



**Geoggrey Oluoch Yogo and Erick Otieno Ojuro T/A Otieno, Yogo Ojuro
& Company Advocates v Dominion Farms Limited & another (Civil
Suit 2 of 2020) [2022] KEHC 12740 (KLR) (26 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 2 OF 2020
FA OCHIENG, J
AUGUST 26, 2022**

BETWEEN

**GEOGGREY OLUOCH YOGO AND ERICK OTIENO OJURO T/A OTIENO,
YOGO OJURO & COMPANY ADVOCATES APPLICANT**

AND

DOMINION FARMS LIMITED 1ST RESPONDENT

LAKE AGRO LIMITED 2ND RESPONDENT

RULING

- 1 The plaintiff's application dated January 28, 2020 was for a temporary injunction to issue against the 1st defendant, to restrain it from transferring its business to the 2nd defendant until all the debts owed to the plaintiffs are settled.
1. Secondly, the plaintiffs asked the court to issue an order restraining the Registrar General from effecting the registration of the transfer of the business from the 1st defendant to the 2nd defendant until the suit is heard and determined.
 2. The application is premised on the following grounds;
 - “ a) That gazette notice no 350 of January 17, 2020 has been issued by the the 1st and 2nd defendants advocates of their intention to transfer business of the 1st defendant to the 2nd defendant but without giving any notice of period within which debtors are to lodge their objections.
 - b) That the plaintiffs are owed large sums of money in the form of legal fees for services rendered to the 1st defendant which remains outstanding to date.



- c) That the 1st defendant is winding up its operations in Kenya and is in the process of disposing of its assets in Kenya with the sole intention of exiting from Kenya.
 - d) That the 1st defendant's directors who are all none Kenyans as they are all United States of America citizens and it will be difficult to have them settle the debts after the business is transferred.
 - e) That the gazette notice is clear that the 2nd defendant shall not take responsibility of the debts currently owed to debtors by the 1st defendant after transfer of the business to the 2nd defendant.
 - f) That the same is a scheme to avoid settling the debt owed to the plaintiff by the 1st defendant.
 - g) That it is proper and legal pursuant to section 3 of the *Transfer of Business Act* that the transfer be halted until the the said debts are settled by the 1st defendant.”
3. It is common ground that an order for an interlocutory injunction may issue in favour of the plaintiff if;
- a. The plaintiff satisfies the court that it has a prima facie case with a probability of success; and
 - b. That if the order was not granted, the plaintiff would suffer irreparable loss, which cannot be compensated by an award of damages.
 - c. If the court was in doubt, the application would be determined on a balance of convenience.
4. It was the plaintiff's case that they had established a *prima facie* case with a probability of success. The plaintiffs' said case was premised on documents which constitute
- “records of the sums of money owed to them, that remain unpaid over a span of years and well within the knowledge of the 1st respondent.”
5. The plaintiffs exhibited “fee notes” and “deposit requests”.
6. But the 1st respondent described the documents as nothing more than “mere mentions of amorphous figures”.
7. The plaintiffs pointed out that the 1st respondent had settled some of the amounts which the plaintiffs had demanded. Therefore, it was the considered view of the plaintiffs, that the 1st respondent was now simply attempting to evade clearing the debts which it owed. That view was informed by the fact that the 1st respondent's action, of settling a part of the debts was an obvious admission that the plaintiffs had rendered services to it, and that the 1st respondent had not yet paid for such services.



8. Guided by the decision of the Court of Appeal in *Mrao Limited Vs First American Bank of Kenya* (2003) eKLR, I have to ask myself whether or not;
- “..... on the material present to the court, a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for the explanation or rebuttal from the latter.”
9. The material which the plaintiffs were provided are 46 documents.
10. By my calculations the total sum, when all the figures shown on the face of the 46 documents is Kshs 36,247,290/=.
11. On a *prima facie* basis therefore, the documents do not support the plaintiffs’ assertion that the 1st defendant owes them in excess of Kshs 40 Million.
12. Secondly, the plaintiffs have not provided the court with particulars of the payments which they had indicated, had been made by the 1st respondent.
13. Meanwhile, it is noted that the documents made available by the plaintiffs bear different descriptions, such as;
- i. Final fee deposit note:
 - ii. Internal fee note
(This is not a Tax Invoice; a fee note will be submitted upon conclusion of the case);
 - iii. Fee note.
 - iv. Deposit request note
(This is not a Tax Invoice; a fee note will be submitted upon conclusion of the case).
 - v. Final fee note
(This is not a Tax Invoice; a fee note will be submitted upon conclusion of the case).
 - vi. Amended final fee deposit note.
14. In my understanding, the plaintiffs labelled the various documents in such a manner as to indicate their respective categorization.
15. In the absence of further clarification by the plaintiffs, the court is unable to appreciate the distinction between the various categories of the documents.
16. I would expect a fee note to be a “bill” raised by the advocate in respect to the services he had rendered to his client.
17. Therefore, when the plaintiffs described a document as a “final fee note”, I would expect that to be the final “bill” from the advocate. However, when the advocate expressly endorses such a document with words which indicate that the said “final fee note” was not a tax invoice, that would negate my initial understanding.



