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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 450 OF 1999**

**MOHAMED ELTAFF AND 3 OTHERS.....PLAINTIFF**

**-VERSUS**

**DREAM CAMP KENYA LIMITED.....DEFENDANT**

**JUDGEMENT**

**Background:**

The background to this suit is that the 2nd Plaintiff, SAGA SAFARIS LIMITED sold to the Defendant the business known as BIG SIMBA CAMP together with the remainder of the lease over all premises known as Title CIS MARA/TALEK/154. The parties signed a Memorandum of Understanding of the same date in which the 3rd Plaintiff was appointed as an agent of the Defendant in Kenya and Sweden. It was the Plaintiff case that the Defendant in breach of the Memorandum of Understanding the Defendant terminated those Agencies and sought to compel the 1st plaintiff to resign as a Director of the Defendant Company. The first Plaintiff claims in addition that the Defendant Company intends to compulsorily acquire his shares and inherit the company.

**Evidence:**

The 1st Plaintiff Mohamed Eltaff gave evidence apparently on behalf of all the plaintiffs in which he narrated how the second plaintiff sold the business BIG SIMBA CAMP to the Defendant Company. He produced the Agreement and Memorandum of understanding dated 19.12.1997.

According to the negotiations and the agreement, the Defendant were to buy 90% of the Company with 10% remaining with Saga Safaris Limited, the 2nd Plaintiff. He said the subscribers to the new company were himself, Gejke and Forshauq. Saga Safaris were not to contribute any money towards the purchase. According to Mr. Eltaff, problems started when he noticed that the provisions of the Agreement and Memorandum of Understanding were not being implemented.

In cross-examination the Plaintiff admitted that none of the things he complained of actually happened, for example he was not removed as a Director or as a Shareholder. He said that one share was given to him for what he did for the Company.

For the Defence, Mr. Gejke and Kristopher Zachrisson and Granli gave evidence.

According to Gejke, they were to pay for 90% of the Company and Mr. Raguz though 1st Plaintiff would retain 10% only. As to the one share to Eltaff, he said that Mr. Eltaff had told them that they should not worry about it as the allocation of the shares would be regularized later. There was no intention of giving a third of the company to Mr. Eltaff. According to these witnesses, problem started when Kristopher Zachirsson resigned from Mr. Raguz's Company to join the Defendant Company. He said they cancelled the agencies when the relationship went sour and when they found that the agencies

were being used against them.

Out of the evidence and the pleadings the court is asked to determine the following issues:

- (1) Whether the 1st Defendant, Mohamed Eltaff holds 1/3 of the share holdings in Dream Camp.
- (2) Whether there was a breach of the Memorandum of Understanding entered into by the parties.
- (3) Whether the Defendant is illegally holding the tents belonging to the Plaintiffs.
- (4) Whether the Defendants are entitled to the prayers sought in the counter claim.

As to whether the 1st Defendant holds one 1/3 of the shares in Dream Camp, the Plaintiff's evidence was that he holds 1/3 of the shares in the Defendant Company by virtue of being one of the three signatories as a subscriber to the Memorandum and Articles of the Association of the Company formed. This would be in addition to the 10% of the shares, which were to be retained by the vendor under the Agreement for Sale.

It is common ground between the parties that there was an Agreement between the parties for sale of the BIG SIMBA CAMP on Title No. CIS MARA/TALEK 154. The details of the Sale are contained in this Agreement for Sale and paragraph 13 of the Agreement provides:

"The purchaser shall apply for all the relevant/necessary licences necessary for carrying on of the said business on the date of completion and the vendor will if necessary assist the purchaser in obtaining the said licences:

- (a) The vendor will retain 10% shares in the said business.
- (b) The vendor will not be required to contribute if any further capital is injected in the company or business.....
- (c) Anything and any other injection by the purchaser will not dilute the vendors 10% holding in the company or business.
- (d) The purchase shall retain first option to purchase the vendors 10% holding in the company business.

It is to be noted that in this agreement for sale there is no provision dealing with the incorporation of the company which was incorporated on the 18.12.1997 in the name of Dream Kenya Limited. It is this company which proceeded to purchase the 90% shares of the BIG SIMBA CAMP from SAGA SAFARIS LIMITED. The provisions of this paragraph 13 are clear and emphatic about the retention of 10% of the Shares by the vendor. The paragraph is to be interpreted to mean what it says as there is no ambiguity. The paragraph makes no mention for further allocation of shares whether one or many to the vendor. It is to be taken that the agreement for sale forms, the basis of the transaction which followed the negotiations between the parties and which culminated in the purchase of the camp. As from the Agreement for Sale, the only shares which were to be retained by the vendor are the 10%. Sub paragraphs (b) and (c) of paragraph 13 of the Agreement emphasise that injection of more capital in the company would not alter the rights of the vendor to hold the 10%.

