



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 649 OF 1996

KABUNDU HOLDINGS LIMITED.....1ST PLAINTIFF

RUTH WAKONYO KABUNDU.....2ND PLAINTIFF

-VERSUS-

PATRICK MUKIRI KABUNDU.....1ST DEFENDANT

JACOB MWONGO.....2ND DEFENDANT

JASON KIMBUI.....3RD DEFENDANT

BISHOP LAWI IMATHIU.....4TH DEFENDANT

JUDGEMENT

The Plaintiff's suit was filed on 30th January, 1997. In a Ruling delivered by the Honourable Mr. Justice Ombija on 10th February, 2003 that suit was held to have been void *ab initio*. In the words of the learned Judge:

“There is no evidence that at the time the Plaintiff's suit was filed... the Plaintiff had authority to file the suit by reason of absence of the resolution of the first Plaintiff company....In the premises the suit was void *ab initio* and/or *ultra vires*. It follows from that illegality that any subsequent steps taken in that matter including the filing of the subject application is tainted with the illegality and in furtherance thereof. I therefore find and hold that, in law, the firm of Njage Wanjeru & Co. Advocates had no capacity to file the subject application on behalf of the second Plaintiff.

“The second issue is whether the second Plaintiff had the capacity and/or authority from the company (first Plaintiff) to represent the company in Court.

“It bears repeating, that a company is not the agent of its members and a member as such is not an agent of the company. For the second Plaintiff to have the requisite capacity to represent the company... there is need for a resolution of its members at a general meeting or by its agents. Where there is in existence a board of directors or shareholders and members of the company the Court should order for a board meeting with a view to ascertaining the corporate character in respect of the matter complained of, whether it has been supported by a majority or minority of the shareholders. If supported by a minority of the shareholders, the suit becomes *ultra vires*.

“In the result I dismiss the application dated 12th August, 2003 with costs to the first, second, third and fourth Defendants/Respondents.”

The original suit having been thus dismissed, there remained unresolved a counterclaim, and what was outstanding was only formal proof thereof. This is the matter that came before me on 3rd March, 2004. Mr. Patrick Mukiri Kabundu appeared for himself as the first Defendant, while Mr. Gitau appeared for the second, third, and fourth Defendants.

Mr. Kabundu began by recounting the mode of service of trial papers as he had conducted it. He had served the hearing notice on 24th February, 2004 together with his list of documents, and he had on the same date served notice on the Plaintiffs to produce certain documents. There was an affidavit of service on file, dated 2nd March, 2004. Mr. Gitau concurred that service had been duly effected.

Mr. Kabundu noted that following the Ruling delivered by the Honourable Mr. Justice Ombija, the Deputy Registrar had entered interlocutory Judgement on 19th February, 2004 and this was now the basis for formal proof on the Defendants' counterclaim.

By a series of exhibits, Mr. Kabundu demonstrated the decision-making process by which the company, Kabundu Holdings Ltd., determined questions relating to the properties in dispute. Exhibit 1 was a notice of an Extraordinary General Meeting of the company to be held on Tuesday, 2nd December, 1996. Agenda items included:

“To give an opportunity to Mrs. Ruth Wakonyo Kabundu to explain why and how she transferred properties belonging to the company to third parties and to account therefor:

(a) Plot No. 47/XX, Mombasa

(b) Plot No. 49/XI, Mombasa

(c) Plot No. 7771/6, Nairobi (which has been sub-divided into 16 plots three of which have been purportedly sold to third parties and the balance thereof have been purportedly transferred to the said Ruth Wakonyo Kabundu in her personal capacity).”

Exhibit 1 also carries the resolutions of the meeting. These include authorisation to the representative of the majority shareholder to file suit to nullify all the transfers of land belonging to the company; issuance of power of attorney to Mr. Patrick Mukiri Kabundu to continue representing the company; removal of the second Plaintiff as a director of the company; appointment of company secretary.

