



REPUBLIC OF KENYA



KENYA LAW
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**Ngumi v Wambugu (Civil Case E039 of 2020) [2021] KEHC 369 (KLR)
(Commercial and Tax) (21 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E039 OF 2020
DAS MAJANJA, J
DECEMBER 21, 2021**

BETWEEN

WINFRED WANJIKU NGUMI PLAINTIFF

AND

NJAMA WAMBUGU DEFENDANT

RULING

1. The Plaintiff has filed the Notice of Motion dated 25th March 2021 made under sections 1A, 1B, 3A and section 63 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 40 Rule 2 of the *Civil Procedure Rules* seeking, “an order of mandatory injunction to compel the Defendant to execute a ‘Supplementary Agreement’ as contemplated by the parties at the time of negotiation and execution of the Agreement of 20th August, 2020”. The application is supported by the Plaintiff’s supporting affidavit and further affidavit sworn on 25th March 2021 and 23rd September 2021 respectively. It is opposed by the Defendant’s replying affidavit sworn on 19th April 2021.
2. The facts giving rise to the application are fairly straightforward and are as follows. The parties are directors and shareholders of a company known as Space and Style Limited (“the Company”) where the Plaintiff holds 51,697 Ordinary Shares and 1,560,000 Redeemable Preference Shares and serves as the Chief Executive Officer and Managing Director. The Defendant owns 43,303 Ordinary Shares but until March 2018 owned 47,500 Ordinary Shares. He also owned 1,560,000 Redeemable Preference Shares. The parties fell out after the Plaintiff accused the Defendant of running a competing company and after they realized that their business relationship had irretrievably broken down, it was agreed that the Defendant would execute a Terms Sheet Agreement dated 20th January 2018 (“the Term Sheet”) where he was to sell and transfer all his 47,500 ordinary shares and 1,560,000 redeemable preference shares to the Plaintiff for a cash consideration of KES 250,000,000.00 and other non-cash consideration as stipulated in the Term Sheet, subject to a valuation to be carried out on the Company.



3. On 17th February 2020, the Plaintiff filed the present suit against the Defendant seeking to enforce the Term Sheet where she sought orders of specific performance, a mandatory injunction compelling the Defendant to transfer the shares in the Company and a mandatory injunction compelling him to execute all the necessary agreements between the parties and costs. The Defendant did not file a Statement of Defence but filed a Notice of Admission of Case under Order 12 rule 1 of the Civil Procedure Rules, 2010 (“the Rules”). The Plaintiff then filed a Notice of Motion dated 23rd April 2020 under Order 12 rule 1 and 2 of the Rules seeking judgment on admission based on the Notice of Admission the Defendant had filed.
4. When the matter came up before the court for directions on 22nd May 2020, the court informed the parties that there was no argument to be made in light of the clear admission by the Defendant to the prayers in the plaint. The court on its own motion entered judgment on admission in terms of prayers (a), (b) and (c) of the plaint dated 13th February 2020 (“the Judgment”) as follows;
 - (a) An order of specific performance be and is hereby issued in the terms of the Term Sheet executed on 20th January, 2018 between the Plaintiff and the Defendant with regard to the transfer of the Defendant’s entire shareholding in Space and Style Ltd. to the Plaintiff.
 - (b) An order of mandatory injunction be and is hereby issued to compel the Defendant to transfer 43,303 Ordinary Shares and 1,560,000 Redeemable Preferential Shares to the Plaintiff based on the equity the valuation determined by Horizon Africa on 31st January 2018 as Kes 413, 930, 798 and settlement shall be, in order of priority as outlined in the Term Sheet.
 - (c) An order of mandatory injunction be and is hereby issued to compel the Defendant execute the necessary agreements for purposes of consideration according to the settlement terms as set out in Clause 11 of the Term sheet as may be agreed between the parties within a period not exceeding thirty (30) of the Court’s ruling.
5. On 8th June 2020, the court also awarded the Plaintiff costs of the suit. Based on this background, I now turn to the Plaintiff’s application.

The Application

6. The Plaintiff’s case is that in a bid to comply with the Judgment, the parties entered into an Agreement for Sale of Shares dated 20th August 2020 (“the Share Sale Agreement”) so as to fully settle all the outstanding issues herein and pending court matters arising from the Term Sheet. That while negotiating the Share Sale Agreement, the parties agreed that upon execution, they would embark on discussions to agree on a Supplementary Agreement incorporating the terms of settlement of the various cases stemming from, concerning or incidental to the Term Sheet.
7. The Plaintiff contends that the Defendant has unreasonably and inexplicably reneged on executing the covenanted Supplementary Agreement in patent breach of the terms set between himself and the Plaintiff as alluded to above and that the completion date of the Share Sale Agreement was due for 30th April 2021 when the final instalment under Clause 3.3.4.2(iii) thereof was set to be paid.
8. The Plaintiff states that all funds contemplated to settle the matter fully and in compliance with this Court’s orders are tied to the Share Sale Agreement which was to incorporate the terms of the Supplementary Agreement and that the said breach of terms of execution of the Principal Agreement



stand to gravely prejudice the Plaintiff if the Defendant is not compelled to execute the Supplementary Agreement as all funds subject to the transfer of shares will have to be contractually released to the Defendant by the said 30th April, 2021 failure to which the Plaintiff shall be exposed to litigation for breach of contract.

9. The Plaintiff submits that she stands to suffer substantial financial loss by further delay of execution of the Supplementary Agreement and is in the interest of justice that this application is allowed as prayed.

