



REPUBLIC OF KENYA



KENYA LAW
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**Omuka v Macharia (Civil Suit E206 of 2020)
[2022] KEHC 13716 (KLR) (Civ) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 13716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E206 OF 2020
DO CHEPKWONY, J**

JULY 26, 2022

BETWEEN

KEVIN ABRAHAM OMOKA APPLICANT

AND

OSBORNE MACHARIA RESPONDENT

RULING

1. Vide an application dated 3rd December, 2021, the Plaintiff/ Applicant is seeking for orders that;
 - a. Spent;
 - b. Spent;
 - c. A temporary injunction be issued restraining the Defendant/ Respondent by himself, his servants, agents and/or employees or whoever is acting on his behalf and/or under his mandate and/or instructions from showcasing, exhibiting, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, disposing off or in any manner whatsoever making profits from all projects worked in collaboration with the Plaintiff/Applicant;
 - d. Spent;
 - e. A mandatory order of injunction be issued compelling the Defendant/Respondent to deliver to the Plaintiff/Respondent high resolution images of the all the projects he worked on in collaboration with the Applicant to date pending the hearing and determination of this suit;
 - f. A declaration be issued that all the projects worked on by the Plaintiff/Applicant in collaboration with the Defendant/ Respondent are jointly owned;



- g. A declaration be issued that the Plaintiff/Applicant has 30% rights from the proceeds made from the sale of all works of collaboration carried out with the Defendant/Respondent;
 - h. An order directing the Defendant/Respondent to render accounts of all sale he has made from the projects worked in collaboration with Plaintiff/Applicant and how much each project sold;
 - i. An order directing the Defendant/Respondent to hand over to the Plaintiff/Applicant his email domain which he is currently handling;
 - j. This honorable court be pleased to grant leave to the Plaintiff/Applicant to serve the pleadings in the instant suit via substituted service of electronic mail and WhatsApp; and,
 - k. Costs of the Application be awarded to the Plaintiff/Applicant.
2. The Application is premised on the grounds that the Plaintiff/ Applicant has been in collaboration with the Defendant/Respondent on a range of projects since the year, 2014, performing the mandate of stylist/costume designer whereas the Respondent was the Photographer. That the Respondent occasionally when interviewed has acknowledged the existence of the alleged collaboration including published articles regarding the same. That the said collaboration gave rise to an agreement between the Applicant and the Respondent for revenue sharing in the ratio of 30:70 respectively on a due date declared by the Respondent. It is contended that the parties herein have had a good working relationship until recently when the Applicant discovered that the Respondent was making sales without transparency and without remitting the 30% revenue of the proceeds made from the collaboration.
 3. It is the Applicant's case that in collaboration with the Defendant they have worked jointly on a total of 18 projects, made 81 images which they co-owned in the aim of mutually benefiting economically. The Applicant contends further that jointly with the Respondent they recently engaged in an exhibition on the projects among them being the series labeled 'Nyanye' and 'Magadi' but the Respondent listed them as a 'solo show' in a bid to solely benefit from the collaboration work in total disregard of the co-ownership agreement. That in furtherance of the breach, the Defendant/Respondent has deliberately refused, ignored and neglected requests to send the Plaintiff/Applicant the high definition pictures of all the 81 images they have jointly worked on for his portfolio and has also in bad faith refused to hand over the email domain in relation to the said pictures. In the Applicant's view, the Respondent is attempting to economically sabotage him on the business, and he is further apprehensive that he stands exposed to imminent risk of loss of his life's work and investment and be left destitute unless this court does urgently intervene to grant the orders sought. Those grounds are replicated in the Plaintiff's/Applicant's affidavit sworn in support of the application.
 4. The Application is opposed vide the Replying Affidavit of Osborne Macharia Kinuthia, the Respondent herein, dated 3rd February, 2021. It is deposed therein that he has known the Applicant for the last 7 years as a professional colleague and has engaged him on project basis for provision of designer/costume services. He also deposes that he has paid the Applicant all his dues just like the other service providers he has previously engaged and all along the Applicant has been aware that the Respondent as a photographer, holds the exclusive right to reproduce, publish or sale his original work of authorship. He states that those rights are guaranteed and protected by *the Constitution* of Kenya, 2010 which provides for support, promotion and protection of intellectual property rights by the State.
 5. The Respondent denies any engagement with the Applicant in any works of joint authorship or any collaborative agreement for revenue sharing at the rate of 30% from the sale of the Plaintiff's works as alleged by the Applicant. It is further deposed that the temporary injunctive orders sought are wide



in range and would deny the Respondent his fundamental rights to freedom of artistic creativity as guaranteed in *the Constitution* of Kenya, 2010. For that reason the Respondent is apprehensive that granting of the declarations sought as to joint ownership of the projects which reserves the subject matter of the suit will render nugatory any determination this court may make upon full trial. In the Respondent's view, the prayers sought are frivolous and imaginary in the sense that the Applicant has neither disclosed nor demonstrated the nature of the collaboration agreement nor has he shown the basis of the 30% rights of claim to the works done. Further, that the prayer for the Respondent's accounts to be rendered is untenable in the absence of a partnership deed or agreement same as the prayer to hand over the Respondent's email domain. In the end, the Respondent opines that the instant Application has not met the threshold for grant of injunctive orders sought even to the least, the Applicant has not established a prima facie case capable of success. He craves for the dismissal of this Application.