Mr. Kabundu showed the basis for the company resolutions by citing the case, BUGERERE COFFEE GROWERS LTD. v. SEBADUKA & ANOTHER [1970] E.A. 147. This case also held that a company commences suit through a resolution of its board, and that an Advocate who brings legal proceedings in the name of a company without authority becomes personally liable to pay costs. On the basis of this authority, Mr. Kabundu submitted that four firms of Advocates which had acted for the Plaintiffs should be ordered to pay the Defendants' costs personally.

Exhibit 2 is a power of attorney by which the company formally appointed Patrick Mukiri Kabundu as its attorney (14th March, 1997). Exhibit 3 shows that the same Patrick Mukiri Kabundu was also appointed as the attorney of the majority shareholders (30th October, 1996). Exhibit 5 is a document of official search at the Office of the Registrar-General (dated 5th September, 2002) and it shows the shareholding position and the names of the directors. The estate of the late Joseph Stephen Mukuongo has 1 share; Ruth Wakonyo Mukuongo has 300 shares; and the trustees in respect of the children of the late Joseph Stephen Mukuongo, have 699 shares – making a total of 1000 shares. Exhibit 5 is the Memorandum and Articles of Association. Exhibit 7 is a lease agreement over L.R. Mombasa/Block XX/47/A (dated 28th June, 1994), showing that this property was registered in the name of Kabundu Holdings Ltd. Exhibit 8 is a letter dated 11th October, 1994 by which the Lands Office requested the Defendant to return the certificate of lease (in Exhibit 7) to the Registrar of Lands, with the threat of cancellation if not returned (Exhibit 9). Counsel stated that the certificate of lease had been issued to the first Defendant as a director of the company; but the second Plaintiff then caused the Lands Office to demand the title document back. Exhibit 10 is Gazette Notice No. 3134, (16th June, 1995) by Mr. K.K. Githii, the Land Registrar at Mombasa who announced that he would issue a new document of title for L.R. Mombasa/Block XX/47/A within the next 60 days. When the Deputy Registrar refused to nullify the existing title, the second Plaintiff, Mrs. Ruth Wakonyo Kabundu appealed to the Chief Land Registrar (Exhibit 11). Before the 60 days specified had expired, a new title was issued, not to the company but to a third party, without any transfer document being executed (on 16th June, 1995). Mr. Kabundu submitted that this mode of transfer of lease, without the consent of the lessor, was contrary to the provisions of Section 48 of the Registered Land Act (Cap. 300).

Exhibit 12 is a transfer of Title No. Mombasa/Block XI/491 and is dated 13th June, 1995. It purports to transfer the land parcel from the first Plaintiff to the second Plaintiff, for no consideration. Mr. Kabundu stated that the property in question is worth Kshs.7 million, and is leased to the Kenya Ports Authority earning Kshs.60,000/= per month. Exhibit 14 refers to Plot No. 7771/6 Nairobi, which was transferred to Kabundu Holdings and subdivided into 16 different plots. Mr. Kabundu stated that three of these plots, No. 26, No. 27 and No. 28 were sold by the second Plaintiff to third parties, allegedly for Kshs.2.5 million each; but this is believed to have been a reduced figure for the purpose of avoiding stamp duty, as the true price would have been Kshs.5 million for each. It is asserted that plots Nos. 34 - 42 inclusive were transferred to the second Plaintiff, allegedly for Kshs.100,000/= each; but the head title shows that the plots were sold for Kshs.5 million each. Exhibit 14 shows the layout of Nairobi L.R. No. 7771 and Exhibit 15 shows the various sub-divisions made to the larger parcel.

Exhibit 16 is a letter dated 18th June, 1990 from Catherine Thairora Mukuongo. It is addressed to the Managing Director of Kabundu Holdings Ltd., and it states that she has resigned as a director of the company with effect from the date of the letter. Mr. Patrick Kabundu stated, in relation to this letter that, by the Memorandum and Articles of Association, such a letter has the effect of terminating the directorship of the author. Thus, when in 1995 and 1996 Ms. Catherine Thairora Mukuongo signed documents in the capacity of a director, she had no authority to do so.

