



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. 237 OF 2015

KOFINAF COMPANY LTD & ANOTHER.....1ST PLAINTIFF
ZEEBO INVESTMENTS LIMITED2ND PLAINTIFF

VERSUS

NAHASHON NGIGE NYAGAH 1ST DEFENDANT
JOCKTAN MBOE MWANJALA2ND DEFENDANT
VIOLINE NAKHA NYONGESA3RD DEFENDANT
JARED OMONDI OBOR4TH DEFENDANT
MARY ANGELA ACHIENG ODHIAMBO5TH DEFENDANT
JANE WAMBUI GACOKA.....6TH DEFENDANT
SAMUEL OJORO MALAKI.....7TH DEFENDANT
ROSEMARY WANJIRU MUGO.....8TH DEFENDANT
ZUHRAH ATIENO AWENDO9TH DEFENDANT
CATHERINE WANJA KIRIAMBURI10TH DEFENDANT
NAILA NENGONDO IBRAHIM.....11TH DEFENDANT
LUCAS AKUNGA OMARIBA.....12TH DEFENDANT
SOLOMON KIOKO KIVUVA13TH DEFENDANT

NELSON HAVI14TH DEFENDANT
OSUNDWA SAKWA15TH DEFENDANT
GUNGA PROPERTIES LTD.....16TH DEFENDANT
THE REGISTRAR OF COMPANIES.....17TH DEFENDANT

RULING

1. The Application that this Court is asked to determine typifies the battle for the control of the Affairs, Management and Business of Gunga Properties Ltd(**the 16th Defendant and hereinafter referred to as Gunga**).It is the Notice of Motion of 26thOctober 2015 which seeks the following two prayers;-

2. The Notice of Appointment of Advocates dated 19th May, 2015 filed by Mbugua, Atudo & Macharia Advocates on behalf of the 16th Defendant be struck out.

3. The Order made herein on 15th May, 2015 be and is hereby varied and/or discharged and set aside.

Following an agreement of Counsel representing parties herein the question of Representation is to be dealt with first.

2. On 15th May 2015,Kofinaf Company Limited (Kofinaf)presented a lengthy Plaintiff running into some 79 paragraphs seeking various reliefs against some 17 Defendants. For purposes of the matter at hand, the Court need only highlight some aspects of the claim.

3. It is alleged by Kofinaf and Zeebo Investments Limited (Zeebo) and this is common ground, that Zeebo is the majority Shareholder of Gunga with 993 Shares out of 1000 authorized and issued Shares. It is also uncontested that at the time of Incorporation of Gunga, the 2nd to 8th Defendants were registered as Shareholders of the Company holding one (1) Share each. Common ground as well is that the 2nd to 8th Defendants transferred their Shares to the 9th , 10th and 11th Defendants and resigned as Directors of Gunga. The 9th , 10th and 11th Defendants assert that they are valid Shareholders of Gunga.

4. One of the controversies raised in the Plaintiff is whether or not the aforesaid share transfers were lawful. Connected with that is the legitimacy of the appointment of the new Directors

5. Put in its simplest form, the claim by Kofinaf and Zeebo is that Gunga is a special purpose vehicle with its shareholding and Directorship held by nominees in trust for Kofinaf. Zeebo having been incorporated as the beneficial owner of Gunga and in turn holding Shares for the benefit of Kofinaf. That the 1st and 12th Defendants were privy to these arrangements and undertook the task of identifying individuals who would be nominee Shareholders and Directors. Enter the 2nd to 8th defendants.

6. At the heart of the dispute is land reference 11285(original number 6772/1. The assertion of Kofinaf and Zeebo is that as a special purpose vehicle Gunga was to hold this high value property measuring about 1005 acres in trust for Kofinaf. And in continuance of that arrangement the property was transferred to Gunga by an instrument dated 4thJuly 2013.

