar of Companies as authoritative, Mr. Esmail may not be a director of the company. This is merely a finding based on what is before me and is not conclusive.

b) M/s K. Getanda & Co. Advocates have not shown their letter of instructions to act for Belgo. When an advocate is being attacked as acting without authority, the first thing to do is to file an Affidavit showing that such authority indeed exists. To the extent that this has not been done, M/s K. Getanda & Co. Advocates may not be properly instructed. Again obviously and noting my earlier comment that no Affidavit was filed in response to the instant Application, this is a non-conclusive finding but is based on material before me at this point.

11. I am being asked to dismiss the suit herein. It has been said time and again that the power of court to dismiss or strike out a suit should be used very sparingly and in the most clear cut of cases and after weighing the interests of parties and seeing quite clearly that the suit is so hopeless and incapable of sustenance. This is not the case in this suit.

12. Further, the issues being litigated upon here are also being litigated upon in HCCC No. 507 of 2003 and it would be an abuse of court process for any party to use the findings of court in one suit to press its advantage in another. I see that possibility arising from any findings I shall make in this suit.

13. I shall therefore, move onto my second point and state that the matters raised in the Application herein cannot be determined on the basis of Affidavit evidence only. There are too many issues that require proof and tested by cross-examination as I have pointed out. I note for example that in a report dated 25th March 2004 by Hawkeye Technologies it is said that the form 203 A produced by Mr. Getanda is a forgery, yet the Registrar of Companies thinks that it is the correct statement of the company's directors. Mr. Esmail's reinstatement to the company, if at all, is also being questioned and evidence needs to be called to clear the matter.

14. Mr. Getanda's appointment has been similarly attacked as unauthorized and I have misgivings about how he has handled it, yet he has filed suit on behalf of Belgo Holdings Ltd. which I have shown is in an unclear position as to directorship. He may have been instructed as he says, by Robert Kotch Otachi and/or Wilson Birir but not the Defendant or Samvir Registrars.

15. Where therefore, an advocate may have acted without authority as is claimed in this Application as I understand it, the correct way to handle the matter is not to strike out or even to dismiss, but to stay the proceedings. In Bland, Corlett and Walsh vs. First National Commercial Bank PLC [1993] 1 JLR 80 it was held as follows: -

"where an advocate acted in proceedings without authority; ... it was the practice in England to stay all orders

16. Similarly, in 44 Halsbury's Laws of England 4th Edition paragraph 115 at 84-85, it is stated as follows: -

"115. Effect of acting without authority. The fact that a Solicitor was not authorized to institute proceedings is not a defence to those proceedings, and although in special circumstances the correct course may be for the court to strike out proceedings instituted without authority, the proper method of raising the questions of want of authority is usually by an Application to stay the proceedings. Accordingly, if a Solicitor takes, defends, or continues proceedings without authority of the litigant whom he purports to represent, those proceedings will be summarily stayed if the proceedings are instituted without authority."

17. In a case very similar to this are, Buikie Estate Coffee Ltd. and two others vs. S. Lutabi & Another [1962] E.A. 328 Bennet, J. at page 329, had this to say,

"In the instant case the question as to whether the Plaintiffs advocate has been duly authorized to sue will depend upon the court's finding as to who are the lawful directors. That is a matter, which can only be determined after evidence has been heard. In my judgment, want of authority to sue does not plainly appear at the present state of the suit, and the suit ought not to be struck out at this juncture. If it should appear that the Plaintiffs Advocate has not been duly authorized by the lawful directors (whoever they may be) to institute proceedings on behalf of the company, the advocate can be ordered to pay the costs of the suit personally; see Judgment of JENKINS L.J. in Danish Mercantile Co. Ltd. vs. Beaumont (2) [1951 Jch-680 at page 682."

18. As I have shown above my mind is one with Bennet, J. for the reasons that the instant matter is even less clear at this stage and I decline to strike out the suit.

19. On my third point, I have made no categorical finding to warrant penalization of M/S K. Getanda & Co. Advocates. The matter should be suitably handled in HCCC No. 507/2003 where the same question is pending. In my Ruling on a number of preliminary objections raised to Mr. Esmail's Applications in that suit, I noted as follows: -

"Mr. Esmail further argued that the purported representation of Belgo Holdings Ltd. by M/S K. Getanda & Co. Advocates was unprocedural, a nullity and the court has power to strike out the proceedings or in the alternative, stay the same."

I agree with Esmail in his alternative to proposition

20. In the event then, I am of the view that I should not allow the

Application dated 24th March 2004 as worded and instead order that all proceedings in this suit be stayed pending resolution and determination of all outstanding Applications in HCCC No. 507 of

2004.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of April 2004.

I. LENAOLA

Ag. JUDGE