Exhibit 17 is a letter from M/s. Hamilton Harrison & Mathews asking M/s. Githongo & Company to pass over to them the company seal for Kabundu Holdings Ltd. In response, Githongo & Co., on 17th February, 1978, dispatched the seal to M/s. Hamilton Harrison & Mathews (Exhibit 18). This seal was then forwarded to Mr. Patrick Kabundu to hold on behalf of the company (Exhibit 19). But Exhibit 20 is a letter from Kanyi Thuo & Co. Advocates dated 7th March, 1994 to M/s. Walimohamed Engineers ordering another company seal, in the name of Kabundu Holdings Ltd. The letter says:

“Kindly therefore take this note as our formal order for the said seal on behalf of the company.”

Mr. Kabundu averred that it is this second seal which appears to have been used later, in 1994, to make unauthorised transfers of the properties of Kabundu Holdings Ltd. Mr. Kabundu produced the valid seal in Court, and affirmed that he has consistently had it under lock and key.

Exhibit 21 shows offers to purchase the subdivided plots (April, 1995) from No. 7771/6 Nairobi at the price of Kshs.5 million for each – and not Kshs.2.5 million as claimed by the second Plaintiff. Exhibit 22, dated 22nd March, 1996 is a request for commission payment by Advocates who conducted the sale and purchase transactions for three of the said sub-divided plots. The letter from Shako & Co. Advocates states:

“Mrs. Kabundu has received our demand for the commission for the sale of the above plots from the agent.

“Kindly let us have your cheque in the sum of Kshs.375,000/= being commission of 2 ½% of Kshs.15,000,000/=.”

Exhibit 23 is a letter from the second Plaintiff dated 16th August, 1995. It is addressed to M/s. Sobhagh Shah and V. Goswani Advocates, and reads as follows:

“This is to authorise you to draw a cheque in favour of Mrs. Ruth Wakonyo Kabundu who is a director of Kabundu Holdings Limited being payment for the purchase of land by La Casa Developers from Kabundu Holdings Limited.”

This letter, which is signed by Mrs. Ruth Kabundu as director and Ms. Catherine Mukuongo purporting to be the secretary, is the basis of one of Mr. Kabundu’s prayers for damages. He has affirmed that the money so paid to the second Plaintiff was never surrendered to the company; she retained it all.

The second Plaintiff’s active sale of the properties of the company on her own account is well documented. Exhibit 25 carries several letters indicating that she was waiting to receive the proceeds of the three plots which she had sold, amounting to the sum of Kshs.15 million. For instance, a letter from her lawyers in the property transactions, M/s. Shako & Co. Advocates, and dated 20th April, 1995 says:

“Our client [Mrs. Kabundu] is selling three plots in Kitisuru and we have instructions to redeem the above account [A/c No. 201884978 with Savings & Loans Kenya Ltd] from the proceeds of sale.”

Exhibit 26 gives irrefutable evidence of 12 transfers of company land title, dated 9th May, 1996. The transactions purport to be transfers of title from the company to the second Plaintiff. The transfers are signed by the second Plaintiff and Catherine Mukuongo, who had resigned as director way back in 1990. These transactions, as Mr. Kabundu has argued, were void *ab initio*.

Exhibit 27 relates to original land title number 7771/6/20 which has been renumbered I.R. 69664 and the second Plaintiff has transferred it to a third party. She herself had bought it for Kshs.100,000/=; but now she has sold it for Kshs.3.2 million. And on the same day the property was sold for Kshs.3.2 million, it was charged for Kshs.9 million (Exhibit 28). Mr. Kabundu submitted on behalf of the company that this property had been grossly undervalued for reasons only known to the second Plaintiff. It is also on record that on 31st March, 2002 the second Plaintiff sold Plot No. 7771/21 to a third party for Kshs.5.6 million, when she had purportedly bought it for Kshs.1 million. The relevant sale agreement is Exhibit 29. The transfer document for this plot is Exhibit 30, and the signatories are the second Plaintiff and Catherine Mukuongo who had ceased to be a director of the company in 1990. The process of transfer for this plot was not completed after the Defendant obtained a status quo order regarding the many transfers being made by the same person, namely the second Plaintiff. (Court Order issued by the Honourable Mr. Justice Githinji (as he then was) on 15th April, 2002) (Exhibit 31). Exhibit 32 is a further status quo order issued by the Honourable Mr. Justice Rimita on 9th October, 2002. Exhibit 33 is still a further Order of the Honourable Mr. Justice Githinji vacating his earlier order (of 15th April, 2002). Exhibit 34 is a later Order by the Honourable Mr. Justice Ransley dated 19th November, 2002. The learned Judge ordered -