7. The allegation by Kofinaf and Zeebo is that in breach of the trust arrangement,the 1st Defendant, using his influence and control over the 2ndto8thDefendants, procured the transfer of the Shares held by them to the 9th,10th and 11th Defendants. The 13th,14th and 15th Defendants are accused of using their professional standing and qualifications to facilitate the said transfers. Kofinaf and Zeebo maintain that

the said transfers are fraudulent.

8. The apprehension of the Plaintiffs is that the Defendants intend to take over the property now registered in the name of Gunga and to transfer it to third parties. In the Plaint, that apprehension is described as real and present. Also, that there is a further intention to alter the structure of the Shareholding and Directorship of Gunga thereby permanently depriving Kofinaf and Zeebo of their beneficial ownership.

9. Ultimately the prayers sought are:-

i. A declaration that the trust property, L.R. No.11285 was reserved in terms of the resolution of the Board of Directors of the 1st Plaintiff dated 11th March 2010 as one of the properties to be sold and the proceeds applied towards reduction of the loan obligation of US\$62,500.000.00;

ii. A declaration that the 1st Defendant is the directing mind and will and has influence and control over the 2nd – 11th Defendants for the purpose of effecting the scheme for the takeover of the 16th Defendant and the beneficial ownership of the trust property;

iii. A declaration that the 2nd - 8th Defendant hold one share each in the 16th Defendant in trust for the Plaintiffs;

iv. A declaration that the 1st Defendant is unfit and unsuitable to continue holding office as a Director and the Chairman of the 1st Plaintiff;

v. A declaration that the purported transfer of shares from the 2nd – 8th Defendants to the 9th – 11th Defendants was fraudulent and accordingly null and void;

vi. A declaration that the 9th, 10th, and 11th Defendants have no authority to act for or in relation to any of the affairs of the 16th Defendant;

vii. An Order expunging from the records of the 16th Defendant held by the 17th Defendant, Forms No.213 and 203A presented by the 15th Defendant;

viii. A permanent Injunction restraining the 9th – 11th Defendants from issuing any notices, convening any meetings, meeting or in any way purporting to conduct any business in relation to the affairs of the 16th Defendant;

ix. A permanent Injunction restraining the 17th Defendant from accepting any resolutions issued by the 9th – 11th Defendants in relation to the 16th Defendant;

x. A permanent Injunction restraining the 13th Defendant from purporting to act as the Company Secretary of the 15th Defendant;

xi. A permanent Injunction be issued restraining the 14th Defendants from acting as Advocates or in any other capacity in relation to the affairs of the 16th Defendant;

xii. A permanent injunction be issued restraining the 1st – 15th Defendants whether by themselves, their servants, agents, employees or assigns or otherwise from removing, transferring, disposing or charging in any manner or dealing with all that property known as L.R No.11285;

xiii. Damages for Fraud;

xiv. Exemplary damages;

xv. Costs of this suit;

xvi. Any such other or further relief as this Honourable Court may deem fit to grant.

10) Avoiding more detail than is necessary for now, the Defendants take a position that there was no trust in favor of Kofinaf and Zeebo by the 2nd to 8th Defendants. The nominee arrangement is refuted. The 2nd to 8th Defendants assert that they hold the Shares as of Legal Right and the transfer to the 9th, 10th and 11th Defendants did not require the authority or sanction of Kofinaf and Zeebo.

11) In respect to the property, Gunga contends that it was sold and transferred to it for valuable consideration pursuant to an agreement for sale dated 4th July 2013. Consequently, Gunga holds the property as absolute owner and not in trust for Kofinaf and Zeebo. In any event it is stated, a claim for trust would be null and void and therefore unenforceable in view of the provisions of section 6(2) of the Land Control Act. The property being Agricultural land.