The Defendant's Reply

10. The Defendant opposes the application on the ground that it is incompetent and should be struck out because it seeks determination of a substantive cause of action in a matter that has already been determined by the Judgment. He contends that the judgment settled all the issues in controversy and dispute in the matter.
11. The Defendant submits that the Plaintiff invites the court to consider and determine a fresh cause of action where the question of whether or not there is breach of contract by either party with regard to the Share Sale Agreement and whether or not it was a term thereof that the parties would consequently execute the purported Supplementary Agreement. The Defendant asserts that a party cannot introduce a fresh cause of action once a suit is determined by a court of competent jurisdiction hence the application is incompetent.
12. The Defendant agrees with the Plaintiff that following the Judgment, they engaged in extensive discussions on the implementation of the Term Sheet which discussions culminated in the execution of the Share Sale Agreement which provided for and addressed all the issues arising from the Term Sheet and Judgment. He maintains that that Share Sale Agreement did not provide, expressly, impliedly, constructively or presumptively, for the execution of the Supplementary Agreement as alleged by the Plaintiff. It accuses the Plaintiff of abusing the court process to force the Defendant to execute a Supplementary Agreement with the intent of rewriting, modifying, writing into and adding the contents to the Share Sale Agreement.
13. The Defendant submits that the Share Sale Agreement having been signed by the parties, each of them is at liberty to commence a separate action to enforce the same or seek appropriate reliefs in the event of a breach by the other party. The Defendant maintains that the application is misplaced and the application incompetent.

Analysis and Determination

14. It is not in dispute that the parties executed the Share Sale Agreement pursuant to the Judgment. Following the Judgment and consequent decree whose terms I have set out elsewhere, it is clear that that parties have complied with terms (a) and (b) thereof by entering into the Share Sale Agreement. At any rate I did not hear the parties contend that the application is in the nature of an application for execution of the decree herein. In the circumstances, I agree with the Defendant that any complaint on the Share Sale Agreement is a separate and independent cause of action that can only be agitated in separate proceedings.
15. On the substance of the application, it appears that the parties' point of departure is whether they contemplated the execution of a Supplementary Agreement. According to the Plaintiff, the parties agreed that upon execution of the Share Sale Agreement, they would embark on discussions to agree on a supplementary agreement incorporating terms of settlement of the various cases stemming from, concerning or incidental to the Term Sheet.



16. To support this position, the Plaintiff relies on two letters from the Defendant's counsel all dated 31st July 2020. In one of the letters, the Defendant's counsel wrote to the Plaintiff's counsel in part as follows:

We have read the draft Supplementary Agreement on conditions for withdrawal of Contempt Application in Nairobi Court of Appeal Civil Applications No. Nai 54 of 2019 UR 60/19 Space & Style Limited & Another vs, Njama Wambugu & 4 Others. In our letter dated 15th July, 2020, at paragraph 3, our client expressed his reservations with the onerous conditions for withdrawal of the Contempt Application, which are reiterated in the draft Supplementary Agreement. The conditions go beyond the question of costs and require our Client to self-indict. Regrettably, the Supplementary Agreement on withdrawal of the Contempt matter is not acceptable to our Client as it reiterates the conditions that our Client already commented on vide our letter dated 15th July 2020. As the Contempt matter is separate from the Term Sheet, we propose if parties can agree on the main agreement and settlement, then proceed to sign the main agreement and separately thereafter continue engaging on modalities for resolution of the pending court cases

17. In the other letter, the Defendant's counsel communicates as follows:

We refer to the above matter.

Further to our letter of today and upon reflecting further on the draft Supplementary Agreement on conditions for withdrawal of Contempt Application in Nairobi Court of Appeal Civil Applications No. Nai 54 of 2019 UR 60/19 Space & Style Limited & Another vs. Njama Wambugu & 4 Others, our Client is of the strong view that Court cases should not be tied to the main agreement as appears in paragraph 5.4 of the main agreement, for closure, and the main agreement be strictly on implementation of the Term Sheet. Let paragraph 5.4 of the main agreement be deleted all together and modalities for resolution of the pending Court cases be separately discussed by the parties.

Kindly send the final agreement by Sunday, 2nd August, 2020 to enable signing on 3rd August, 2020 if parties agree.

18. It is clear from the correspondence that the draft Supplementary Agreement was not acceptable to the Defendant. He called for more discussions and negotiations on the pending court cases that formed the basis of the draft Supplementary Agreement. The Plaintiff's counsel's letter dated 22nd October 2020 forwarding the draft Supplementary Agreement to the Defendant's counsel seeks the Defendant's approval of the same, rather than execution, buttressing the position that the Defendant never agreed with terms of the draft Supplementary Agreement. A draft agreement can only be taken as binding if it is shown that the parties to the draft agreement had agreed on all the terms which they regarded as binding on them or the law requires as essential for the formation of a legally binding contract (See *Jim's Fresh Vegetable Growers & Exporters Limited v Loiland Limited & another NRB ELCC No. 277 of 2011 [2020] eKLR*). In the absence of consensus ad idem, the court cannot compel the Defendant to execute the draft Supplementary Agreement as least in these proceedings.

Conclusion and Disposition

19. For the reasons set out above, I dismiss the Plaintiff's application dated 25th March 2021 with costs to the Defendant assessed at KES 30,000.00



DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Mungai with him Mr Miano instructed by Kinoti and Kibe Advocates for the Plaintiff.

Ms Munyua instructed by Ngonyo Munyua and Company for the Defendant.

