



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E405 OF 2018**

VICTORY CONSTRUCTION LTD.....1<sup>ST</sup> PLAINTIFF

AVTER SINGH SURI.....2<sup>ND</sup> PLAINTIFF

**-VERSUS-**

KIRPAL SINGH.....1<sup>ST</sup> DEFENDANT

AMRITPAL SINGH.....2<sup>ND</sup> DEFENDANT

TECHNO ASPHALT LIMITED.....3<sup>RD</sup> DEFENDANT

**RULING**

1. This ruling relates to two applications, namely:

a) The application dated 27<sup>th</sup> November 2018 and amended on 3<sup>rd</sup> December 2018 wherein the applicant seeks orders that; -

**1. Spent**

**2. Spent**

**3. An order of permanent injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from accessing or dealing howsoever or withdrawing funds from the 1<sup>st</sup> plaintiff's official account with Bank of Baroda, A/C No. 9586040000065, Sarit Centre Branch, pending hearing and determination of this suit.**

**4. Pending the hearing and determination of this application, the accounts of Victory Construction Company Ltd, held with CFC Stanbic Bank, Garden City Mall Branch A/C Nos.0100003774958,0100004269025,and 00004269041, A/CNos.03201348181212,03201348181210 and 0320134181211, held with I & M Bank, Garden City Mall Branch and A/C No. 051000017378 held with Family Bank, Banana Branch, be frozen and the 1<sup>st</sup> and 2<sup>nd</sup> defendant be restrained from accessing, withdrawing, transferring or howsoever dealing with the funds in the said accounts.**

**5. Pending the hearing and determination of this suit, the 1<sup>st</sup> and 2<sup>nd</sup> defendants be restrained from accessing, withdrawing, diminishing, transferring or howsoever dealing with accounts of Victory Construction Co. Ltd, held with CFC Stanbic Bank, Garden City Mall Branch A/C Nos. A/CNos.0100003774958, 0100004269025, and 0100004269041, A/C Nos. 03201348181212, 03201348181210 and 0320134181211, held with I & M Bank, Garden City Mall Branch and A/C No. 051000017378 held with Family Bank, Banana Branch.**

**6. An order of mandatory injunction do issue against the 1<sup>st</sup> and 2<sup>nd</sup> defendants for them to return all construction equipment belonging to the 1<sup>st</sup> plaintiff, being used by Techno Asphalt Limited for a project in Thogoto where the 1<sup>st</sup> and 2<sup>nd</sup> defendants operate the 1<sup>st</sup> plaintiff's Bitumen Plant;**

**7. An order that the 1<sup>st</sup> and 2<sup>nd</sup> defendants do render accounts for all monies received from usage of the 1<sup>st</sup> plaintiff's equipment by Techno Asphalt Limited for a project in Thogoto where the 1<sup>st</sup> and 2<sup>nd</sup> defendants operate the 1<sup>st</sup> plaintiff's Bitumen Plant.**

**8. An order that the 1<sup>st</sup> and 2<sup>nd</sup> defendants do render accounts for all monies received from Mtito Andei Resurfacing Road Project and Kisumu Water and Sewerage Project.**

**9. An order that the 1<sup>st</sup> and 2<sup>nd</sup> defendants do pay to the plaintiffs what is found due on taking the account.**

**10. Costs of this application be borne by the defendants.**

b) The application dated 18<sup>th</sup> December wherein the applicant seeks inter alia the following orders: -

**1. Spent**

**2. Spent**

**3. Pending hearing and determination of the suit filed herein, a mandatory injunction do issue compelling the respondents either by each one of them or jointly whether by themselves, their employees, servant, agents, or nominees or any other person claiming through them to deliver up of all the plaintiff's assets to the company warehouse.**

**4. The application herein be consolidated with Milimani HCCC No. E405 of 2018, Victory Construction Ltd and Avter Singh Suri, Amritpal Singh & Techno Asphalt Limited.**

**5. The costs of occasioned by this application be provided for.**

2. The applications are supported by the 2<sup>nd</sup> plaintiff's affidavits and are premised on the grounds that the 1<sup>st</sup> and 2<sup>nd</sup> defendants, being directors of the 1<sup>st</sup> applicant that has its official bank account with the bank of Baroda, Account No. 958604000000, Sarit Centre Branch have opened parallel accounts in the 1<sup>st</sup> plaintiff's name with various branches of CFC Stanbic Bank with a view to clandestinely denying the 1<sup>st</sup> plaintiff its dues.

3. The applicant states that the said accounts with CFC Stanbic Bank should be frozen in order to safeguard the 1<sup>st</sup> plaintiffs accounts from dissipation.