12) The Notice of Appointment which is sought to be impeached was filed by the firm of Mbugwa, Atudo and Macharia Advocates on 20th May 2015. The firm declared that it was appointed to act by Gunga in this litigation. The grounds and reasons raised in support of the impeachment are on the face of the Application and the Affidavit in support sworn by Naila Nengondo Ibrahim on 26th October 2015. It is asserted that Gunga did not authorize the filing of the Notice of Appointment and that Kofinaf and Zeebo had, and have, no legal right to determine the Company Secretary and or Advocates for Gunga. The appointment is seen as step to procure the compromise of the suit to the detriment of Gunga.

13) Mr. Kamau Wa Mbugwa an Advocate and partner in the firm of Mbugwa, Atudo and Macharia Advocates swore an Affidavit in opposition. It was sworn on 8th March 2016. Mr. Kamau deponed that the Notice was filed pursuant to instructions received by the firm, initially, conveyed orally by a Mr. Robert James Reid and later by a written Company Resolution by Zeebo. Mr. Reid is said to have held a power of attorney to sign Court pleadings on behalf of Zeebo and Gunga. The Resolution by Zeebo also set out the following;

(i) That the above matter be investigated and remedial action be taken.

(ii) That the appointment of Messers, Ochieng, Onyango, Kibet & Ohaga Advocates to represent the Company in the above matters be and is hereby approved.

(iii) That the appointment of Messers Mbugwa, Atudo & Macharia Advocates to represent Gunga Properties Limited in the above matters be and is hereby approved;

(iv) That Havi & Company Advocates shall have no right and authority to represent the companies.

14) Kofinaf opposes the Application. In a lengthy Affidavit sworn on 24th February 2016, Stephen Armstrong Jennings sets out Kofinaf's view of the dispute. That history reiterates and elaborates the contents of the Complaint that I have abridged earlier in this decision. The position of Kofinaf is unequivocal! Zeebo is the beneficial owner of Gunga and duly exercised its legal right when it appointed the firm of Mbugwa, Atudo and Macharia to represent Gunga.

15) Against this short background and arguments made by counsel, the court sees the following as issues to be resolved;

a) Whether, in the circumstances of this case, Zeebo could properly and lawfully appoint counsel to represent Gunga in the proceedings.

b) If the answer to (a) above is in the affirmative, whether the firm of Mbugwa Atudo and Macharia were duly appointed in the manner required by law.

The Court does not intend to rehash the arguments made by Counsel. Instead, the Submissions will be discussed as the Court makes its rendition. It is trusted nevertheless that the fervor with which the arguments were made will not be lost.

16) At outset it needs to be noted that the contention raised by Mr. Busaidy for the Plaintiffs that the appointment of Havi and Co. to represent Gunga was made in contempt of the Court Order of 15th May 2015 may not pose a serious challenge to the Application. The point pressed by Counsel was that the firm needed to be barred from arguing the matter. However, the Application is also presented on behalf of the 9th to 11th Defendants and so even if that the Court was to uphold that argument in regard to Gunga, the Application will survive the objection in so far as it is also an Application by three other Defendants. The Court must however revisit that issue in another context.

17) It is avowed by Counsel for both sides that the dispute herein is essentially about the control of the Management, Business and Affairs of Gunga. Joined to the hip is the question whether the property registered in the name of Gunga is held in trust for Kofinaf. Take for example when Mr. Mbugua depones;

5. "The Plaintiffs claim the right of ownership over the 16th Defendant and its assets having incorporated the Company and purchased its assets which were held in trust by individuals introduced to the Plaintiffs by the 1st Defendant who was at the time the Chairman of the 1st Plaintiff's Board of Directors.

6. The beneficial owners of the 16th Defendant contend that the 1st to 11th Defendants acting in concert with the 12th, 14th and 15th Defendant have, in breach of the terms of declarations of trust executed by the 2nd to 8th Defendants, inclusive, conspired to defraud the Plaintiffs of their shareholding in the 16th Defendant so as to ultimately seize control and ownership of the 16th Defendant's parcel of land situated in Ruiru identified as Land Reference No.11285 which comprises one thousand and five (1005) acres (less road reserve of 8 acres) or thereabouts".

