



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 194 OF 2019

ZIPPORAH MOGAKA.....1ST PLAINTIFF/APPLICANT

FELISTAS NGATUNY.....2ND PLAINTIFF/APPLICANT

-AND-

KENYA REINSURANCE CORPORATION LIMITED.....DEFENDANT/RESPONDENT

RULING

1. I am considering the application dated **27th August 2019**. This application is filed by the two plaintiffs, namely **Zipporah Mogaka** and **Felistas Ngatuny**. By that application the plaintiffs seek interlocutory injunction to restrain the defendant, Kenya Re-insurance Corporation Limited, from removing the plaintiffs from the board directors or interfere with execution of their duties in Kenya Re Zambia and Kenya Re Cote D'Ivoire (hereinafter the two companies). The plaintiffs by that application also seek an order to restrain the defendants from refusing to facilitate the plaintiffs' travels or execution of their duties as members of the board of the two companies.

2. The plaintiffs through their plaint and the affidavit of **Zipporah Mogaka** have set out the background of this matter. It is to be noted that there is no affidavit sworn by **Felistas Ngatuny** only that there is a document which seems to be an incomplete affidavit, signed by her.

3. The background in those pleadings is that **Zipporah Mogaka** and **Felistas Ngatuny** were elected as directors of Kenya Re Zambia and Kenya Re Code D'Ivoire on 26th March and 7th May 2019 respectfully. They pleaded that their election and appointment to those boards was in accordance with the provisions of Article of Association of those two companies. It is the case of the plaintiffs that the Articles of the two companies do not grant the defendant power to interfere with the appointment of their directors.

4. Further that there was an agreement and a matter of notoriety between the defendant and two companies to the effect that whenever the two companies held meetings, in Zambia and Cote D'Ivoire, the defendant facilitated the travel of the plaintiffs to those meetings. That however when the two companies scheduled their meetings in the month of July 2019, the defendant despite persistent requests failed to facilitate the plaintiffs travel to those meetings.

5. In their final prayer in the plaint, the plaintiffs seek a declaration that the defendant's action to remove them from being members of the board of directors, in the two companies, and interfering with the performance of their function would be illegal, null and void. Further they seek an order of permanent injunction to restrain the defendant from removing the plaintiffs from being directors of the board of the two companies and interfering with plaintiffs execution of their duties including refusal to facilitate their travel to attend the board meetings of the two companies.

6. The defendant opposed the plaintiffs' application. The replying affidavit, of the defendant, in opposition to the plaintiffs' application is sworn by Jadian Mwarania the defendant's managing director. He begins his affidavit by setting out the undisputed facts, as follows:

a. THAT there is no dispute that Kenya Reinsurance Corporation Zambia Limited and Kenya Reinsurance Corporation Limited (Cote D'Ivoire) are foreign companies duly registered under their respective foreign laws being, Companies Act, 2017, Laws of Zambia and the Uniform Act Relating to Commercial Companies and economic Interest Groups No. 4/1997.

b. THAT there is also no dispute that Kenya Reinsurance Corporation Zambia Limited and Kenya Reinsurance Corporation Limited (Cote D'Ivoire) have their own constituting instruments more so the Articles of Association that govern the internal management of the two companies.

c. **THAT** it is also not in dispute that the Respondent herein is a shareholder of both Kenya Reinsurance Corporation Zambia Limited and Kenya Reinsurance Corporation Limited (Cote D'Ivoire), with rights of a shareholder as provided for under the respective Memorandum and Articles of Association.

d. **THAT** it is also not disputed that under the various Articles of Association of Kenya Reinsurance Corporation Zambia Limited and Kenya Reinsurance Corporation Limited (Cote D'Ivoire), the shareholders of the two foreign companies have been bestowed various rights including the right to vote on appointment and removal of their directors in a duly convened meeting by the two foreign companies.

e. **THAT** it is not in dispute that the 1st and 2nd Applicants were duly appointed and or elected as directors of the Kenya Reinsurance Corporation Zambia Limited and Kenya Reinsurance Corporation Limited (Cote D'Ivoire) on different dates as directors.

f. **THAT** as such the relationship as regards any director's duty towards the company and company obligation towards the directors can only be matters as between the 1st and 2nd Applicants and the Kenya Reinsurance Corporation Zambia Limited and Kenya Reinsurance Corporation Limited (Cote D'Ivoire) respectively. The Defendant herein was not a party to that relationship and accordingly no cause of action accrues against the defendant premised on that relationship as there is no privity of contract.