4. The applicants further contend that the respondents continue to fraudulently squander the plaintiff's assets by selling them or hiring them out without the plaintiffs' authority. It is the applicants' case that unless the court intervenes, the suit herein will be rendered nugatory thereby resulting in substantial irreversible loss to the applicants.

5. The background of the case is that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are directors and shareholders of the 1<sup>st</sup> plaintiff and the sons of the 2<sup>nd</sup> plaintiff. The 2<sup>nd</sup> plaintiff states that the 1<sup>st</sup> plaintiff obtained loan facilities with various banks in order to acquire equipment and machinery. He adds that in the year 2010, his wife fell ill and required specialized treatment in the United Kingdom. He avers that he accompanied his wife to the United Kingdom but that during his absence, the 1<sup>st</sup> and 2<sup>nd</sup> respondents squandered all the money belonging to the 1<sup>st</sup> plaintiff and failed to service the 1<sup>st</sup> plaintiff's loan facilities thereby resulting in the issuance of statutory notices and the threat to sell the 1<sup>st</sup> plaintiff's properties and those of its affiliate companies.

6. He further contends that he was forced to use his own savings to settle the 1<sup>st</sup> plaintiff's loans but that the 1<sup>st</sup> and 2<sup>nd</sup> respondents fraudulently incorporated a new company, the 3<sup>rd</sup> respondent herein, and that they have converted the use of the 1<sup>st</sup> plaintiff's equipment to the new company. It is the applicants' case that the actions of the defendants continue to unjustly destabilize of the 1<sup>st</sup> plaintiff's business and finances thereby depriving it of the money and use of its equipment.

7. When the amended Notice of Motion dated 3<sup>rd</sup> December 2018 came up for hearing *ex parte*, in the first instance, this court, differently constituted, issued temporary orders as follows: -

**a. That an order of temporary injunction be and is hereby granted restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from accessing or dealing howsoever or withdrawing funds from the 1<sup>st</sup> plaintiff's official account with Bank of Baroda, A/C No. 95860400000065, Sarit Centre Branch, pending hearing and determination of this application.**

**b. That pending the hearing and determination of this application, the accounts of Victory Construction Company Ltd, held with CFC Stanbic Bank, Garden City Mall Branch Nos.0100003774958,0100004269025, and 00004269041, Account Nos.03201348181212,03201348181210 and 0320134181211, held with I & M Bank, Garden City Mall Branch and A/C No. 051000017378 held with Family Bank, Banana Branch, be frozen and the 1<sup>st</sup> and 2<sup>nd</sup> defendant be restrained from accessing, withdrawing, transferring or howsoever dealing with the funds in the said accounts be and is hereby granted.**

8. On 24<sup>th</sup> October 2019, directions were issued that the two applications be canvassed by way of written submissions after which the matter was listed for mention on 17<sup>th</sup> December 2019.

9. On 17<sup>th</sup> December 2019, **Miss Balongo**, learned counsel for the defendants, sought and obtained an adjournment to enable her file the defendants written submissions. The defendants did not however file any submissions as at 15<sup>th</sup> July 2020 when the court reserved a ruling date for the 2 applications.

10. The defendants opposed the application through the replying affidavit of the 2<sup>nd</sup> defendant who denies every single allegation made by the applicants and accuses the 2<sup>nd</sup> plaintiff, of selling the 1<sup>st</sup> plaintiff's properties held by **Berkshire Limited** as a holding company. He states that the equipment described in the application are vital for the daily operations of their company and that the interim orders stopping them from using the equipment has caused it great hardship, inconvenience and financial loss.

11. He further states that there was no valid resolution of the 1<sup>st</sup> plaintiff company appointing the plaintiffs' advocates to institute the suit on behalf of the 1<sup>st</sup> plaintiff and that the 1<sup>st</sup> plaintiff company did not authorize the 2<sup>nd</sup> plaintiff to swear the affidavits on behalf of the company. He denies the claim that the defendants are in possession of assets belonging to the 1<sup>st</sup> plaintiff and that all the company accounts were opened with the authority of all the directors.

12. He further states that the application and suit offend the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules and adds that the 1<sup>st</sup> and 2<sup>nd</sup> defendants as directors of the 1<sup>st</sup> plaintiff, have a right to discharge the functions/duties of their office for the benefit of the company. It is the defendant's case that the 2<sup>nd</sup> plaintiff lacks the *locus standi* to institute the suit against them.

### **Analysis and determination**

13. I have carefully considered the two applications, the respondent's response together with the applicants' submissions. The main issues for determination are as follows:

a. Whether the 2<sup>nd</sup> plaintiff has the *locus standi* to institute the instant suit and swear affidavits on behalf of the 1<sup>st</sup> Plaintiff company.

b. whether the applicants have made out a case for the granting of the injunctive orders sought in the twin applications.