Indeed that characterization of the dispute is borne out by the Plaintiff itself. The nature of the dispute will turn out to be pivotal in the resolution of the matter at hand.

18. It is not in dispute that the impugned appointment of Mbugwa Atudo and Macharia Advocates was made or ratified in a Resolution of the meeting of Zeebo held on 29th May 2015. Whether that Resolution could lawfully support the Notice filed earlier on 20th May 2015 need not be decided now. Agreed however is that Zeebo holds 993 out of 1000 issued shares of Gunga. Contested is whether the 2nd to 8th Defendants held or still hold those Shares merely as nominees for Kofinaf. Also contested is whether those Shares were lawfully transferred to the 9th, 10th and 11th Defendants. The imperative is that Zeebo is by a long way the majority Shareholder of Gunga.

19. That notwithstanding, Mr. Havi argues that Zeebo cannot use its dominant position to usurp the powers of the Directors and appoint Counsel. Counsel drew the attention of Court to Halsbury's laws of England 5th Edition paragraphs 302;

"302. As regards litigation by an incorporated company, where management powers are vested generally in the board of directors, it is the directors who have authority to act for the Company. In the absence of any provision to the contrary in the articles of association, the majority of the members of a company are not entitled to decide whether an action in the company's name should be begun or allowed to proceed. The secretary' of a company cannot institute proceedings in its name in the absence of express authority to do so; but proceedings begun without proper authority may subsequently be ratified".

Also cited to support this proposition was the Decision in NrbMilimaniCommercial HCC No.524 of 2004 Affordable Homes Africa Ltd v Ian Henderson and 2 others.

20. Mr. Macharia was of a different view. He asked the Court to bear in mind that Gunga was simply a special purpose vehicle that was owned by the Plaintiffs. Further the Defendants had sought to disrupt that arrangement by use of fraudulent device and that the allegations of fraud were not spurious. In this regard the Court was asked to pay heed to the remarks of Gikonyo J. in a related case of HCC No.320 of 2015 (Kofinaf Company Ltd & Another vs.Nahason Ngige Nyagah)There the Judge observed;

“On consideration of the pleadings as couched and without probing for any extrinsic evidence, does the Amended Plaintiff disclose a cause of action with some chances of success? Or can the Amended Plaintiff herein be said to be one which is beyond redemption such that it cannot even be cured by any amount of amendments?The 16th, 17th and 18th Defendants argued that they acted as advocates and agents of disclosed principal and so they cannot be joined in a suit against the disclosed principal. They have stated the true position of the law except in each case the facts must support the said inference of the law. One thing that is coming out clearly is that, this action is based on alleged fraud and collusion among the 16th, 17th and 18th Defendants to defraud the plaintiffs from beneficial ownership of the 19th Defendant through alleged fraudulent scheme or design hatched by the 17th Defendant and executed by him, and through the 16th and 18th Defendants; wherein they registered transfer of shares thereby altering the register of members of the company to the detriment of the plaintiffs. The particulars of the fraud have been specifically stated in the amended plaintiff at paragraph 79 showing the basis of those allegations and the nexus among the parties herein. The way I understand the law is that an agent may be sued personally for fraud he has committed. Fraud bears a criminal characteristic and will result into personal liability once it is proved. I do not therefore think it would be astute move to lay as law that an agent will go unpunished for fraud he has committed because he did so on instructions by the principal. There is no such thing as instructions to commit fraud lest we should catapult ourselves back to the dark days of ‘instruction from above’.

21. That argument found support in the submissions by Mr. Busaidy that the minority shareholders had denied the majority of control and affairs of Gunga.