These two sub paragraphs appear to have been meant to underline the importance the parties attached to the need to retain the 10% shares by the vendor.

On incorporation of the company three persons Mohamed Eltaff, Jonas Gejke and Forshauq signed the Articles of Association, which provide:

“We the several persons whose names addresses and descriptions are subscribed are desirous of being formed into a company in pursuance of this Memorandum of Association and we respectively agree to take the number of shares in the capital of the company set opposite our respective names”

Each of them signed for one share.

This is the usual standard form to be found in all Memorandum and Articles of Association of Companies. The Plaintiffs evidence leading to the signing of the Articles by the subscribers was by Mr. Jonas Gejke who said that Mr. Eltaff should have allocated himself in the Company the 10% as per the Agreement of Sale. Instead he allocated himself 1/3 of the Shares and gave the explanation that this is normal for the purposes of incorporating the company. Mr. Gejke who was a foreigner to this country accepted this explanation and added in his evidence that since the incorporation of this company, Mr. Eltaff never claimed ownership of 1/3 of the shares, until the dispute started.

On his part, Mr. Eltaff says that by signing this Memorandum he acquired 1/3 share of the company in addition to the 10%.

From the Agreement for Sale the intention of the parties is quite clear and that is the plaintiff would retain 10% of the shares of the company so that the other partners take the rest of the shares being 90%.

There was no other evidence to show deviation from this objective.

The Agreement for sale forming the basis of the sale would have to be altered to express contra intention to those expressed in paragraph 13 of the Agreement for Sale. It is true that the Memorandum and Articles of Association as they stand signed by the three subscribers gives Mr. Eltaff 1/3 of the shares. But the Memorandum and Articles can not be read in isolation of the main Contract, which is the Agreement for Sale. If it had been the intention of the parties to alter the share holding after the signing of the Agreement, they would have amended the Agreement. The shifting of the intention of the parties which expressly stipulated that Mr. Eltaff the vendor would retain 10% of the shares to that he takes 1/3 of the company would be a major change in the over all objective of the parties. Reading the Paragraph 13 of the Agreement for Sale it is to be noted that there is emphasis that the vendor is not to pay any more money into the company (see sub paragraphs (b) and (c)).

Reading the Agreement for Sale and the provisions of the Memorandum and Articles of Association, I have no difficult in coming to the conclusion that there was no agreement between the parties to add to the share holding of the parties from 10% to the vendor to any other percentage. I accept the evidence of Gijeke when he says that Mr. Eltaff told him that the signing of the Articles as subscribers was purely for the purposes of incorporation of the company. Firstly, the witness struck me as being honest and forthright and totally simple and uncomplicated and secondly, on balance of probability I will accept the explanation that in the absence of specific agreement altering the agreement for sale the signing of the articles was meant for incorporating the company and not to increase Mr. Eltaff's Shareholding.

I also accept his evidence that Mr. Eltaff told him that the purposes of signing the Articles was for enabling the incorporation of the Company and not to increase the shareholding beyond the 10%. I therefore find and hold that the signing of the Articles did not alter the Agreement between the parties and that the Plaintiffs' Shareholding in the company will remain 10%. The 1/3 shareholding by the

plaintiff as now shown by the Memorandum and Articles means that the plaintiff will hold these extra shares in trust for the Defendants.

The other issue is whether there was a breach of the Memorandum of Understanding. This memorandum of understanding is the document signed by the parties after signing the Agreement for Sale. According to the plaintiffs, the purpose of this agreement was to give the 3rd, and 4th Plaintiff's exclusive agencies so that the business which had been built earlier is not lost. As agents for the company the plaintiffs Tour Africa Safaris Limited would be the agent for the purchases in Kenya and Saga Travel and Safaris the agent in Stockholm. The Agencies operated for about a year but were revoked when the relationship between the first plaintiff and the other parties deteriorated.

Indeed the spirit behind the Memorandum of Understanding and these Agencies appear to have been to maintain the good will which existed between the parties during the negotiations for sale of the business.

It is now necessary to examine this Memorandum of Understanding with this background. This is the document signed by the parties dated 19.12.97, Mr. Jonas Gejke in his evidence said that they had been advised by the lawyers that matters concerning agencies will be better placed in the Memorandum of Understanding rather than in the main Agreement for Sale which had been signed by the parties earlier on. According to him what was to be contained in the Memorandum was an expression of goodwill and was not intended to be binding. The document was signed by the parties (although it was pointed out that the execution and sealing of the document by the second plaintiff was not proper in that it was not signed by the number of persons who should have signed, only one director signed it).