18. And when the advocate expressly states that a fee note would be submitted upon the conclusion of the case, I hold the considered opinion that the advocate was telling the client to await a fee note, which the advocate would send when the case in issue had been concluded.
19. If my said view is right, there would be no reason to expect the client to pay when it had been expressly told to await a fee note.

Deposit Request Note

20. In my understanding a deposit is the amount of money which the client pays in advance, towards the fee which the advocate is expected to eventually charge, when the advocate will have rendered services.
21. Ordinarily, a deposit is not paid to an advocate who had rendered services.
22. When the client pays a portion of a fee note, that would be part-payment of fees.
23. In the circumstances, I find that the plaintiffs would need to lead evidence to satisfy the trial court that although they were raising deposit request notes, those constituted demands for payment of fees, for services already rendered.
24. The plaintiffs had submitted thus;

“ it is also very apparent the fact that the fee notes raised by the plaintiff pending settlement by the 1st respondent have never been disputed and thus due and owing.”
25. Here below is the summary of the materials which the plaintiffs filed to support their case. A perusal of the list discloses that it has only six unqualified fee notes; and four Interim fee notes which have been described as not being Tax Invoices.



| Description | Date | Amount |
|--|------------|--------------|
| Final Fees Deposit Note | 7/7/15 | 14,000,000/= |
| Final Fee Deposit Request Note | 31/08/17 | 1,813,826/= |
| Interim Fee Note (Not a Tax Invoice fee note to be sent) | 14/05/2012 | 1,210,000/= |
| Fee note | 25/05/2013 | 1,170,000/= |
| Final Fee Deposit Request Note | 22/10/15 | 281,827/= |
| Final Fee Deposit Request Note | 23/10/14 | 281,827/= |
| Final Fee Deposit Request Note | 22/10/15 | 1,422,000/= |
| Deposit Request Note (Not a Tax Invoice Fee Note to follow) | 13/07/17 | 531,325/= |
| Final Fee Note (Not a Tax Invoice) | 28/08/14 | 895,000/= |



| Description | Date | Amount | |
|-------------|--|------------|-------------|
| 10. | Final Fee Deposit Request Note | 22/10/15 | 281,827/= |
| 11. | Final Fee Deposit Request | 30/10/15 | 281,827/= |
| 12. | Final Fee Deposit Request | 23/10/14 | 281,827/= |
| 13. | Final Fee Deposit Request | 23/10/14 | 281,827/= |
| 14. | Final Fee Deposit Request | 23/10/14 | 281,827/= |
| 15. | Final Fee Deposit Request | 22/10/15 | 281,827/= |
| 16. | Final Fee Deposit Request Note (Not a Tax Invoice) | 11/02/17 | 238,950/= |
| 17. | Final Fee Deposit Request Note | 30/01/18 | 5,270,000/= |
| 18. | Final Fee Deposit Request Note | 11/12/12 | 251,225/= |
| 19. | Final Fee Deposit Request Note | 17/01/2011 | 186,150/= |
| 20. | Final Fee Note | 28/08/2014 | 233,550/= |
| 21. | Final Fee Deposit Request Note | 10/02/2015 | 421,827/= |
| 22. | Final Fee Deposit Request Note | 24/09/15 | 421,827/= |
| 23. | Final Fee Request Note | 25/07/16 | 374,225/= |
| 24. | Final Fee Request Note | 28/06/2011 | 194,625/= |
| 26. | Final Fee Request Note | 27/08/2015 | 192,725/= |
| 27. | Final Fee Note | 23/07/2016 | 178,300/= |



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|-----|--|------------|-----------|
| 28. | Final Fee Deposit Request Note | 23/10/2014 | 421,827/= |
| 29. | Final Fee Request Note | 27/08/2018 | 192,650/= |
| 30. | Final Fee Request Note | 23/07/2016 | 209,595/= |
| 31. | Final Fee Request Note | 28/06/2011 | 182,150/= |
| 32. | Amended Final Fee Deposit Note | 04/10/2017 | 438,003/= |
| 33. | Final Fee Request Note | 28/06/2011 | 195,150/= |
| 34. | Final Fee Request Note (Not a Tax Invoice) | 28/06/2011 | 214,150/= |
| 35. | Final Fee Request Note | 28/06/2011 | 193,225/= |
| | Description | Date | Amount |
| 36. | Final Fee Note | 13/11/2019 | 279,310/= |
| 37. | Deposit Request Fee Note | 13/05/2013 | 964,500/= |
| 38. | Final Fee Note | 09/03/2010 | 172,225/= |
| 39. | Deposit Request Fee Note | 02/11/2017 | 116,000/= |
| 40. | Interim Fee Note (Not a Tax Invoice | 11/05/2015 | 116,000/= |
| 41. | Interim Fee Note (Not a Tax Invoice) | 11/05/2015 | 116,000/= |
| 42. | Final Fee Note | 13/11/19 | 264,310/= |
| 43. | Final Fee Deposit Request Note | 28/01/2015 | 239,625/= |
| 44. | Final Fee Note | 13/11/2019 | 381,225/= |
| 45. | Interim Fee Note (Not a Tax Invoice) | 28/08/2014 | 116,000/= |