“That the issue of ownership of Nairobi L.R. 7771/21 be determined before the registration of the charge.”

The second Plaintiff attempted to transfer L.R. No. 7771/21 to one Alphas Musigo Nyamodi (Exhibit 36) (January, 2003), but this was rejected because of the Court Orders barring the transactions; the proposed transfer was cancelled. On the same day (16th January, 2003) the second Plaintiff attempted to register a charge over the same property, but again this was rejected because of the Court Orders.

Exhibit 38 is an official search conducted at the Lands Office by Mr. Patrick Kabundu on 21st March, 2004. He found that the files for L.R. No. 7771/21 (Exhibit 38) and that for L.R. No. 777/18 (Exhibit 39) were missing; and so he was unable to obtain the current official searches.

Exhibit 39 is a letter dated 6th December, 1995 emanating from Mr. Patrick M. Kabundu as Director and Company Secretary of Kabundu Holdings Ltd., and addressed to M/s. shako & Co. Advocates. It cautions against transfers of Kabundu Holdings Limited Kitisuru Estate Plots. It states that Plots 7771/6/17, 7771/6/15, 7771/6/23, and 7771/6/14 were illegally transferred. It states reasons as follows:

- (i) the transfers were signed by one of the former directors who resigned on 18th June, 1990 and has never been a company secretary;
- (ii) Mrs. Ruth Wakonyo Kabundu has no right to transfer the Plots as she was a minority shareholder, and her action was not authorised by the company.

Mr. Patrick Kabundu also put up a public notice in the *East African Standard* of 20th December, 1995 (Exhibit 41) cautioning members of the public about the illegally conducted sales of lands belonging to Kabundu Holdings Ltd.

Exhibits 42, 43 and 44 are concerned with the search status of the Mombasa plots.

Mr. Kabundu submitted that all the transactions alienating land the property of Kabundu Holdings Ltd., were unauthorised and illegal. He correctly submitted, on the basis of authority, that actions of the kind taken by the second Plaintiff could only be done with the authority of the company given at formal meetings: BUGERERE COFFEE GROWERS LTD. v. SEBADUKA [1970] E.A. 147. He cited from Halsbury's Laws of England, 4th Edition, Vol. 7, at paragraph 715. This may be quoted here:

“How a company may act. A company, not being a physical person, can only act either by the resolution of its members in general meeting, or by its agents. It is not the agent of its members, and a member as such is not the agent of the company, the company being a separate entity or legal person apart from its members, who are not, even collectively, the company. The legal position of a company, as so stated, must be regarded in relation to its contracts, to torts committed by it, and to its liabilities as regards acts which, if committed by individuals, would bring them within the criminal law.”

This statement of the law expresses the point that the self-indulgence of the second Plaintiff in relation to lands of the company, which she generously sold off or attempted to dispose of, was not sanctioned by law and indeed amounted to actionable wrongs at the instance of the company, in the proper running of its affairs.

The law regarding the responsibility of directors in relation to the property of the company of which they are directors, is well settled at common law which is also the residual law of this country. To illustrate this point, Mr. Kabundu cited the old case, COOK v. G.S. DEEKS & OTHERS [1916] A.C. 554. In that case three directors of a company carrying on the business of railway construction contractors obtained a contract in their own names to the exclusion of the company. The Judicial Committee of the Privy Council held as follows (P.554):

“The contract was obtained under circumstances which amounted to a breach of trust by the directors and constituted them trustees of its benefits on behalf of the company.”

