



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO 422 OF 2004

MODE 1996 SECURITY LTD.....APPLICANT

VERSUS

MODE SECURITY SERVICES

LTD & ANOTHER.....RESPONDENT

RULING

There was before me on 15.09.2004 an application by way of a Chamber Summons dated 30th August 2004 and filed on 2.09.2004 which sought orders from the Court that:-

- (1) the Court issues an order compelling the 2nd defendant to effect the transfer of his shares in the plaintiff company by immediately executing the necessary documents before the Registrar of Companies,
- (2) the Court be pleased to order the Registrar of Companies to effect change of directors in the plaintiff company as per the notification of Change of Directors dated 6th August 2004 and filed on 18th August 2004.
- (3) costs of this application be provided for.

The application was premised on the grounds that:-

- (1) the 2nd defendant, Daniel Mutua Mutweia resigned both as a Director and shareholder of the plaintiff with effect from 1.06.2004,
- (2) for the Registrar to effect change of directors in the plaintiff company in the Register of Companies, it is mandatory that the 2nd defendant transfers all his shares in the plaintiff company.
- (3) Without the Registrar of Companies confirming the change of Directors in the plaintiff company following the resignation of the 2nd defendant, the new Directors of the company cannot access the monies in the company accounts as the 2nd defendant was a cosignatory to the plaintiff's bank accounts.
- (4) Due to the inability of the new Directors of the plaintiff company to access the company's accounts, the operations of the plaintiff company have been paralysed as the plaintiff is unable to meet its financial obligations.

The application was also supported by the affidavit of Anthony Mungai Gitau sworn on 30.08.2004 and filed in Court on 2.09.2004. This deponent who is a director of the plaintiff company reiterates the grounds of the application, and attaches, form 203A, notification of Change of Directors, Secretaries or in their particulars pursuant to section 201 of the Companies Act. There is also attached as annexure AGM 2, another Notification of Change of Directors and Secretaries or in their particulars. This Notification of Change of Directors and Secretaries or in their particulars, shows that with effect from 26.07.2004, three new directors were appointed Anthony Mungai Gitau, (the deponent), Joshua Kithome Mutiso, and a Mr Tuma or Juma. This latter form is neither dated nor signed. The form of Notification of Change of Directors and secretaries or their particulars is signed and dated 5.08.2004 by a person identified as a Director. Common to both forms is that there is no evidence that either of the Notification of Change have been filed with the Registrar of Companies as is required by section 201 of the Companies Act, (Cap 486), pursuant to which they are filed. There was no official receipt showing the amount and date of filing of those notifications of change. I shall however return to this subject later. I shall first consider the events of 15.09.2004.

On 15.09.2004, when this application was urged *inter partes*, the replying affidavit of the 2nd defendant Daniel Mutua Mutweia sworn and filed on 9.08.2004, was struck out and expunged from the record being incurably defective for failure to comply with the statutory requirements namely ss 34 and 35 (1) of the Advocates Act, (Cap 16). The consequences of this was that the respondent's advocate was given leave to submit only on law in response to the plaintiff's application. Mr Omboga, counsel for the applicant reiterated the grounds set out in his application that the Court should make orders compelling the 2nd defendant to transfer his shares in the plaintiff company as he had resigned as a director and shareholder thereof. Counsel told the Court that it has power to make such an order under section 100 of the Companies Act. Section 100 does not provide for and does not confer any such power upon the Court. The reference is quite misguided.