### **Locus Standi**

14. The defendants took issue with the plaintiffs' non-compliance with the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules. The said Order stipulates as follows: -

***"(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."***

15. It is however noteworthy, from the above stated provision, that there is no requirement that the authority given to the deponent of the verifying affidavit be filed. In **Republic v Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** the court observed that such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Guided by the said decision, I find that even though the plaintiff did not establish that he had the company's authorization to institute the instant proceedings and that no resolutions of the Company's Board were produced to show that the suit was filed with the company's consent/ratification, the absence of such authorization may not be fatal to the suit at this point in the proceedings. This court notes that there is a peculiar aspect of the dispute herein in that the disputants are not only relatives and close family members, to wit, father and sons respectively, but that they are also co-directors of the subject company, the 1<sup>st</sup> plaintiff.

16. My findings on the subject of the authority to file the suit notwithstanding, I am still minded to determine the merits of the applications.

### **Injunction**

The plaintiffs sought both mandatory and temporary injunction against the defendants. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides: -

***"Where in any suit it is proved by affidavit or otherwise—***

***(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;***

***(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."***

17. The principles governing the granting of orders of injunction were stated in the celebrated case of **Giella v Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

***"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."***

18. The test for granting of an interlocutory injunction was considered in the American *Cyanamid Co. v Ethicom Limited (1975) A AER 504* where three elements were noted to be of great importance namely:

- i. There must be a serious/fair issue to be tried,**
- ii. Damages are not an adequate remedy,**
- iii. The balance of convenience lies in favour of granting or refusing the application.**

19. In *Mrao Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a *prima facie* case as:

**"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".**

20. Mandatory injunction, on the other hand, is not the same as a prohibitory injunction as the considerations for granting the two injunctions are slightly different. Whereas in the case of prohibitory injunction an applicant must establish a *prima facie* case with a probability of success, that the applicant will suffer irreparable damage which cannot be adequately compensated by an award of damages if an injunction is not granted or further still, that the balance of convenience tilts in the applicant's favour. In the case of mandatory injunction, the applicant must in addition establish special circumstances and the standard for its grant is usually higher than that of prohibitory injunctions.

21. The considerations for granting interlocutory mandatory injunctions were well stated in the case of *Kenya Breweries Ltd & Another v Washington O. Okeyo* [2002] eKLR where the Court of Appeal said: -

**"The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 948 which read: -**

**"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 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 plaintiffs ... a mandatory injunction will be granted on an interlocutory application."**

22. The Court of Appeal quoted with approval an English decision in the case of *Locabail International Finance Ltd v Agroexport and others* (1986) 1 ALLER 901 where it was stated: -

**"A mandatory injunction ought not to be granted on an interlocutory application in the absence or 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 higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction."**

23. In the recent case of *Nation Media Group & 2 others v John Harun Mwau* [2014] eKLR the Court of Appeal said: -

**"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."**

24. The principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. In the instant case, the court is faced with a unique case where one director is seeking to restrain his two co-directors and sons from having any dealings with the company including accessing the company's accounts. The question which then arises is whether in the circumstances of this case the plaintiffs can be said to have established a *prima facie* case so as to warrant the granting of the interim orders of injunction. Courts have taken the position that they will not interfere with the running/operations of the companies.

25. My view is supported by the decision in the case of *Foss v Harbottle (1843) 2 Hare 261* where it was stated that courts will interfere only where the act complained of is *ultra vires*, or is fraudulent or not rectifiable by an ordinary resolution. In the instant case, I find that the matters complained of do not border on fraud or *ultra vires* but are such that can be resolved by the company itself. In the present case, I note that even though the applicants accuse the defendants of fraud, conversion and syphoning of funds from the 1<sup>st</sup> plaintiff's accounts, no material was placed before this court to show that such fraud was committed or that the applicants had reported the defendants' alleged activities, which are clearly criminal in nature, to the relevant investigative bodies for their necessary action.

26. The picture created in the instant case is that of directors of a company and indeed family members who cannot agree or see eye to eye. My humble view is that the dispute herein clearly arises out of disagreements between the directors and is such that it should be resolved in the manner envisaged under the company's articles of association. I am therefore not convinced that the plaintiffs have met the threshold of the condition on *prima facie* case so as to entitle them to the orders sought in the application.

27. The plaintiffs also sought orders of permanent injunction, for the rendering of accounts and for the payment of what is found to be due to the plaintiff after the said accounts are rendered. My finding is that these are orders which can only be granted after the full hearing of the main suit and not at this interlocutory stage.

28. For the above reasons, I am not persuaded that the two applications are merited I therefore dismiss them with orders that the costs of the applications shall abide the outcome of the main suit.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 22<sup>nd</sup> day of October 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Njoki for Miss Muthee for the plaintiff.

No appearance for defendant.

Court Assistant: Sylvia