22. In view of those unhappy circumstances, from the standpoint of Kofinaf and Zeebo, he Court was asked to find that it is not only the Directors who could appoint Counsel. That in determining the vexed issue the Court should lift the corporate veil. For this proposition the Court was referred to some English cases;

In Atlas Maritime vs. Avalon Maritime No. 1, [1991]4 AII ER 769, Neill LJ.held as follows;

“There are case where, notwithstanding the principle of Salomon v. Salomon Co. Ltd [1897] AC 22, [1895-9] AII ER Re 33, the corporate veil’ between two companies can be pierced so that one company is to be regarded as the alter ego of the other. But this is not such a case, as I have already demonstrated when dealing with the question of agency. Nevertheless in the exercise of a discretion in relation to injunctive relief ‘the eye of equity’ (see Jones v Lipman [1962] 1 AII ER 442 at 445, [1962] 1 WLR 832 at 836 per Russell J) can, I think, look behind the corporate veil in order to do justice. This approach was recognized by Danckwerts LJ in Merchandise Transport Ltd v British Transport Commission [1961] 3 AII ER 495 at 518, [1962] 2 QB 173 at 206, where he said:

‘...where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as al legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance’.

It is to be noted that in Adams v Cape Industries plc [1991] 1 AII ER 929 at 1024, [1990] Ch 433 at 542 Slade LJ accepted this approach as being correct in an appropriate case”.

His Lordship made reference to the decision in Adams and Others vs.Cape Industries plc and

Another[1991] 1 All ER 929, also cited by the Respondents herein.

23. It was argued that the appointment of that firm was necessary because Mr. Havi had obtained confidential information as to the strategy and structure of the transaction that would be undertaken by Kofinaf and used that information to instigate the fraud complained of. The Court understood that submission to be that Mr. Havi and his firm could not be trusted to represent the best interests of Gunga. The Court was to give regard to the following passage in the Decision in Pender vs. Lushington[1877]vi.Ch.D.70;

“In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights or property are entitled to exercise them, whatever their motives may be for such exercise- that is as regards a Court of Law as distinguished from a court of morality or conscience, if such a court exists”.

24. Article 91 of the Articles of Association of Gunga provides;

“The business of the Company shall be managed by the Directors who may pay all expenses incurred in promoting and registering the Company, and may exercise all such powers of the Company as are not, by the Act or by these Articles, required to be exercised by the Company in general meeting, and the exercise of the said powers shall be subject also to the control and regulation of any general meeting of the Company, but no resolution of the Company in general meeting shall invalidate any prior act of the Directors which would have been valid if such resolution had not been passed”.

That article vests the Management of Gunga in the Board of Directors. Where, like here, the powers of Management are generally vested in the Board of Directors, it would be the Directors who have the authority to appoint the Advocates for the Company in litigation (see Halsbury's *supra* at paragraph 302). That finds support in this holding in Affordable Homes(*supra*);

“With regard to the powers and duties of its board of directors, article 94 of the plaintiff's articles of association is in the following words-

‘The business of the Company shall be managed by the Board which ...may exercise all such powers of the Company as are not by the Act or by these Articles required to be exercised by the company in general meeting...’

This article is substantially identical with article 80 of Table A in the first schedule of the Act and will therefore receive the same judicial interpretation as the said article 80. From QUIN & AXTENS LTD V. SALMON [1909] AC 442 HL and subsequent cases, it seems to be well settled that where the formula in article 80 is employed, the general meeting cannot interfere with a decision of the board of directors unless they are acting contrary to the provisions of the Companies Act or the Company's Articles of Association. This view was adopted in SHAW & SONS (SALFORD) LTD V. SHAW [1935] 2 K. B.113, C.A in which Lord Justice Greer reiterated, at page 134-

‘..if powers of management are vested in the directors, they and they alone can exercise these powers’.

