



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 662 OF 1998

AHMED RASHID JIBRIL.....PLAINTIFF

VERSUS

EAST AFRICAN TELEVISION

NETWORK LTD.....1ST DEFENDANT

SAM KRUSCHEV SHOLLEI.....2ND DEFENDANT

GLADYS BOSS SHOLLEI.....3RD DEFENDANT

AFRICA BROADCASTING LIMITED.....4TH DEFENDANT

WILFRED DAVID KIBORO.....5TH DEFENDANT

RICHARD CHARLES HENRY.....6TH DEFENDANT

ATTORNEY GENERAL.....7TH DEFENDANT

R U L I N G

The facts of this case are sufficiently set out in the pleadings but a brief mention of the salient points need to be mentioned at this stage.

The first defendant East African Televisions Network Limited is a limited liability Company incorporated on 7th August, 1996. There were two subscribers, the plaintiff Ahmed Rashid Jibril and the second defendant Sam Kruscher Shollei. Both took one share each and were Directors from the inception.

It is the plaintiffs case that on 17th March, 1998 he learnt through the media that his partner the second defendant had sold majority shares to the 4th defendant Africa Broadcasting Limited. The plaintiff contends that he was never aware of such a sale either as a shareholder or a Director.

Following the said sale, documents were presented to the Registrar of Companies to effect the necessary changes but were returned for further clarification and amendments. The plaintiff says he was not aware of that until he wrote to the Registrar. He then came to court and obtained an exparte order.

The plaintiff in his plaint dated and filed on 20th March , 1998 has challenged the whole transaction which led to the presentation or lodging of the forms with the registrar of companies to change the particulars. Alongside the said plaint he filed an application by way of Chamber Summons for Injunctory orders. Upon that application the Exparte order aforesaid was obtained. For avoidance of doubt, the said

order restrained the 1st to 6th defendants from relodging with the Registrar of Companies any returns or document relating to the 1st defendant, East African Televisions Network and in particular the Return of Allotment Form 213 dated 6th March, 1998, the Annual Return Form 1 dated 6th March 1998, the notification of change of Directors Form 203A dated 6th March, 1998 and the Notice of situation of registered office Form 201 dated 18th March, 1998. The 1st defendant was also restrained from conducting or holding any meeting of any kind whatsoever until the hearing of this application inter partes. In the course of the hearing of the application the court acceded to the plaintiff's request to maintain the status quo by retaining the interim orders in place.

Several affidavits have been filed together with annexures in support of the application and in opposition thereto. Both learned counsel have also made their very able submissions for which I commend them.

At the centre of this dispute are two documents attributed to the plaintiff. The first is dated 6th January, 1998 said to be a letter written by the plaintiff to the first defendant. In the said letter the plaintiff is alleged to have resigned as a Director of the Company with immediate effect and confirmed he had no claims against the company of whatever nature. He also confirmed that there was no outstanding agreement or arrangement under which the company has or could have any obligation to him.

The second document is a form headed "TRANSFER OF SHARE OR STOCK". This is said to have been executed by the plaintiff on 6th March, 1998 before J.K. Kibet advocate whereby the plaintiff is said to have transferred his one ordinary share in the first defendant to Gladys Boss Shollei at a consideration of a sum of Kshs.24,444.45.

Armed with these two vital documents, the second defendant Mr Sam Kruschev Shollei convened a meeting of Directors of the first defendant on 6th March, 1998 where Mrs Gladys Boss Shollei was admitted to the membership of the company. It was then resolved to transfer the plaintiff's share to Mrs Gladys Boss Shollei which the meeting approved. The resignation of the plaintiff as a Director was tabled and accepted; 998 shares were allotted to the second defendant in satisfaction of the obligation of the company to repay him a loan of Kshs. 909,366/- and it was further resolved that 899 shares be sold to Africa Broadcasting Limited and one(1) share to Mr Wilfred David Kiboro. In the same meeting M/s Wilfred David Kiboro and Richard Charles Henry were appointed to the Board. The resignation of Mrs Gladys Boss Shollei as Director was then tabled and accepted with regret. Mr James Charles Kinyua was appointed secretary with immediate effect and instructed to make requisite returns to the Registrar of companies. Another meeting of the new board followed soon thereafter.

It is the plaintiff's case that he never wrote the alleged letter of resignation and neither did he sign or execute the same. It is not his document, it is false, a fabrication and a forgery. He has in fact lodged a complaint with the police so that they may investigate. In respect of the transfer of the shares, he admits that sometime in 1997 he did sign a blank transfer of shares which he handed over to the second defendant to retain or hold in custody. He was then about to proceed for an overseas leave. The second defendant then went to him with the blank transfer for signature so that the company could keep it in safe custody. The plaintiff believed that the second defendant was acting as an honest and loyal employee of Transnational Bank Limited for whom they subscribed as nominees in the first defendant. The only entries in the said blank transfer at the time he signed it were his name at the top, the name of the company and his name again in the first space reserved for witness. There was no consideration disclosed or shown, there was no transfer, no date no other signature or attestation. The sale of his one share was never discussed with the second defendant to his wife or any other person. He never discussed, negotiated or contracted with the 3rd defendant to sell his share in the company to her. He never received any consideration of Kshs. 24,444.45 and he never appeared before Mr J.K. Kibet advocate to execute the transfer. Many other matters have been raised but which do not concern us at this stage.

All the averments of the plaintiff have been countered by the second defendant. He says he invited the plaintiff to the company and took up one share as his nominee. The first defendant was not formed at the request of Transnational Bank Limited and the said Bank has no interest in the first defendant.