According to the plaintiffs this document represented a binding contract between the parties whose contents were to be observed.

Upon the evidence and the documents produced, it is evident that soon after signing the agreement for sale the parties agreed on the agencies as found in the Memorandum of Understanding. The document seems to be concerned about the Agencies, which were to go to the plaintiffs. These agencies were duly given to the plaintiffs as per the Memorandum. When the relationship between the parties deteriorated it was difficult to see how the agencies could continue given the relationship that the 1st Plaintiff was a director in the Defendant Company. There was also the question of conflict of interest, which is quite manifest on the part of the 1st Plaintiff in relation to the operations of the Defendant Company.

Taking these factors into account I would take the Memorandum to mean what it reads and that is a document to express the relationship between the parties and as an expression of goodwill between the parties. I would not construe this document to mean an agreement. For one if it was the intention of the parties that it be an agreement the parties who had the services of a lawyer would have expressly said so or would have had the documents so worded as to bring out this intention. Secondly, the contents of this document could have been very conveniently put in the agreement for sale, which was signed by the parties. No, the Memorandum could not have been meant to be a binding contract by the parties. Just as it says the document recorded the understanding of the parties at the time and is a typical document usually signed by businessmen all over the world when they want to express a loose understanding with the intention of reducing it to a binding contract.

With regard to this document in relation to the operation of the Defendant Company it was not possible for the Defendants to maintain the agencies in the face of the deteriorating relationship between them, a fact admitted by the parties. Under the terms of the Memorandum, the 4th plaintiff was to be an

agent during the takeover period; to that extend the agency had served its purpose. I do not read in the document the rights to exclusiveness in these agencies but having found that the document was not meant to be a binding contract it becomes unnecessary to go into the question whether there was a breach of the contract affecting the agencies.

It is however noteworthy that Mr. Eltaff the first plaintiff said in evidence that soon after the agencies were revoked and upon request by the plaintiffs new agencies were granted with the contract rates as contained in J.G. 3 which appears to confirm this. This would also seem to underline the understanding between the parties of the nature of these agencies and that they were not meant to be part of the firm agreement between the parties envisaged in the agreement for sale.

Besides the Memorandum not being a binding document I still would have found it difficult to accept the Plaintiffs explanation on these agencies. It is difficult to imagine how they could have worked when the Defendant is in competition for the same kind of business with the 1st Plaintiff who is strutting over these companies breathing fire on the Defendant. The Defendant was within its rights as principals to discontinue the Agencies.

In coming to this conclusion, I had taken into consideration the evidence of Jonas Gejke and Peter Granli when they told the court that the Plaintiff Companies had taken steps to damage the business interests of the Defendant Company.

With the prevailing hostile atmosphere between the parties it would be inevitable that the agencies would have to be discontinued

The 1st Plaintiff complained that the Defendant's Directors were forcing him to resign as a director of the Company. This complaint cannot form a basis for an action as it is presented. Under the Company's Articles of Association and the Company's Act, the Company can remove any of its directors by Ordinary Resolution. In any case the law provides remedies against harassment of minority shareholders by the majority in a company. Equally, matters of running the affairs of the company are internal and will depend on the agreement between the parties. The Agreement for Sale which as I said earlier forms the basis of the relationship between the parties does not address the issue of what role the first plaintiff was to play in the day to day running of the Company.

The plaintiff in this case did not establish a case that he was denied any information he is entitled to from the Company. To the contrary in his evidence it turned out that the Plaintiff did not specifically ask for any information and was refused. He accepted that he had been invited by the Defendants to go and inspect the company documents, which he did not by the time the matter went to court.

As a director and shareholder in the company the plaintiff would be entitled to the information which is normally given to the shareholders of a company who are not engaged in the day to day running of the company.

I accepted the evidence of Mr. Granli that it was not the intention of the investors that Mr. Eltaff would be involved in the day-to-day management of the company. Given his position in the other companies, which are competitors, his involvement in the management of Dream Camp Kenya Ltd. would have created an unattainable situation because of the conflict of interest, which would result.

The other issue is that of the canvas which the Plaintiffs say that the Defendants have confiscated and have refused to hand over to the plaintiffs. The defendants accepted in their evidence that they have in their possession four small two man nylon tents and eight sleeping bags and not ten. They said they

were ready to hand them over to the Defendants.