7. The deponent proceeded to point out that the defendant, as a shareholder of the two companies, has rights as provided under the Memorandum and Articles of the two companies to vote, appoint on merit and remove any directors. He however stated that contrary to what the plaintiffs plead the defendant had not threatened to remove the plaintiffs from board of directors of the two companies. He also denied that there was an agreement between the defendant and the two companies for the defendant to facilitate travel to board meetings of the plaintiffs.

ANALYSIS

8. What the plaintiffs seek is interlocutory injunctive orders. The correct approach of consideration of evidence, in such applications was discussed by the court of appeal in the case

Mbuthia v Jimba Credit Finance Corporation & another [1988] eKLR Where the court held:

“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits.”

9. Bearing that holding in mind I will consider whether the plaintiffs have met the principles of granting an injunction which enunciated in **Geila Vs Cassman Brown & Co. Ltd 1973**, E. A. 358 thus:

i. The Applicant must establish a prima facie case with a high probability of success.

ii. The Applicant must show that if the orders are not granted, then the Applicant will suffer irreparable loss.

iii. If the Court were to decide otherwise, then it should decide on the basis of the balance of convenience.

10. The plaintiffs' prayers, in the present application, are two. The plaintiffs seek restraining orders against the defendant to stop the defendant from removing the plaintiff from the board of directors of the two companies. Secondly the plaintiffs seek an order requiring the defendant to facilitate their travel to board meetings of the two companies.

11. The defendant has denied that it has threatened to remove the plaintiffs as directors of two companies. Although the plaintiffs case is that the defendant intend to so remove them. I have not been able to find evidence whether by correspondence or otherwise of such threat. The only defendant's correspondence, both by letter and email, which are attached to the affidavit evidence speak to the defendant's reluctance to pay for the travel costs of the plaintiffs for purpose of attending board meeting abroad. That prayer therefore fails.

12. The second prayer, of the plaintiffs as correctly submitted by the defendant, seek mandatory interlocutory injunction. It is trite that for mandatory injunction to issue, at interlocutory stage, there must be demonstration of special circumstances. This is what was stated in the case **Robai Kadili Agufa & another v Kenya Power & Lighting Co Ltd [2015] eKLR**

“The considerations for granting interlocutory mandatory injunctions were well stated in the case of Kenya Breweries Ltd & Another vs 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 4th 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 match on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’”

13. The defendant's reluctance to provide for plaintiffs' travel expense, to board meetings abroad, is because the plaintiffs ceased to be defendant's directors on 14th June 2019. The defendant, now states, as can be seen above, that the responsibility of providing for the travel expenses of the plaintiffs falls at the feet of the two companies. Although the plaintiffs allege that there exists an agreement between the defendant and the two companies that the defendants would provide for those travel expenses the plaintiff did not show evidence of such an agreement. It does indeed seem to be a figment of the plaintiffs' imagination.

14. On the whole considering the plaintiffs two grounds, which they rely on for the orders sought the plaintiff have failed on a prima facie basis to establish a prima facie case with probability of success. Because the principle of granting injunction are sequential and the plaintiffs having failed to satisfy the first of those principles the plaintiffs' application fails. See the case of **NGURUMAN LIMITED V JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012** thus:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) Establish his case only at a prima facie level,*
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and*
- (c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.*

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit 'leap-frogging' by the applicant to injunction directly without crossing the other hurdles in between.” (Emphasis added).”

CONCLUSION

15. The plaintiffs' application having failed the costs of it must follow the event.

16. Accordingly it pleases me to grant the following orders:

- a. The Notice of Motion dated 19th August, 2019 is dismissed.*
- b. The costs of that application are awarded to the defendant.*

DATED and SIGNED at NAIROBI this 28th day of November 2019.

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFFS**

..... **FOR THE DEFENDANT**