Since article 94 of the Plaintiff's Articles of Association is in *pari material* with article 80 of Table A, it follows that the power to manage the Plaintiff Company's affairs is vested in its board of directors and they alone should authorize the commencement of court proceedings in the company's name”

25. Do the circumstances of this case warrant a deviation from this conventional position?

26. The Court proceeds to answer this question on the footing that the nature of the claim by Kofinaf and Zeebo is faithfully set out in paragraphs 5 and 6 of Mr. Kamau's Affidavit of 8th March 2016;

"5. The Plaintiffs claim the right of ownership over the 16th Defendant and its assets having incorporated the company and purchased its assets which were held in trust by individuals introduced to the Plaintiffs by the 1st Defendant who was at the time the Chairman of the 1st Plaintiff's Board of Directors".

6. The beneficial owners of the 16th Defendant contend that the 1st to 11th Defendants acting in concert with the 12th, 14th and 15th Defendant have, in breach of the terms of declarations of trust executed by the 2nd to 8th Defendants, inclusive, conspired to defraud the Plaintiffs of their shareholding in the 16th Defendant so as to ultimately seize control and ownership of the 16th Defendant's parcel of land situated in Ruiru identified as Land Reference No. 11285 which comprises one thousand and five (1005) acres (less road reserve of 8 acres) or thereabouts".

27. In the Complaint, the wrong doing and Acts of fraud are attributed to the 1st to 15th Defendants. This is best illustrated by paragraph 75 thereof. Just as Kofinaf and Zeebo, Gunga is depicted as a victim of these Acts. In a sense therefore the joinder of Gunga to these proceedings was inevitable as it is the subject of the alleged misfeasance, while the true protagonists are the Plaintiffs on the one hand and the Defendants (save for Gunga) on the other hand.

28. Kofinaf and Zeebo have sought the intervention of the Court to reassert their control and ownership of Gunga and by extension ownership of LR No. 11285. This action is a plea to Court to reverse certain acts of the 1st to 15th Defendants and to make Orders and Declarations that will assure and protect the supposed rights of Kofinaf and Zeebo. The prayers in the Complaint speak to this;

i. A declaration that the trust property, L.R. No. 11285 was reserved in terms of the resolution of the Board of Directors of the 1st Plaintiff dated 11th March 2010 as one of the properties to be sold and the proceeds applied towards reduction of the loan obligation of US\$62,500,000.00;

ii. A declaration that the 1st Defendant is the directing mind and will and has influence and control over the 2nd – 11th Defendants for the purpose of effecting the scheme for the takeover of the 16th Defendant and the beneficial ownership of the trust property;

iii. A declaration that the 2nd - 8th Defendant hold one share each in the 16th Defendant in trust for the Plaintiffs;

iv. A declaration that the 1st Defendant is unfit and unsuitable to continue holding office as a Director and the Chairman of the 1st Plaintiff;

v. A declaration that the purported transfer of shares from the 2nd – 8th Defendants to the 9th – 11th Defendants was fraudulent and accordingly null and void;

vi. A declaration that the 9th, 10th, and 11th Defendants have no authority to act for or in relation to any of the affairs of the 16th Defendant;

vii. An Order expunging from the records of the 16th Defendant held by the 17th Defendant, Forms No. 213 and 203A presented by the 15th Defendant;

viii. A permanent Injunction restraining the 9th – 11th Defendants from issuing any notices, convening any meetings, meeting or in any way purporting to conduct any business in relation to the affairs of the 16th Defendant;

- ix. A permanent Injunction restraining the 17th Defendant from accepting any resolutions issued by the 9th – 11th Defendants in relation to the 16th Defendant;
- x. A permanent Injunction restraining the 13th Defendant from purporting to act as the Company Secretary of the 15th Defendant;
- xi. A permanent Injunction be issued restraining the 14th Defendants from acting as Advocates or in any other capacity in relation to the affairs of the 16th Defendant;
- xii. A permanent injunction be issued restraining the 1st – 15th Defendants whether by themselves, their servants, agents, employees or assigns or otherwise from removing, transferring, disposing or charging in any manner or dealing with all that property known as L.R No.11285;
- xiii. Damages for Fraud;
- xiv. Exemplary damages;
- xv. Costs of this suit;
- xvi. Any such other or further relief as this Honourable Court may deem fit to grant.

