



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CASE NO. E284 OF 2020

AMIR LODGES LIMITED.....1ST PLAINTIFF

SHARIFF FOREX BUREAU LIMITED.....2ND PLAINTIFF

VERSUS

MOHAMED OMAR SHARIFF.....DEFENDANT

R U L I N G

1. This is a ruling on the plaintiffs' Motion on Notice dated 11/8/2020. It was brought under *sections 1A, 1B and 3A of the Civil Procedure Act, Order 40, Rules 1, 2, 4 and 10 Order 51 Rules 1, 3 and 4 of the Civil Procedure Rules, 2010.*
2. The application sought orders for an injunction to restrain the defendant from trespassing, entering or interfering into the business premises of the plaintiffs or from holding himself out as a director of the plaintiffs.
3. It was supported by the affidavit, supplementary and further supplementary affidavits of **Jaffer Omar Shariff** sworn on 11/8/2020, 27/8/2020 and 26/10/2020, respectively. The plaintiffs' claim is that, the 1st plaintiff operates a lodge in Eastleigh and was developing a property in South C on **LR. R No. 209/1111/13**. On the other hand, the 2nd plaintiff operates flats in South C on **LR. Number 209/13284/2**.
4. It was contended that, the defendant is a minority shareholder with a stake of 40% in the 1st plaintiff and 20% in the 2nd plaintiff. The plaintiffs accuse the defendant of holding himself out as a director of the plaintiffs before both clientele and staff. In so doing, he has been undermining the true directors of the plaintiffs to the detriment of the plaintiffs' business operations. The plaintiffs attached a copy of the companies CR-12 dated 11/6/2020.
5. The defendant opposed the application vide a replying affidavit sworn on 17/8/2020. He contended that he was a director and shareholder in the 1st and 2nd plaintiff with 40% and 20% stakes, respectfully. That the CR-12 attached by the plaintiffs reflecting **Anishab Investment Limited** as a director of the plaintiffs was irregularly obtained without his consent as a director of the plaintiffs.
6. That the mentioned CR-12 produced by the plaintiffs was a subject of police investigation vide **OB No. 17/17/08/2020**. The defendant attached a CR-12 dated 4/5/2019 of the 1st plaintiff which did not reflect **Anishab Investment Limited** as a director.
7. That there were two pending cases, **Rent Restrictions Case No. 1257 of 2019 (Mariam Adam Ahmed v Shariff Forex Limited)** and **Milimani ELC Case No. 497 of 2019 (Mariam Adam Ahmed v Shariff Forex Limited)**, involving one Miriam Adan Ahmed and Jaffar Omar Mohamed. Those cases were in relation to the South C premises where the 2nd plaintiff claimed to reside. That Jaffar Omar Mohamed had produced a CR-12 in those matters none of which reflected **Anishab Investment Limited** as a director of the plaintiffs. That the plaintiffs had failed to disclose the existence of the two cases to Court.
8. The defendant admitted that the 1st plaintiff was the registered owner of the property in South C known as **L. R. No. 209/111/13**. As regards the lodge in Eastleigh operated on **LR. NO. 209/361114**, the 1st plaintiff only managed the business. Due to disagreements between the two directors of the 1st plaintiff, the defendant and Jaffar had resorted to managing the lodge as individuals. He produced a copy of the title which showed the registered owners as being **Jaffar Omar Shariff and Mohammed Omar Shariff**.
9. That there was a similar application dated 22/5/2019 in the **Milimani Commercial Civil Case No. 3678 of 2019** by the 1st plaintiff which

had been dismissed. In the premises there was material non-disclosure.

10. In rejoinder, the plaintiffs contended that the CR-12 they had produced was legitimate and that of the defendant was outdated. That **Civil Suit 3678 of 2019** was for a different cause of action. That it had since been withdrawn. A copy of the order was attached.

11. The parties filed their respective submissions which I have carefully considered. The sole issue is whether the plaintiffs have met the necessary conditions for granting the injunctive orders sought.

12. The principles applicable for granting of injunctions are now well settled. These were enunciated in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**. These are that an applicant must establish a prima facie case with a probability of success. Secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury that would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

13. It is clear that the case before me is one where shareholders and probably directors of the Company are at war with each other. The plaintiffs claim that the defendant is not a director of the plaintiffs. The defendant insists he is a director but is unaware how he was removed and a company associated with the deponent of the replying affidavit substituted therefor. The plaintiffs attached a CR-12 dated 11/6/2020 in support of their contention.

