



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 228 OF 2018

IN THE MATTER OF HIPORA BUSINESS SOLUTIONS (EA) LIMITED

AND

IN THE MATTER OF COMPANIES ACT NO. 17 OF 2015 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE DERIVATIVE ACTION

JOHN WANJOHIPLAINTIFF/APPLICANT

VERSUS

JOHANN DE JAGER.....1ST DEFENDANT/RESPONDENT

JORAM GATEL.....2ND DEFENDANT/RESPONDENT

TSHEPPO EDWIN MONNANYANN.....3RD DEFENDANT/RESPONDENT

HIPORA BUSINESS SOLUTIONS (EA) LTD1ST INTERESTED PARTY

HIPORA SECURITY SOLUTIONS LTD.....PROPOSED 2ND INTERESTED PARTY

RETAIL MANAGEMENT SOLUTIONS LTD.....PROPOSED 3RD INTERESTED PARTY

RULING

1. The Plaintiff (herein “the Applicant”), filed the subject notice of motion application herein on the 6th June 2018, seeking for orders that;

(a) The Honourable court be pleased to allow the Plaintiff to proceed with and/or institute this suit as a derivative action on behalf of the Interested party;

(b) In furtherance of prayer (a) above, there be an order injunctiong the Respondents from holding the special meeting scheduled for 8th June 2018 during the pendency of this application and the main suit and the Applicant be allowed to maintain his position as the Managing Director of the Interested party;

(c) In furtherance to (a) above, the Respondents be compelled to provide the Applicant with documentary and other evidence in support of the serious allegations contained in the notice of general meeting in order that the Applicant may prepare his representations to the said notice.

(d) The Honourable Court be pleased to issue any further order/directions as it may deem appropriate.

2. The application was filed alongside a plaint of the same date seeking for orders that;

(a) A declaration that the Defendants have acted in breach of their statutory duty to promote the success of the Company and avoid conflict of interest;

(b) A declaration that the intended removal of the Plaintiff as Managing Director is in conflict with the Defendant's duty to promote the success of the Company;

(c) The Defendants be directed to discuss the exit of the 1st Defendant from the Interested Party in order to promote its success as per the agenda of the meeting of 17th April 2018;

(d) The Defendants be ordered to pay damages for breach of trust and/or breach of their statutory duties;

(e) Costs of the suit;

(f) Interest on (e) above at court rates until payment in full

3. The court ordered the application be served for directions inter parties on 8th June 2018 and upon appearance of the parties on 28th June 2012, the Respondents were allowed five (5) days within which to respond to the application and the Applicant given seven (7) days to file and serve submissions. The Respondents had a similar period for the same. The Highlighting of submissions was stood over to 20th September 2018.

4. However, on 7th August 2018, the Applicant filed another notice of motion application seeking for orders;

a) That pending the hearing and determination of the application inter-parties and the main suit, the Honourable court be pleased to grant an injunction restraining the Defendants/Respondents by themselves, their agents, servants, employees or any other person acting under their authority from removing the Plaintiff from this employment as Managing Director of Hipora Business Solutions East Africa Limited, from withholding his salary from the month of July 2018 henceforth and from withholding the Plaintiff's special remuneration;

b) That pending the hearing and determination of this application inter-parties and the main suit, the Honourable court be pleased to grant an injunction restraining the Defendants/Respondents by themselves, their agents, servants, employees or any other person acting under their authority from interfering with the day to day operations of Hipora Business Solutions East Africa Limited including but not limited to the Plaintiff's operations as Managing Director;

c) That the minutes of the meeting purported to have been held on the 8th July 2018 be declared a nullity;

d) Any other order that the Honourable court may deem fit to issue;

e) The costs of the application and those of the entire suit be borne by the Plaintiff.

5. The matter was certified as urgent and ordered served for inter parties directions, 10th August 2018. Upon hearing the parties, the court ordered that, the status quo prevailing before the filing of the application dated 6th June 2018 be maintained. On 20th September 2018, the court heard the parties orally on the notice of motion application dated 6th June 2018; and directed that the matter be negotiated with a view of reaching a consent settlement.

6. On 28th September 2018, the Respondents were not in court, therefore matter was stood over to 5th October 2018 and after hearing the parties orally, it was resolved the parties continue with negotiations with a view to record a consent settlement.