29. Given the above, should the Court endorse the Appointment of Mbugua, Atudo and Macharia on the strength of the argument that;

“.....the Appointment of the firm of Mbugua, Atudo and Macharia Advocates was in order to protect the 2nd Plaintiffs holding, ownership and control of the 16th defendant”(paragraph 17 of the Affidavit of Stephen Armstrong Jennings)

Put differently should Zeebo, in deference to its majority Shareholding in Gunga and avowed interest in the prized property, be permitted to direct and manage the conduct of Gungas’ defence?

30. The question of the Management, Conduct and Control of Gunga and the property registered in its name has been submitted to the Court and is the heart of these proceedings. As a substantive matter this is one of the issues this court will have to determine. It must be that, notwithstanding their dominance, Kofinaf and Zeebo, on their own, could not adequately deal with these issues hence the filing of these proceedings. Having done so, should they be permitted to control the Defence of Gunga or should they not allow the litigation to play out and the bigger issue of the overall management, conduct and control of Gunga to be decided? It would be untoward, I think, for a Plaintiff to mount a suit and then cross the floor to the other side and control the manner in which the Defence is conducted. And this would be true even where the Defendant is a notional Defendant. It would be ever so true here because by coming to court, Kofinaf and Zeebo have presented their affliction to the right forum for resolution. Confronted with not dissimilar circumstances, in **Kuri Tea Factory Limited vs. Kenya Tea Development Agency Limited**[2013]eKLR, Judge Mabeya remarked,

“It is very clear that the intention of the 5th Defendant in passing the said resolution was that the conduct of the present suit be taken over by the firm of J.K Kibicho & Company and thereupon terminate the present proceedings. Is it possible that a named Defendant in a proceeding can in any circumstances, mutate itself to be a Plaintiff for purposes of terminating those proceedings? To my mind, there is much to it that meets the eye. A court of law will tread very carefully to allow such a step more so there is a rival claim that the persons purporting to undertake such steps are doing so irregularly.

In any event, whether or not the 5th Defendant was a holding company of the Plaintiff, I hold the view that it was not open to it to circumvent the orders of the court of 22nd July, 2010. To my mind

all the issues regarding the alleged majority shareholding with power to control the Plaintiff is an issue of Defence but not one to be used to take over the conduct of and terminate proceedings. While there were no records from the Registrar of Companies produced to support the allegations put forward by the 5th Defendant, the Plaintiff produced the Memorandum and Articles which supports the contention of the Plaintiff as to the original shareholding and directorship of the Plaintiff”.

31. In reaching this decision the court must also be concerned that Kofinaf and Zeebo, who are alleging a fraudulent takeover of Gunga, are not handicapped because the case of Gunga is in the hands of counsel appointed and directed by the supposed transgressors. The Court takes the view that the devise that is the Civil Procedure Act and the Rules thereunder offers sufficient tools and safeguards to enable the Plaintiffs to conduct their case effectively and to protect their interest in Gunga. What of reliefs and processes like Injunctions, Interrogatories, Discovery and Inspection? Indeed on 15th May 2015, Kofinaf and Zeebo deployed one of the tools and obtained the following Orders to protect their claim herein:-

- a) A temporary Injunction restraining the 9th -11th and 13th from issuing Notices convening any meetings, meeting or in any manner conduct any business in relation to the affairs of the 16th Respondent.
- b) Any resolution made in contravention of this Order shall not be received by the 17th Respondent.
- c) Any action by the 14th and 10th Respondents in relation to the business or assets of the 16th Respondent is hereby restrained.
- d) I order also that the suit property LR NO.11285 shall not be alienated or sold, or disposed of or charged in any manner be dealt with by any of the Respondents or their servants or employees or agents.
- e) These Orders are issued ex parte and so shall be in force for 14 days.
- f) Hearing on 28.10.15.

