



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE NO. 1164 OF 2001

**GIBSON MACHARIA MUCUNU**

**& TWO OTHERS.....PLAINTIFF**

**VERSUS**

**STANLEY OMINDE KHAINGA &**

**ANOTHER.....DEFENDANT**

**RULING**

This is the plaintiffs application for orders that:

1. The Registrar of Companies be restrained from effecting changes in directorship of the company (2nd defendant) and / or registering new directors pending the hearing and determination of the suit.
2. Defendant be restrained from locking the plaintiffs out of the company premises and/or denying plaintiff free access to company's premises and / or interfering with plaintiff performance of their duties as directors of the company.
3. The first defendant be ordered to allow the plaintiffs access to accounts books and records of the company.

The 2nd defendant was incorporated on 6.11.2000. The company is running a maternity and Nursing Home at Naivasha. The directors and share holders of the company were as at 16.2.2001 as follows:

Stanley Ominde Khainga – 5600 shares

Kepha Ambunya Lubutsi – 900 shares

Wycliff Asiagi Ogega - 900 shares

Gibson macharia Muchunu – 1600 shares

The four were the only shareholders and directors.

Plaintiffs are three of the four directors/ shareholders.

The first defendant is one of the four directors/shareholders.

Plaintiff aver that on 28.6.2001 first defendant unilaterally and unlawfully effected and or caused change of directors of the company to be effected by filing a Notification of change of Directors to the effect that plaintiffs have ceased to be Directors. Plaintiffs further aver that no Annual or special General meeting had been convened for purposes of election of new directors. Plaintiffs further aver that first defendant has unlawfully and unilaterally introduced new directors namely:-

1. Albert Khainga
2. Raymond O. Mulindi
3. Anyasi Olusesa

The Reliefs sought in the plaint are

- (a) Registrar of Companies be restrained from registering new directors and / or effecting new changes in the directors of the company
- (b) Defendants be ordered to allow plaintiffs access to the premises accounts records and books of the company
- (c) A permanent order restraining defendants from interfering or in any way locking of its company and or appointing new directors to the company.

The first defendant says in the replying affidavit inter alia that:

- (i) The served a Notice dated 27.5.2001 convening a board meeting on 18.6.2001.
- (ii) Plaintiffs were notified of the meeting but failed to attend
- (iii) A meeting was held on 18.6.2001 and the board resolved that plaintiff should cease from being directors but remain ordinary shareholders
- (iv) The resolutions of the company were duly registered by registrar of Companies on 20.6.2001
- (v) Three new people acquired shares in the company and were appointed directors.

I have perused the documents annexed to the replying affidavit of the first defendant. The Notice of board meeting dated 27.5.2001 convening a meeting for 18.6.2001 is annexed. By minute No. 1 the plaintiffs were retired as directors. By Minutes no 2 three signatories to the bank account were appointed. It appears that an extraordinary General meeting of the members was held on 27.6.2001 as a special resolution is annexed. By that special resolution plaintiff ceased from being directors with effect from 28.6.2001 and Anyasi Olusesa, Albert Omusundi and Fredrick Aswani Shisia became directors and signatories to the bank accounts with effect from 21.5.2001. the Notice of change of Directors is annexed.

It shows that Mr. Anyasi Olusesa, Mr. Albert Omusundi and Mr. Fredrick Aswani Shisia became directors with effect from 21.5.2001. the Notification of change of Directors is dated 25.5.2001 Plaintiffs say that the meeting of 18.6.2001 was not held. There are contradictions in the documents annexed to the first defendants replying affidavit. The notification of change of Directors is dated 25.5.2001.

That was even before the notice dated 27.5.2001 was issued convening the meeting of 18.6.2001 which was to discuss change of directorship of the company. The meeting of 18.6.2001 removed plaintiffs as directors but did not appoint new directors. The special resolution of the meeting of 27.6.2001 appointed three new directors with effect from 21.5.2001. The documents prima facie show that plaintiffs were removed as directors and new directors appointed even before the notice dated 27.5.2001 convening the meeting was issued. Thus the removal of the plaintiffs as directors and the

appointment of new directors is prima facie ultra vires . section 185 (2) and section 185(3)of the Companies Act.

But that notwithstanding, is it just to grant orders sought in the application?. An order of injunction is a discretionary remedy. Court may or may not grant it. The second defendant is a private company and it is apparent that plaintiffs and 2nd defendant are fighting over the control of the company.

There are three other people allegedly appointed as directors and signatories to the Bank accounts. The company has in accordance with s. 204(4) of the companies Act delivered a Return Notification of change of Directors to the registrar of companies. The second defendant says that the return has been registered by the Registrar of Companies plaintiffs say that it has not been registered.

I do not know the true state of affairs but by the time plaintiffs filed this suit on 13.7.2001 they knew that Notification of change of Directors had been filed with the Registrar of companies. They aver so in paragraph 9 of the plaint. The first thing to note in this application is that the application seeks the same prayers sought in the plaint. So if the prayers sought in the interlocutory application are granted the whole suit will have been determined without a formal hearing.

Secondly, the applicant must show that the orders if granted will not be futile. They pray that the registrar of companies be restrained from effecting the changes in the directorship and / or registering new directors. But they have not shown that the Return on Notification of change of Directors has been registered.

Thirdly, prayers no 2 and 3 of the application are in effect prayers for mandatory injunction. Plaintiffs have not even attempted to satisfy the conditions for granting a mandatory injunction.

Fourthly, it is apparent that the three plaintiffs have de factos been removed as directors and three new directors de facto appointed. The three new directors have an interest in this suit.

Plaintiffs did not join them as defendants in this suit. Plaintiffs have not also sought any order to nullify the resolution to remove them as directors or to nullify the appointment of the three new directors So, the suit as framed is not likely to give plaintiffs any effectual remedy.

Lastly, If the orders sought in the application are granted they will have the effect of restoring plaintiffs to their former position as directors. That means that there will be seven directors. I do not know if the memorandum and Articles of Association provide for such number of directors. The three new directors cannot be removed without being given an opportunity to be heard. They are not parties in this suit. There is no prayer in the plaint for nullification of their appointments. The relationship between plaintiffs and first defendant is very acrimonious. It is not practically possible that the company will run smoothly if the plaintiffs are restored as directors to work with first defendant and with the three new directors.

In all the above circumstances it is not just to grant orders sought in the application.

I dismiss the application with costs in the cause.

**E. M. Githinji**

**JUDGE**

**29.11.2001**

Mr. Ngaa for Applicants present

Miss Khamasi holding brief for Miss Guserwa present