7. However on 28th November 2018, the Applicant filed another notice of motion application seeking for orders that;

(a) That pending the hearing and determination of the application inter parties, the Honourable court be pleased to order the joinder of the 2nd and 3rd Interested parties to this suit;

(b) That pending the hearing and determination of the application inter parties and/or any mediation or arbitration process, the Honourable court be pleased to order that all cheques and payments of the three interested parties companies in all bank accounts including Account number 0100004076677 held at Stanbic Bank Kenya Limited in the name of Retail Management Solutions Limited and Account number 0100004075328 held at Stanbic Bank Kenya Limited in the name of Hipora Security Solutions Limited and Account Number 010000545451 held at Stanbic Bank Kenya Limited in the name of Hipora Business Solutions (EA) Limited be signed and payments be authorized by the Plaintiff and the 3rd Defendant only jointly;

(c) That pending the hearing and determination of the suit, the Honourable court be pleased to order the joinder of the 2nd and 3rd proposed interested parties to this suit;

(d) That pending the hearing and determination of the application inter parties and/or any mediation or arbitration process, the Honourable court be pleased to order that all cheques and payments of the three interested parties companies in all bank accounts including Account number 0100004076677 held at Stanbic Bank Kenya Limited in the name of Retail

Management Solutions Limited and Account number 0100004075328 held at Stanbic Bank Kenya Limited in the name of Hipora Security Solutions Limited and Account Number 010000545451 held at Stanbic Bank Kenya Limited in the name of Hipora Business Solutions (EA) Limited be signed and payments be authorized by the Plaintiff and the 3rd Defendant only jointly;

(e) That the costs of the application be borne by the Respondents.

8. The application was considered and similarly ordered to be served for directions inter parties on 3rd December 2018. On that date, the court observed that, the Applicant was abusing the court process by filing several applications and leaving them pending. The Court then intervened to understand the underlying factors. On 13th December 2018, the court heard from the parties in person, and directed that it would consider the main issues in the matter and give a ruling and/or direction thereon on 6th June 2018, which was later stood over to 7th February 2019.

9. However before the ruling or directions were given, the parties entered into a consent on the same date in the following terms:-

“By consent of the parties

1. The parties have agreed to separate in the running of the three companies, that is;-

(a) Hipora Business Solutions (EA) Limited;

(b) Hipora Security Solutions Limited; and

(c) Retail Management Solutions Limited

2. To enable the separation, the parties will do the following;-

(a) confirm the outstanding liabilities of the three (3) said companies by engaging an independent Auditor to finalise the accounts. The Auditor is Mr. Chege Joseph of FAS Auditors;

(b) the parties will engage on how to resolve the issue of personal guarantees given by the directors to Banks in respect of liabilities

3. The parties will meet on 10th January 2019 at 11.00am at Hipora Board room at Karen to fine tune the details of separation and discuss the final accounts in the presence of the Auditor and their Advocates;

4. The order issued on 3rd December 2018, freezing the accounts, be varied in the following terms. In respect of all the accounts of the three companies, Mr. John Wanjohi and Mr. Tsheppo Edwin Monnanyamania be joint signatories and if anyone of them is out of the country Joram Gatehi will sign.

5. The matter be mentioned in February to advise the court of the progress of the separation.”

10. As a result of the consent, the court was informed that, there was progress in the matter and the remaining issue was on the discharge of the other directors from liability on the guarantee. As a result of which the court granted the parties more time to finalise the negotiations. The matter was stood over to 23rd February 2019.

11. On that date, the court was informed the parties could not agree on the issue of discharge of guarantors and release of the Respondents from the liabilities arising therefrom. The Applicant's counsel informed the court that, he had offered the Respondents a professional undertaking, but the Respondents' counsel told the court that, the Respondents were not agreeable to the terms of the undertaking.

12. The court then intervened and ordered the Plaintiff to give the Defendants a professional undertaking of Kenya Shillings Seven Million Five Hundred Thousand (Kshs. 7,500,000.00) within fourteen (14) days and upon issuance thereof, the Respondents to sign the relevant documents to finalize the transfer of the companies to the Plaintiff and the Plaintiff to facilitate the discharge of the Respondents from the liability within seven (7) days.

12. On 12th March 2019, the Plaintiff told the court that, he had fully complied with the court orders. However, although the Respondents were agreeable to the letter of undertaking, they were not agreeable to the proposal to pay the Kenya shillings Seven Million Five Hundred Thousands (Kshs. 7,500,000.00) in eight (8) installments and requested the payment be made in two (2) installments. In the alternative, security be provided. The court then allowed the parties' time to discuss the matter further. However, they could not agree.

13. The court then ordered the outstanding sum of Kenya Shillings Seven Million Five Hundred Thousand (Kshs. 7,500,000.00) be paid in four installments with effect from 15th March 2019. On 15th March 2019, the court was informed that, the Plaintiff had offered three motor vehicles and a payment of Kenya Shillings One Million (Kshs. 1,000,000). The motor vehicles are valued at Kenya shillings Five Million Six Hundred and Thirty Thousand (Kshs. 5,630,000), but still the Respondents were not agreeable to the securities offered. Consequently, on 12th March 2019, the court directed that the parties do file brief submissions on the pending issues of guarantors' liability and the proposed repayment of the outstanding amount of Kenya Seven Million, Three Hundred and Forty Thousand (Kshs 7, 340,000).