This is clearly a matter blown out of proportion by the deteriorated relationship between the parties. The Defendants should simply hand over these tents to plaintiffs forthwith. I find that the issue of the tents does not in any way prejudice the other claims, as there was no evidence showing how the tents issue affected the other claims in the suit. In their prayers the plaintiffs are asking for a mandatory injunction to compel the defendant to hand over the said tents and further prays for damages for conversion by the defendant. Since the Defendant has accepted that these tents belongs to the plaintiffs it was not proper that they should have kept them and the plaintiffs are within their rights to ask for compensation for having been denied their use for the period the plaintiffs demanded them to the time they are returned. I do not find there is any conversion of these items since the defendants say they are ready to return the items.

The Defendant will therefore return the tents and will pay the plaintiff damages for having kept the tents from the time they were demanded. Such damages are to be ascertained.

The defendant in their evidence denied that they attempted to forcibly acquire the 1st plaintiff's shares in the Defendant Company.

Mr. Eltaff conceded that no steps were taken by the defendant to forcibly acquire his shares in the defendant. The only evidence to this effect was that in the Board of Directors Meeting of 10th February, 1999, the Directors attempted to pass a Resolution to force the 1st plaintiff to sell his interest. This claim was denied by Mr. Gejke and Zachirsson in their evidence and said that they merely made an offer to purchase the plaintiffs' shares at market value. I did not find any evidence that the directors were to forcibly acquire these shares.

There is nothing wrong with other directors making an offer to the plaintiff to purchase his shares in the Defendant Company. It is up to the plaintiff to accept such offer or to refuse it. I see no need to make an order for a declaration that it is unlawful for the defendant to acquire the shares of the plaintiff forcefully as prayed for in prayers D and E of that plaint.

In prayer F the plaintiff is asking for an injunction to restrain the defendant from disposing the business known as Big Simba.

The Defendant denied that there was any such intention to dispose of the business. The plaintiffs in asking for this remedy were acting more on speculation as there was no evidence that the defendant were about to dispose off the property. In any event this being a property of the company it can not be disposed of without a resolution to that effect by the Board of Directors.

An injunction cannot therefore issue on the basis of the evidence, which does not show that the act complained of is likely to happen. The plaintiffs in prayer C of the plaint are asking for an order for specific performance to compel the defendant to transfer. 10% of the shares in the company to the 2nd Plaintiff in accordance with the agreement for sale dated 19.12.97.

This remedy will be available to the plaintiffs if the defendant had refused to transfer the shares amounting to 10% to the plaintiffs.

What the defendant is saying is that it acknowledges the plaintiffs rights over 10% shares but does not recognize the extra shares which the 1st plaintiff claims to have acquired by virtue of signing the Memorandum and Articles of Association. Having found that the plaintiffs is entitled to 10% of the shares

only, it is the 1st plaintiff who should transfer the other shares so that the plaintiffs remain with the 10% in accordance with the Sale Agreement.

The Defendant's defence contains a counter claim in which they are asking for orders:

(a) To compel the 1st plaintiff to surrender the 23 1/3% shareholding to the defendants.

(b) To compel the plaintiff to offer his shares for sale to the other existing shareholders. (c) To restrain the plaintiff from interfering in the business of the defendants.

It is quite clear that the relationship between the parties has deteriorated to the extent that it may not be possible for the plaintiff to work with the Defendant again. The situation is made worse by the fact that the plaintiffs are running competing business to that of the defendant. I noted that the Agreement for sale contains an arbitration clause. This dispute would have been best handled through arbitration rather than litigation. For some reasons litigation was preferred to Arbitration. I may however observe that where parties have chosen to resolve their dispute through Arbitration, the courts will endeavor to give effect to the wish of the parties. The trend world over is to construe any such agreement in favour of arbitration particularly if the dispute involves parties of different nationalities. It is possible that if this matter had been handled through arbitration the business relationship between the parties could have been saved.

The best way out of the existing situation which was made worse by this litigation is that the 1st plaintiff sells his shareholding of 10% to the other existing shareholders of the company at a fair market value to be determined by an arbitrator to be agreed by the parties and if not to be appointed by the court. The Plaintiff would then have to relinquish his Directorship in the Defendant Company. The existing shareholders will by an ordinary resolution reduce the 1st plaintiff shareholding to 10% of the issued shares.

In conclusion I find that the Plaintiff evidence does not support the claims described in the plaint with the exception of the issue of the tents. I further find that the 1st plaintiff is largely to blame for the situation which developed leading to this litigation. The Defendants evidence supported their claim in the counter claim. The plaintiff shall bear 2/3 of the costs of this suit and the defendants 1/3.

**Delivered and dated this            day of July, 2000.**

**KASANGA MULWA**

**JUDGE**



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