14. On his part, the defendant produced a CR-12 dated 4/5/2019 to buttress his contention. He challenged the authenticity of the CR-12 produced by the plaintiffs and stated that the same was a subject of criminal investigations vide **OB No. 17/17/08/2020**. That his co-director, Jaffar Omar Shariff had since moved to court in a constitutional matter to block the said investigations.

15. In a sudden turn of events, the plaintiffs for the first time admitted in their submissions that the defendant was a former director of the plaintiffs but had been removed from directorship. That since the CR-12 was conclusive as to directorship, it did not matter how he had been removed.

16. With greatest respect, a party cannot approbate and reprobate at the same time. Having held out that the defendant was never a director, the plaintiffs could not be allowed to change that position when faced with the defendant's stiff challenge. The plaintiffs had not only failed to make material disclosure but they also withheld evidence as to how the defendant was removed as a director.

17. The defendant's case was that if he was not a director, he must have been wrongly removed. The plaintiffs are the ones who had evidence of his removal and by dint of **section 112 of the Evidence Act, Cap 80 Laws of Kenya**, it was incumbent upon them to prove that the defendant had been properly removed as a director and was therefore not allowed to masquerade as one.

18. To the extent that the plaintiffs failed to discharge that evidentiary burden, they cannot be said to have established a prima facie case with any probability of success.

19. These parties have been involved in multiple law suits. One of them is **ELC NO. 497 OF 2018**. One of the exhibits produced before me was a ruling in that case dated 27/6/2019. In that ruling the court observed as follows: -

“The respondent opposed the applicant’s application through a replying affidavit sworn on 17th December 2018, by Jafar Shariff Omar. The respondent contends that the suit property is owned by the respondent which has two directors. One of the directors of the Respondent is the applicant’s husband Mohamed Omar Shariff who owns 20% shares in the respondent company whereas Jafar Shariff Omar who is a brother to the applicant’s husband owns 80% shares in the respondent company.”

20. What I infer from the foregoing is that, Jafar Shariff Omar who deposed all the affidavits herein on behalf of the plaintiffs admitted in that case that the defendant was a director of the 2nd plaintiff. He cannot be allowed to rescale from that position without a proper and satisfactory explanation. There has to be a legal and procedural change of directorship in the company. This lends credence to the defendant's contention of fraud on the part of the said Jaffer and the plaintiffs.

21. He who comes to equity must do equity. The plaintiffs have come to equity with their hands dripping with blood. Criminal investigations have been opened against them for acts which they now want the Court to sanction. That won't do.

22. In **Kenya Ports Authority v Fadhil Juma Kisuwa [2017] Eklr**, the Court of Appeal held: -

“We can only emphasize that ex turpi causa non oritur action, based on the doctrine that no legal remedy or benefit can flow from an illegal act, explained succinctly by Lord Mansfield CJ in Holman v. Johnson [1775] 1 Cowp 341 as follows:

“The objection that a contract is immoral or illegal as between the plaintiff and the defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, the objection is ever allowed; but it is found in general principles of policy, which the defendant has advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; ex dolo malo non oritur action (“no action arises from deceit”). No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff’s own standing or otherwise, the cause of action appears to arise ex-turpi causa (“from an immoral cause”) or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because but because they will not lend their aid to such plaintiff”.

23. I fully reiterate this here. The plaintiffs are accused of having illegally removed the defendant from the directorship in the plaintiffs. They failed to explain the process they undertook to arrive at having a new director in the place of the defendant. Then they rush to Court and say “*sorry defendant. You are now out. It doesn’t matter how you found yourself out there. ‘Omnia praesumuntur rite esse acta’ (All things are presumed to have been done rightly’!)*”

24. Not before a Court of law or equity.

25. Further, it is clear that a similar application was dismissed by the subordinate court. The issues are deemed to have been determined and cannot be re-litigated again here. The matter is *res judicata*. That is so notwithstanding the addition of one more party and the subsequent withdrawal of the aforesaid proceedings.

26. In view of the foregoing, the plaintiffs having failed to establish a prima facie case with any probability of success, I need not address the other two limbs of the **Giella and Cassman Case**.

27. In any event, there was no evidence that the plaintiffs will suffer any loss that cannot be compensated by an award of damages. Further the balance of convenience tilts in favour of declining the injunction.

28. Accordingly, I find the application to be without merit and dismiss the same with costs.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 24th day of June, 2021.

A. MABEYA, FCI Arb

JUDGE