This is directly in point in the present case. There is evidence that the second Plaintiff held herself out as a director of Kabundu Holdings Limited, and, armed with the letterheads of the company and with an unauthorised company seal which appeared to have been ordered at her behest, she was perceived as the veritable company itself, as she transacted generously with lawyers, banks and different parties, over the company's landed interests. I would hold, in respect of all such transactions, that the second Plaintiff was a trustee for the corporate body as established and regulated under the Memorandum and Articles of Association.

Carrying the same tenor is the East African Court of Appeal case from Uganda, TREVOR PRICE & ANOTHER V. RAYMOND KELSALL [1957] E.A. 752. This was an appeal from the High Court of Uganda, dismissing a suit by the first and second Appellants claiming a declaration that a leasehold tea estate known as Kiko Estate, standing in the name of the Respondent, was held on trust for the second Appellant, and seeking Orders for transfer of the same to the second Appellant, or alternatively, damages. It was held that the Respondent “was in a fiduciary position vis-à-vis the company from the start; in order to obtain the lease he made use of the licence issued to the company, he spent the company's money on development and in breach of duty acquired a title to Kiko in his own name. Accordingly the Respondent held the title to Kiko on trust for the company” (P.753).

It becomes clear that, with respect to the properties of Kabundu Investments Ltd. improperly applied for personal gain by the second Plaintiff, she became a constructive trustee, a term thus exemplified in BULLEN & LEAKE & JACOB'S PRECEDENTS OF PLEADINGS, 14th ed. (London: Sweet & Maxwell, 2001), Vol.2 at page 843:

“For example, in an instance of ‘company fraud’ the facts may involve a (i) director who has misapplied the company's funds, (ii) someone who has beneficially received the company's funds with knowledge of the misapplication and (iii) another who has dishonestly assisted in the misapplication of the funds by the director.”

Mr. Kabundu also argued, with absolute merit, with respect, that the second Plaintiff as a director, by selling company assets for personal benefit (and there is much evidence of this), had so placed herself as to have interests sharply in conflict with the interests of the company, fully knowing that this was the case, and yet maintaining this status quo over a prolonged period of time. This is a breach of the law, about which case law has been quite eloquent. The case, GUINNESS PLC v. SAUNDERS AND ANOTHER [1990] 1 ALL E.R. 652 may be cited in this regard. In that case it was held that the appellant “had put himself in a position where his personal interests conflicted irreconcilably with his duty as a director and in such a situation the equitable principle...forbade a trustee making a profit from his trust unless authorised by the trust instrument...” This position is clearly stated in other cases as well: FOSS v. HARBOTTLE, 2 HARE 461; BURLAND v. EARLE [1902] A.C. 83; ABERDEEN RAIL CO. v. BLAIKIE BROTHERS [1843-60] ALL E.R. REP. 249.

Mr. Kabundu was also concerned with the position of counsel who have given the second Plaintiff professional assistance in conducting serious breaches of fiduciary duty against the company of which she is a director. The case cited will substantially coincide with the facts under consideration. This case is KIWANUKA & CO. v. WALUGEMBE [1969] E.A. 660, a case decided by the High Court of Uganda. The facts were that the Plaintiffs, a firm of Advocates, had accepted instructions to act for a company, given by the Defendant, who was a director. The Plaintiffs filed a suit against another party. But the suit was dismissed, on the ground that the company had not validly authorised its institution. The Plaintiffs were ordered to pay the costs of the Defendant in that suit personally. The Plaintiffs now sought to make the Defendant liable for those costs; and they brought an action for a declaration that the Defendant was liable. The Honourable Mr. Justice Phadke held as follows (P.663):

“In the circumstances, in my opinion, all the Plaintiffs' claims to fasten personal liability upon the Defendant amounts to is that,

although the Plaintiffs agreed to act for the company, they now wish to hold the Defendant personally liable because as things turned out later the company had never validly authorised the institution of the suit. This attitude of the Plaintiffs is, in my opinion, clearly an afterthought formed in the light of subsequent events which can have no bearing upon what actually transpired between the parties at the time Mr. Kiwanuka accepted instructions to act.