The second defendant says that in mid October 1997 he informed the plaintiff that he was considering

selling the shares in the company or inviting a large investor to take up shares. This is what led the plaintiff to tender his resignation as a director and signing the blank share transfer form. He did so as his nominee and to give him a free hand in the negotiations. He (the second defendant) dealt with the affairs of the first defendant on his own behalf and not as a nominee of the bank or anyone else.

With the material before me I am now able to address the orders sought. I bear in mind that as at this stage I only have affidavit evidence that has not been tested under cross-examination.

The record confirms that it was submitted on behalf of the plaintiff that the main dispute the plaintiff has is with his Co-director. He has nothing against the 4th defendant or the other parties. Probably they were not aware of the dispute.

Both the plaintiff and the second defendant vis-a-vis the first defendant are separate legal entities. I have seen nothing in the pleadings or the affidavits that incriminate adversely the position of the first defendant. What then is the cause of action shown by the plaintiff against the first defendant? Save that the first defendant is the substratum of the dispute, the said dispute is squarely between the two individuals.

It has been suggested severally that the first defendant was incorporated at the instance of Transnational Bank Limited, whereby both the plaintiff and the second defendant were nominees of the Bank. This is the position taken by the Bank through its Chairman Mr Sio who has sworn an affidavit in these proceedings and the plaintiff.

The court has not been shown any trust deed or declaration of trust executed by the bank on the one hand and the plaintiff and the second defendant on the other to confirm that relationship. The first defendant does not appear as one of the subsidiary companies of Transnational Bank Limited in the returns before me. Further, when the plaintiff learnt that the second defendant had allotted himself shares in the first defendant, he filed his own returns with the Registrar of Companies, Form 203A of which shows one William Kipchumba Sambu was appointed as a Director in the first defendant with effect from 6th March, 1998. If the plaintiff was a nominee of the Bank there is no reason why he did not involve the bank in this transaction. In my view the logical conclusion is that the bank has no interest in the first defendant.

In the pleadings there are no allegations of forgery against the 3rd defendant Mrs Gladys Boss Shollei. Other than that she acquired the plaintiff's interest in the disputed transfer form, I see no other role she played. The attestation of the form has been contested very strenuously. However, the easiest step to take would have been to cause an affidavit to be sworn by the attesting advocate. This the plaintiff elected not to do. Further, the signing of the share certificate per se, is an overt act on the part of the plaintiff of his own intention and as the contents of a document talk for themselves, I am not able to infer any other meaning other than the said contents. Prima facie therefore, he executed the transfer for the purposes contained therein.

There is no evidence that the 4th defendant had notice of any dispute between the shareholders of the first defendant. The fourth defendant is a purchaser for value without notice and notwithstanding that the consideration has not been disclosed, the law protects its position. Other than that the 5th defendant was allotted one share and that he and the 6th defendant were invited into the new board, I see no other reason why they should be included in the arena of conflict between the plaintiff and the second defendant.

The plaintiff's case against the second defendant is however different. I need not go over the same facts that appear in the early part of this ruling. Suffice is to say that, no particulars of fraud and/or forgery have been given in the pleadings.

The sequence of events that took place between the time the plaintiff is said to have resigned and signed the share transfer form up to the time the majority shares were transferred to the fourth defendant and my observations about the possible ownership of the first defendant would tend to point or show, prima facie, that there is some element of truth in what the second defendant has stated.

Assuming without deciding that the letter of resignation and the transfer of shares were executed by the plaintiff, the second defendant complied with Article 22 of the Articles of Association of the first defendant. A reading of the minutes of 6th March, 1998 clearly shows that. If as submitted on behalf of the plaintiff, there were any discrepancies in the minutes, those did not invalidate the transactions. The second defendant must have had in mind the issue of quorum. To be able to transact the business of the company he brought in Mrs. Gladys Boss Shollei to bridge the gap. I see nothing wrong in law for the second defendant to have taken that step.

The remedies that the plaintiff has sought are equitable. Equity demands that he who comes to court must come with clean hands. The plaintiff has admitted that he also lodged separate returns with the Registrar of Companies in respect of the first defendant. While he succeeded to block, by an *ex parte* order, the re-lodging of the defendant's returns, his are still with the Registrar's office. I note he has admitted as much in his affidavit but that does not make his position any better.

I am of the view that the case presented by the plaintiff has not at this stage passed the test of a *prima facie* case with a probability of success. On the other hand, if the plaintiff is eventually able to establish his case against the second defendant or any other defendant, his remedy will be in damages. The value of one ordinary share in the first defendant can be calculated with mathematical precision. In that case no irreparable loss can be said shall befall the plaintiff.

I know that all parties are equal before the law but I must observe that, the financial integrity of any of the defendant, herein has not been impugned. The plaintiff can therefore adequately be compensated by an award of damages.

I am not in any doubt about my findings hereinabove but, even if I were, the balance of convenience would still tilt in favour of the defendants. The first defendant is a limited liability company whose operations may be compromised by a restraining order. Except the second defendant, the plaintiff has little to say, if anything, against the rest of the defendants. In that case the balance of convenience shall favour continuity.

One last matter. The first defendant has sued the Minister for Information and Broadcasting and also the Kenya Posts and Telecommunications Corporation for cancelling the licences and withholding the airwaves respectively. The plaintiff has been accused of supporting the Minister and the Corporation and so it is submitted, his real intention is to kill the company, the first defendant. There has been a mild rejoinder from the plaintiff in that regard but since these are matters that are subject to litigation in another court, I say no more.

In the end I have come to the conclusion that the plaintiff's application must fail. Accordingly the same is dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of June, 1998

A. MBOGHOLI MSAGHA

JUDGE