Analysis and Determination

6. Having laid out each party's perspective on the dispute at hand, I wish to start by pointing out that the question on leave for substituted service has been overtaken by events. The ground for that prayer was that the Respondent resides in Canada, outside this court's jurisdiction. However, the Firm of Nzamba Kitonga, Advocates LLP entered appearance for the Respondent and has represented the Respondent throughout these proceedings. Therefore, in my view, the only issue for determination is whether the Applicant has met the threshold for grant of the prayers sought.
7. The first issue is whether a case for grant of injunction, has been made. The guiding principles applicable in regard to granting injunctions were well settled in the case of *Giella -vs- Cassman Brown & Co.* (1973) EA, where the court stated:-

“To succeed, the applicant must establish a prima facie case with a probability of success, that irreparable loss which cannot be adequately compensated by award of damages would be suffered and if in doubt, the court will decide on a balance of convenience”
8. Further, the Court of Appeal in the case of *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, sheds light on what can be stated to be a prima facie case. It observes thus:-

“.....a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
9. The Applicant in this case alleges that he was engaged by the Respondent and that he was to be paid a 30% commission on every sale. The Respondent on the other hand admits the existence of the engagement but denies the existence of any agreement allocating the Applicant a 30% commission on every sale as alleged. At this stage, it is for the court to determine whether there was any agreement and if so, what were the terms of the said agreement and whether there is breach of the same.
10. It is also to be remembered that a contractual relation is not necessarily proven by adducing a duly executed contract, as the court can infer such relationship from the conduct, and even correspondences of the parties, so far as the essential elements of a contract are met.
11. The email correspondences between the Plaintiff/Applicant and the Respondent attached to the application pinpoint the fact that they had agreed to work in collaboration in their artistic works and the email sent by the Defendant on 18th June, 2020 to the Plaintiff/Applicant narrows it down to the



conclusion that the Respondent was paying the Plaintiff 30% on the sales made for every work done. At no point has the Respondent shown that such agreement or representation was ever varied on the basis of paying the Applicant dues just like the other service providers as he alleges. This court is therefore convinced that the Plaintiff has established a prima facie case that he is entitled to 30% of the proceeds made on every sale on the projects jointly worked on with the Defendant.

12. Through the annexures, the Plaintiff/ Applicant has further established ownership of an mail domain currently being handled by the Respondent whereas the Respondent has not shown the basis of his continued handling of the said email domain. That being the case, I am also persuaded that if a temporary injunction is not granted, the Plaintiff stands to lose, not only the right to claim on the collaborative works but also the economic gain derived from those works. As such the Plaintiff/ Applicant has met the hurdle for establishing that he stands to suffer irreparable loss in the event the injunction sought is not granted. For that reason, I find prayer No.3 of the application merited and the same is hereby allowed.
13. On whether the court should grant the orders of Mandatory Injunctions sought, it must be remembered that Mandatory Injunctions are granted sparingly by courts unless in clearest of cases where the facts in issue are not disputed. Further, the Court of Appeal in the case of *Lucy Wangui Gachara -vs- Minudi Okemba Lore* [2015] eKLR had the following to say, and which position I entirely adopt:-

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.”

14. The superior court went on to cite with approval the English case of *Locabail International Finance Ltd. -vs- Agroexport* [1986] 1 ALL E.R. 901, where it was held that;

“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.”

15. Similarly, the Court of Appeal in the case of *Kenya Breweries -vs- Washington O Okeyo* [2002] eKLR, laid the test to be applied in granting mandatory injunction. The court stated thus:-

“The test whether to grant a mandatory injunction or not is correctly stated in Vol 24 Halsbury’s Laws of England 4th Edn. Para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff...a mandatory injunction will be granted on an interlocutory application.”

Also in *locabail International Finance Ltd v Agroexport and others* [1986] 1 ALL ER 901 at pg.901 it was stated:- “A mandatory injunction ought not to be granted on an interlocutory



application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”(emphasis added)

16. It thus follows that a mandatory injunction fully determines the rights of the parties before the court and is one, which if granted would amount to the grant of major part of the relief claimed in the action. Such an application should be approached with great circumspect and caution, and as buttressed in the Court of Appeal cases I have cited above, such relief ought to be granted only in a clear case lest the suit is finalized at the interlocutory stage and there would be nothing left to be heard and determined.
17. In the present case, I have read through both the Plaint dated 3rd December, 2020 and the application at hand and confirmed that the prayers No.5, 6 and 7 in the Application herein are similar to those sought in the Plaint and also have the effect of determining the suit substantially. Having considered the grounds adduced in support and opposition of granting those prayers, I am not convinced that this is a clear case which needs no further evidence in granting the prayers sought. What is in dispute here is whether the Plaintiff is entitled to declarations for first ownership of the collaborative work and the rights emanating therefrom. This can only be allowed upon further evidence being adduced. For these reasons, this court finds that the Plaintiff/Applicant has not demonstrated a case that meets the threshold for the grant of mandatory injunction as laid down in law. Consequently, prayers No.5, 6 and 7 of the application are hereby declined.
18. In prayer No.8, the Applicant is asking this court to order the Respondent to provide all accounts of work done in collaboration with him and how much each project sold. In my view these accounts are crucial to the proper determination of the suit. In the event this court finds that the Applicant is entitled to the 30% commission on every sale, these accounts will help in determining how much the Applicant should be paid. This prayer is allowed.
19. In the upshot, the Application partially succeeds and the same is allowed in terms of prayers No.3, 8, and 9 with no orders as to costs.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED A NAIROBI THIS 26TH DAY OF JULY, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Chitechi holding brief for Mr. Makanda for Plaintiff

M/S Kimani holding brief for Mr. Weche for Defendant

Court Assistant - Kevin