In response to this submission Mr Mativo counsel for the defendant invited the Court to look at the prayers in the plaint, and in particular paragraphs 5 – 9 which set out the plaintiff's complaints against the 2nd defendant:-

- (1) the plaintiff as General Manager of the 1st defendant, advised the plaintiff's customers that the plaintiff had changed its name to the 2nd defendant's name (paragraph 5),
- (2) the 2nd defendant has by such deception, fraud and misrepresentation, obtained, payments from the clients of the plaintiff and the particulars of fraud are set thereafter (para 6).
- (3) the plaintiff had by virtue of such deception, fraud and misrepresentation incurred huge financial losses, experienced a lot of inconveniences suffered loss and damage which had paralysed its operations (para 7),
- (4) using the information coming to him by virtue of being a former director, the 2nd defendant has manifestly acted improperly, in bad faith, and illegally but to the immense benefit of the 1st defendant and himself, (para 8).
- (5) The plaintiff's claim against the defendants "is for an order "restraining them from misleading confusing and interfering with the plaintiff's clients and/or further receiving payments on the pretext that the same is due to the plaintiff notwithstanding the alleged change of name. (para 9)

Mr Mativo, counsel for the defendants lastly drew the attention of the Court, to the prayers in the plaint following upon the allegations set out in the said paragraphs 5 – 9 and the prayers are these:-

- (a) a permanent injunction to restrain the defendants by themselves, their agents, servants and/or employees and/or whomsoever acting under their instructions, reversing, extending and/or interfering with contracts of service entered into between the plaintiff and its various clients pending the hearing and final determination of this suit,

(b) an order compelling the defendants to render accounts for monies fraudulently received from the plaintiff's clients as per contracts of service in force and a declaration that the plaintiff is entitled to compensation thereof,

(c) general damages and other relief the Court may grant.

Mativo, counsel for the defendants submitted that these being the plaintiff's prayers in the suit, the plaintiff was bound by them in accordance with the provisions of order VI rule 6 (1) of the Civil Procedure Rules which is to the effect that "no party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his suit in the same suit." This rule does not however affect the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative (order VI, rule 6 (2)). The situation here is quite different.

The plaintiff by his application has sought orders completely inconsistent with the prayers in his suit. Unless he applies to amend his pleadings, he is bound by them until so amended. Mr Mativo counsel for the defendant says, and I accept and agree with his submission, that the plaintiff is bound by his pleadings, he cannot raise new claims by way of an application. The Court will not allow him to do so. I find the plaintiff's application as incompetent and the same is struck out. I should stop here ordinarily, but I did say above that I would revert to the issue of Notification of Change of Directors or Secretaries or in their particulars.

The plaintiff prays in the application (which I have already found incompetent for the reasons stated), for an order compelling the 2nd defendant to transfer his share or shares to persons unknown, and that this be done before the Registrar of Companies. If such an order were to be given, or to become one of the functions of the Registrar of Companies, even for a small private company like the plaintiff, the Registrar would become company secretary for hundreds if not thousands of companies small or big, private or public. He could become a securities exchange competing with the Nairobi Stock Exchange in respect of listed companies. This is not the law, and no order of such kind would have been made if this were part of the plaintiff's suit.

Secondly a shareholder does not in law "resign" from membership of a company, he only ceases from being a member by selling and transferring his share or shares to a purchaser for value called a consideration. He will not be compelled to do so by the Court except in the enforcement of a valid contract. Thirdly the Court will also not order the Registrar of Companies to effect Changes of Directors of the plaintiff company. The Registrar of Companies is neither a shareholder nor a director of the plaintiff company. The duty of the said Registrar under s 201 of the Companies Act upon receipt of an appropriate fee is to receive and file away if in order, the Notification of Change of Directors or Secretaries or in their particulars. The Registrar of Companies does not effect any such change in the directorate of any company. If these prayers were contained in the pleadings I would have dismissed them for these reasons. In the upshot therefore the application is both incompetent for being contrary to the provisions of order VI rule 6(1) that is the plaintiff is bound by his pleadings and may alter them only by formal leave of court to amend if pleadings are both closed. He will not however do so by way of an application for orders completely inconsistent with his principal pleadings, namely the Plaint. The Court has no jurisdiction to grant such prayers. In the circumstances therefore, the plaintiff's application is hopelessly incurable, and must suffer the fate of such applications. It is dismissed with costs.

Dated and delivered at Nairobi this 30th day of September, 2004

A.EMUKULE

Ag. JUDGE