“I find that Mr. Kiwanuka, in accepting instructions to act for the company according to his understanding, made an unequivocal representation to the Defendant that it was the company for whom he was acting.”

From such clearly worded authority, it is for certain that the company will be entitled to claim against the counsel concerned, for filing suit at the behest of a director who lacked a basis in a valid corporate resolution.

The foundation of this Judgement is the Ruling made by the Honourable Mr. Justice Ombija on 10th February, 2003. After careful consideration of this long and tortuous case he arrived at the correct decision, with respect, that the suit brought at the behest of the second Plaintiff, was entirely misconceived in point of law. The second Plaintiff appears not to have taken counsel to appreciate that suits in the name of a company must be commenced upon the resolution of the company, and that it was not open to a director or anyone else to prosecute such a suit purely on whim. The suit, thus, should not have persisted for so long, but was, mercifully, terminated by the learned Judge. That decision took away both the Plaint and the reply to counterclaim; and the counterclaim being thus untraversed, qualified for the formal proof.

Mr. Gitau who represented the second, third and fourth Defendants fully adopted the submissions made by Mr. Patrick Kabundu. Mr. Gitau adopted the counterclaim and prayed for Judgement on the counterclaim. But Mr. Kabundu and Mr. Gitau prayed for costs against the second Plaintiff.

In my Judgement, the formal proof has been conducted effectively and most professionally, and on that basis I will now make the following Orders:

1. It is hereby declared that the issuance of title deeds in the name of the second Plaintiff to land parcels No. Mombasa/Block XX/47(A) and Mombasa/Block XI/491 was and is irregular, unlawful, null and void.
2. The second Plaintiff shall execute all necessary documents to effect a transfer of land parcels No. Mombasa/Block XX/47(A) and Mombasa/Block XI/491 to the first Plaintiff, failing which the Deputy Registrar of the High Court shall execute these documents for the purpose of effecting the transfer as indicated herein; and should such transfer be impossible, then the second Plaintiff shall pay to the first Plaintiff the current market value of the said land parcels.
3. The second Plaintiff shall execute all necessary documents to effect a transfer of land parcels No. Nairobi 7771/9; 7771/10; 7771/11; 7771/12; 7771/13; 7771/14; 7771/15; 7771/16; 7771/17; 7771/18; 7771/19; 7771/20 and 7771/21 to the first Plaintiff, failing which the Deputy Registrar of the High Court shall execute these documents for the purpose of effecting the transfer as indicated herein; and should such transfer be impossible, then the second Plaintiff shall pay to the first Plaintiff the current market value of the said land parcels.
4. The second Plaintiff shall provide an account of all monies received from the sale of properties belonging to the Estate and the Trust to herself or to third parties, which account shall be audited by reputable auditors and filed in this Court within six months of the issuance of this Order.
5. I do hereby issue an Order of injunction to restrain the second Plaintiff either by herself, her servants, agents or anyone else acting for her, from selling, disposing of or in any way howsoever, dealing with any property of the first Plaintiff without the consent of the shareholders expressed in a resolution made at a formal meeting.
6. The Estate shall, within a reasonable period of time which shall not in any case exceed eighteen calendar months, unless the Court makes a different Order, be wound up and the Trust dissolved, the proceeds thereof being distributed under the authority of the Court to the beneficiaries.
7. The costs of the first, second, third and fourth Defendants in the suit shall be borne by counsel on record for the second Plaintiff, jointly and severally, and the same shall carry interest at Court rates as from the date of this Judgement.

DATED, and DELIVERED at Nairobi this 7th day of May, 2004.

J.B. OJWANG

AG. JUDGE

Coram: Ojwang, Ag. J

Court Clerk: Mwangi

For the Plaintiffs: No representation

For the first Defendant: Mr. Patrick M. Kabundu

For the second, third and fourth Defendants: Mr. Gitau, instructed by M/s. Deche Nandwa & Bryant Advocates