Kofinaf and Zeebo need not control the conduct of Gunga’s case to advance their own! Granted, Zeebo is the majority shareholder in Gunga and is distressed by the manner in which the affairs of Gunga are being conducted. However, it has not been demonstrated, in specific terms, how the substantive and procedural law fails or is inadequate to protect its interests in the interim as its grievance is heard and determined. The circumstances that present themselves herein may not be well suited for taking the drastic step of lifting the corporate veil.

32. And it has to be said that if Kofinaf and Zeebo were of the view that the corporate veil ought to have been lifted to allow Zeebo to appoint Counsel for Gunga then they should have moved the Court for appropriate Orders. It was improper for Kofinaf and Zeebo to first act and then seek the sanction of Court.

33. Two other matters are called to my attention. The first is in respect to the Orders granted by Justice Gikonyo on 15th May 2015 and alluded to above. The orders do not brook of any ambiguity and their effect was fully understood by Gunga. Naila Nengondo Ibrahim says as follows of the orders;

- a. The 16th Defendant is not able to call and convene any meetings of its Board of Directors;
- b. The 16th Defendant is not able to call and convene any meeting of its shareholders;
- c. The 16th Defendant is not able to appoint auditors to carry out an audit of its annual financial statements;

d. The 16th Defendant is not able to file its annual returns or any returns;

e. The 16th Defendant is not able to open and operate any bank accounts;

f. The 16th Defendant cannot instruct its current or any other Company Secretary or Advocates now that the current Company Secretary and Advocates are restrained by the Order from acting in the interests of the Company.

g. The 1st and 2nd Plaintiffs have relied upon the said Order to bar the 16th Defendant's Advocates from acting in other matters concerning the said 16th Defendant; and

h. The 16th Defendant is not able to meet its financial and other obligations.

A position taken by the Respondents to the Application before Court was that the appointment of Havi & Co. Advocates to act for Gunga was an act of disobedience of the Court Order by some of the Defendants.

34. Given the uncompromising nature of the obligation to obey a Court order (see many decisions including **Hadkinson –vs- Hadkinson** [1952] 2 All ER 567) and the ever present duty of the Court to protect and uphold its authority, the Court was at first minded to deal with that issue right away. But on further reflection it chooses not to.

35. This is because if the Court were to consider the matter as raised and reaches a conclusion that there was disobedience of the Court Order, then it may also conclude that the disobedience was an act of contempt of Court. Grave consequences may flow from such a finding. My sense of justice is that such findings should be made only where the alleged disobedience has been brought up for the Court's consideration as a substantive matter. This gives an opportunity to the supposed wrongdoer to confront the accusation with the full knowledge of the possible outcome. It also gives opportunity to Court, where contempt is alleged, to consider the matter on the Standard of proof required by law (**Mutitika –vs- Baharini Farm Ltd** [1985] eKLR. I will leave that matter for another day.

36. The second issue is the propriety of Havi & Co. to act for certain Defendants herein including Gunga. The court notes that the question as to whether Nelson Havi and any other partners or associates of Messrs Havi & Co. Advocates should be disqualified and prohibited from so acting is the subject of the Notice of Motion dated 29th February 2016 and presented by Kofinaf and Zeebo. The motion is yet to be heard. Obvious as it may be, it needs to be stated that my holding that Kofinaf and Zeebo, cannot appoint counsel to act for Gunga herein does not foreclose them from questioning the propriety of members of Havi & Company to act for Gunga.

37. Ultimately, the Court allows prayer 2 of the Notice of Motion of 26th October 2015 with costs.

Dated, Signed and Delivered in Court at Nairobi this 4th day of November, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Busaidy for Ahmed Nassir for Plaintiffs

Havi for 1st – 16th Defendants

Omugunda for Macharia for 16th Defendant

Change for 14th & 15th Defendants

Alex - Court clerk