| | | | |
|-----|------------------------|------------|-----------|
| 46. | Final Fee Request Note | 11/08/2015 | 174,000/= |
|-----|------------------------|------------|-----------|

26. Of the unqualified fee notes, there is one for Kshs 1,170,000/=, which is dated May 25, 2013. As the 1st respondent has intimated, there is a possible issue of that fee note being “time barred”.
27. Another unqualified fee note is for Kshs 233,550/=, and it is dated August 28, 2014.
28. There is also the fee note for Kshs 172,225/=, which is dated March 9, 2010.
29. The plaintiffs may have to justify their rights to pursue recovery in respect to the fee notes which were already more than 6 years old.
30. In a nutshell, I find and hold that the plaintiffs have not shown that they have a prima facie case with a probability of success.

Irreparable harm or loss

31. Having held that there was no *prima facie* case with a probability of success, I should not be giving consideration to the question about whether or not the plaintiffs would suffer irreparable harm or loss if an interlocutory injunction was not granted.
32. But in the event that my finding on the first limb was wrong, I do take the precaution to delve into the second component.
33. The plaintiffs submitted that their business would suffer grave harm if the 1st respondent was allowed to transfer its business to the 2nd respondent.
34. According to the plaintiffs, the directors of the 1st respondent had already relocated to the USA. Therefore, it was the plaintiffs’ case that if the injunctions sought were not granted, the plaintiffs would have no way to recover their fees.
35. The plaintiffs also submitted that the debts owed by the 1st respondent were so huge that any award of compensation, by way of damages would not cure the harm occasioned.
36. The plaintiffs’ claim in the plaint is for an order to restrain the Registrar General from effecting the transfer of the 1st respondent’s business to the 2nd respondent, until and unless a provision is made for the settlement of the debts owed by the 1st respondent to the plaintiffs.
37. Secondly, the plaintiffs sought an order that a provision be made, to cover the debts owed to them, by the 1st respondent.
38. In my understanding, the plaintiffs believe that they are entitled to recover a specified sum of money from the 1st defendant, on account of fees for services which they had rendered.
39. As the directors of the 1st defendant had migrated back to the USA, the plaintiffs feel that there would not be any way to recover the outstanding fees, if the court did not stop the transfer of the business to the 2nd defendant.
40. However, the plaintiffs have not told the court how the grant of an injunction, to stop the transfer of the business would translate into the recovery of the fees.
41. If the directors had relocated to the USA, and the court stops the sale of the 1st defendant’s business, that cannot pay the outstanding fees.



42. Indeed, the plaintiffs real chance for recovery of any outstanding fees would be through laying their hands on a portion of the proceeds from the sale of the business.
43. I find that the rejection of the application for an interlocutory injunction would not occasion irreparable harm or loss to the plaintiffs.
44. Incidentally, the plaintiffs have a prayer in the plaint, for an injunction to restrain the Registrar General from effecting the transfer of either the whole or part of the 1st defendant's business to the 2nd defendant, without first making provision for the settlement of debts owed to the plaintiffs.
45. I understand that to mean that the plaintiffs do not have a fundamental objection to the transfer of the business, in itself. The plaintiffs' objection was only to the transfer, if it was effected without a provision having been made for the payment of any fees payable by the 1st defendant, to the plaintiffs.
46. It is in the best interests of the parties that;
 - a. The plaintiffs take steps to have the debt computed with finality. One possible means of doing so is through taxation of advocate/client bills of costs, unless there was proof that the 1st defendant had received and accepted any particular fee note which the plaintiffs had raised.
 - b. The parties negotiated a method through which the sale proceeds would be utilized to pay-off any fees that was outstanding.
47. The process of intended transfer of the business has not been shown to have any procedural or legal defect or impediment. In the absence of any irregularity or impropriety in the process, the court would be very slow to put a hurdle in the path to be used to complete the said process.
48. If I were called upon to determine the balance of convenience, I would most certainly have held in favour of the respondents.
49. In the result, the application dated January 28, 2020 is dismissed, with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 26TH DAY OF AUGUST 2022

FRED A. OCHIENG

JUDGE

