



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

ELC NO. 55 OF 2013

1. **WILL M. OMIDO**
2. **JANET A. OMIDO** **PLAINTIFFS**

VERSUS

TAWAI LIMITED **DEFENDANT**

RULING

The interested parties Philip Indiaka Keya and Martin Nyongesa brought a notice of motion dated 18th November, 2013 seeking an order staying proceedings herein until their application to be enjoined to this suit is heard and determined. They also sought costs for the application.

The two interested parties are directors of Tawai Limited, the defendant in this case. On 8/5/2013 some two plaintiffs namely Will Omido and his wife Janet Omido filed a suit against Tawai Limited (the company) seeking specific performance of a sale agreement dated 18/12/2012.

The interested parties contend that that they have been adversely mentioned in the proceedings in this case and that a consent has been entered into between some directors of the company and the plaintiffs which consent they intend to contest once they are allowed to be enjoined as parties to this suit. They contend that the directors who executed the consent had no authority of the company to do so.

The first plaintiff herein Will Omido had given his evidence in chief to conclusion. When the defendant's lawyer rose to cross examine him, Patrick Makokha a director of the company and chairman protested that the company had not instructed the advocate to act for the company. The hearing was then adjourned to enable the issue of representation to be sorted out. The issue of representation was never sorted out.

On 28/10/2013 the Plaintiffs Advocate Mr Victor Olewe and two directors of the company namely Patrick Wafula and Fred Juma chairman and treasurer respectively signed a consent in which the suit was compromised in terms indicated in the consent. This is the consent which prompted the interested parties to move to court for the orders mentioned hereinabove.

The two interested parties are directors of the company. The two are the ones who signed the sale agreement dated 18/12/2012 on behalf of the company. This is the agreement the basis upon which the suit was compromised. The interested parties contend that they have been adversely mentioned in the proceedings and that is why they want to be allowed to come into this suit. They have not stated how they were adversely mentioned.

The two applicants are not contesting signing of the agreement dated 18/12/2012. The first

plaintiff in his testimony testified that he paid some Kshs.750,000/= to one of the interested parties Philip Indiaka. Perhaps this is why the applicants contend that they have been adversely mentioned in the proceedings.

The applicant's application is opposed by the respondents who contend that the defendant is a limited liability company where the applicants are directors and as such, the two cannot be allowed to litigate outside the company. The issue which arises for determination is whether the two applicants should be allowed into this suit as parties. It is apparent that there are serious differences amongst the directors of the company. The applicants herein were the ones who executed the sale agreement of 18/12/2012 in which the plaintiffs are said to have bought 55 acres from the company.

The applicants can not again turn round and contest the consent which was entered compromising the suit. It is clear that the two applicants are merely seeking to contest the consent because the same was entered into by their rival directors. There is no honesty on the part of the applicants.⁰¹ What the applicants are seeking to do is to stall what the other directors have done. The court can not be drawn into internal wrangles of the company.

The two applicants are not the right persons to contest the consent. They are part of the problems affecting the company. One of the applicants is said to have received 750,000/= into his personal account purportedly for onward transmission to the company. It is not clear whether this amount reached the company.

The other directors of the company namely Patrick Makokha and Fred Juma are equally to blame. They compromised the suit when the plaintiff clearly testified that he never paid even a single cent to the company for the purchase of the 55 acres of land. It is clear that the plaintiff having realized that his case against the company could not stand, he convinced some directors to enter into a consent compromising the suit. How could a plaintiff buying property belonging to a company pay money to individuals and then go ahead to commit the company? There is something seriously wrong with the running of the company. Certain individuals are out to fleece the company and defraud the members.

The consent herein can be challenged by any aggrieved party such as a member but not the applicants who are clearly out to fight their co-directors. It is for this reason that I find that this application is not made in good faith. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 13th day of February, 2013.

E. OBAGA,

JUDGE

COURT: Ruling signed in court in absence of parties who were aware of today's date. Court clerk – Kassachoon.

E. OBAGA,

JUDGE

13/2/2014