14. In that regard, the Plaintiff submitted that Respondents were agreeable of the repayment of the subject sum to four installments. The Plaintiff then informed the court that the 1st Interested party (HBS) could offer unencumbered assets which include three motor vehicles, namely.

a) *KBQ 343C Ford Ranger Pickup valued at Kshs. 1,550,000;*

b) *KBS 163M Toyota valued at Kshs. 400,000;*

c) *KBR 529Q Toyota NZE, valued at Kshs. 640,000*

15. The Plaintiff further submitted that, as the company continues to trade and its turnovers are increasing due to the ardent efforts of the Plaintiff who has concentrated all his energies in the business after the separation was agreed upon, there will be sufficient funds to cover the Respondents debt. The Plaintiff in addition said, he is ready and willing to offer his motor vehicle number KBV 999E, Toyota Prado valued at Kenya Shillings, Two Million Eight Hundred Thousand (Kshs. 2,800,000) as security.

16. The Plaintiff further proposed to deposit the original logbooks in court to cover the Respondents completely and give three post dated cheques for the difference of Kshs. 1,950,000, that would appear unsecured. On 12th March 2019, the Plaintiff proposed to settle the same as follows:-

a) *Kshs. 1.5 million within thirty (30) days of separation;*

b) *Kshs. 2.0 million within sixty (60) days of separation;*

c) *Balance of Kshs. 2.34 million within 120 days of separation*

17. The Plaintiff urged the court to order the Respondents execute the documents that will enable separation transferring 1st and 2nd Interested party to the Plaintiff only and those removing the Plaintiff from the 3rd Interested party within seven (7) days and in default, the Honourable Deputy Registrar of the court be ordered to sign the same. Finally, since the parties had previously agreed, the matter will rest with no orders to costs.

18. However, the Defendant submitted that the following securities would be tenable;

a. *Insurance bond;*

b. *Bank guarantee;*

c. *In the alternative; a title deed*

19. The reason in support of the above preferred securities was stated to be that, the same will come into effect upon failure to pay the installments which the Plaintiff has categorically stated that he shall make. Further, this avoids any further litigation and/or default clauses, in any orders to be issued by the court that, would result to getting back to the hearing of a matter already resolved through mediation. Also there is a very low chance that the securities proposed will be tampered with.

20. The Defendants argued that, they highly oppose the use of any moveable assets as security as this will culminate to a further process of tracing the assets which can be tampered with or be put out of reach. It will then be followed by conducting a sale that is so uncertain as to amount of money that would be recovered. In the event of such sale since the same are prone to depreciation or accidents. These securities should then be re-enforced with the ruling of the Honourable court.

20. I have now considered all the proposals made by both parties and in deciding on what orders to make the court will be guided by two key issues: the interest of the parties and/or justice and the fact that the matters has reached an advanced stage and it will be in the interest of justice to resolve it amicably and expeditiously. The court should therefore remain in control of the same.

21. However, it should be noted that the court has already ruled that payments due should be made in four installments. That order is still valid. To balance the scale of justice in the statement, I shall consider the hybrid solution where the securities suggested by both parties will be considered alongside. Priority will be given to any cash offer. In that case, I order that, the Plaintiff:

(a) *makes a cash payment of Kshs 1,340,000 in favour of the Respondent on or before the 14th day of this order;*

(b) *give the Respondent a postdated cheque in the sum of; Kshs 1, 000, 000 payable within 30 days of the date of this order;*

(c) *Cause the motor vehicle registration number KBQ 343C Ford Ranger Pickup allegedly valued at Kshs. 1,550,000 to be registered in the joint names of the parties and the logbook be deposited in court within 30 days of the date of this order. The motor vehicle will be security for a sum of Kshs 1,000, 000.*

22. I have also considered the securities proposed by the Defendants and I find that unless the Defendants merely want the title deed to be deposited without execution of a legal charge thereon the process of transfer of the title will be cumbersome and time consuming. But even more realization thereof in case of default will be difficult. Indeed taking into account that the Defendants are not licensed financial

institution, the charging of the title deed may not be tenable, the sale may be difficult. The other two securities proposed will require a deposit of funds with the service provider and if the cash is available, then it might as well be paid directly to the Defendants. In fact a professional undertaking from the Applicants counsel will be more suitable.

23. To conclude the matter, I order a professional undertaking be given by the Plaintiff's Advocate in the sum of Kshs 2,000,000 within 30 days of the date of this order and the balance of the sum be secured within forty five (45) days of this order by a Bank guarantee or Insurance bond. In the meantime once the Plaintiff has fulfilled the conditions set and to be fulfilled within thirty (30) days of this order, the Respondents shall execute the necessary documents to conclude the separation of the companies. In default of compliance with any order after execution of the documents for separation, all the orders given herewith shall stand discharged and/or vacated without further recourse to the court, including the consent recorded by the parties. The matter shall then be set for mention for confirmation of compliance

23. It is so ordered

Dated, signed and delivered in an open court this 23rd day of April 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Kirimi for the Plaintiff

Mr. Odhiambo for the Defendants

RobertCourt Assistant