



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.E111 OF 2019

MARY JOSEPH WANJIKU KURIA.....PLAINTIFF

VERSUS

THOMAS KINYANGA KURIA.....1ST DEFENDANT/1ST RESPONDENT

JANE NJERI MUCHIRI.....2ND DEFENDANT/2ND RESPONDENT

GLOBUS TOURS AND TRAVEL LTD.....3RD DEFENDANT/3RD RESPONDENT

RULING

(1) Before this Court the Notice of Motion dated **29th April 2019** by which **MARY JOSEPHINE WANJIKU KURIA**, (the Plaintiff/Applicant) sought the following Orders:-

“1. SPENT

2. SPENT

3. SPENT

4. SPENT

5. THAT pending hearing and determination of this suit an injunction be and is hereby issued to restrain the Respondents and each of them, whether by themselves or by their respective servants or agents or any of them or otherwise however and whether in the case of the second Defendant by their directors, officers, subsidiary companies, servants or agents or any of them or otherwise howsoever, from doing the following acts or any of them that is to say, interfering by way of cash withdrawals or transfer from any or all bank accounts held in the name of the 3rd Respondent and further be restrained from removing from the jurisdiction of this Court or from disposing of, dissipating, diminishing or in any way howsoever dealing with any of the assets owned by the 3rd Respondent within the jurisdiction.

6. THAT the Defendant do within Seven (7) days of service of this order upon him make and serve on the Plaintiff's Advocates an Affidavit disclosing the full value of the current outstanding debtors and assets belonging to the 3rd Respondent whether within or without the jurisdiction of this court, identifying with full particularity the nature of all such assets and their whereabouts.

7. THAT the costs of this application be provided for.”

(2) The application was premised upon **Sections 1, 1A, 3a and 3A** of the **Civil Procedure Act Cap 21. Order 39 Rules 5(1),5(2), 5(3)** of the **Civil Procedure Rules 2010**, and all enabling provisions of law and was supported by the Affidavit of even date sworn by the Plaintiff/Applicant.

(3) The Respondent opposed the application through the Replying Affidavit dated **9th May 2019** sworn by **THOMAS KINYAGA** the 1st Defendant/Respondent in the matter. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed her written submissions on **22nd October 2019**, whilst the Defendant/Respondent filed their submissions on **24th July 2019**.

BACKGROUND

(4) The Plaintiff on **20th February, 2006** registered a sole proprietorship business in the name of **Globus Tours and Travel** to offer tours and travel services. The Plaintiff later met the 1st Defendant and invited him to join her in business and together they incorporated a Company on **11th July 2006** to carry out the business of tours and travel in the name and style of **Globus Tours & Travel Limited**. (The 3rd Defendant herein) The Plaintiff and 1st Defendant were directors and shareholders of the Company with each holding a stake of 50%.

(5) Sometime in **2017** the shareholding changed to 70% in favour of the Plaintiff and 30% in favour of the 1st Defendant. The parties continued to work together from 2006 until sometime in the year 2018 when their working relationship began to deteriorate due to sudden changes in the working approach adopted by the 1st Defendant. The Plaintiff alleged that the 1st Defendant was paying less attention to the company. The parties then decided to dissolve the company and part ways.

(6) In that respect a Board meeting was held on **23rd January 2019** between the Plaintiff and 1st Defendant as directors for the dissolution of the Company at which the following resolutions were made:

“1. The directors will be actively involved in debt collection and pay ourselves with respect to outstanding debtors of the company. The amounts are to be paid as soon as the debtors make payments to the company.

2. The directors can move on to doing their businesses as the process of dissolving is going on.

3. Properties acquired with the company name will be split equally, and each director will be entitled to 50% each.

4. All the staff will be paid according to the current labour laws.

5. At the said meeting, upon motion duly seconded, a resolution was duly adopted for the dissolution of this company.”

The minutes of that Board Meeting which are annexed to the Plaintiffs Supporting Affidavit dated **29th April 2019** (Annexure “MJWK4”) were duly signed by both parties.

(7) The 1st Defendant however changed his mind about dissolving the company and instead implored the Plaintiff to resign as a director in return for the Plaintiff getting the total value of half of the assets of the company. The Plaintiff obliged and tendered her resignation on **25th January 2019**.

(8) The Applicant contends that upon tendering her resignation as agreed the parties adopted new resolutions dated **24th January 2019** as follows:-

“(i) On a special meeting of the Board of Directors held at Ratansi Educational Trust Building 2nd floor on 24th January 2019, a resolution was adopted for the revocation of the resolution dated 23rd of January 2019 with exception to clause 2, 3, 4 & 5.

(ii) Mary Josephine Wanjiku Kuria to resign being a director effective 1st of February 2019.

(iii) All assets and liabilities as at 1st February 2019 of the company will be shared equally.

(iv) All company bank accounts mandate will both to sign until all the debtors pay and the funds to be shared equally.

(v) The KCB Bank account mandate will be changed upon sharing the funds in that account so to enable Thomas Njuguna to operate the business from 1st February, 2019 unencumbered.

(vi) Mary Josephine Kuria will not be responsible for any liabilities incurred by the company after 1st February 2019.

(vii) The resigning director will transfer the shares to at the company in trust that the assets and liabilities be shared equally on condition that if this is breached by the company or its directors then the transfer of shares will be considered null and void.

(viii) There will be no changes of bank account details communicated to debtors until all the dues as at 1st February, 2019 are paid.

(ix) All the staff will be paid as per the labour law for redundancy.”

(9) The parties then wrote a letter dated **1st February 2019** to the Branch Manager **Standard Chartered Bank, Koinange Street Branch** informing the Bank as follows:-

“- The accounts mandate will be both to sign in any transaction for a period of a few months until all the debtors pay.

- The funds in the company account will be shared by both directors equally.

- A written instruction thereafter will follow to allow Mr Thomas Kinyaga Njuguna to be left as the sole signatory.”

(10) In the course of debt collection the Plaintiff realized that some debtors had made payments and that the 1st Defendant had been unilaterally and unlawfully withdrawing varying amounts of money from the Company account. The Plaintiff became apprehensive since there were other remaining funds held in the account at Standard Chartered Bank Koinange Street Branch. The Plaintiff found out from the bank that the 1st Defendant had changed the mandate for the signatories in another branch and caused the Plaintiff's name to be removed as signatory from the two main accounts. The Plaintiff became apprehensive that the 1st defendant would continue changing and replacing her name as a signatory in all accounts held by 3rd Defendant and would continue to transfer and or misappropriate the jointly owned property.

(11) On his part the 1st Defendant averred that the Board Resolution of 23rd January, 2019 was to the effect that the 3rd Defendant would be dissolved and how assets would be divided between the Plaintiff and the 1st Defendant but the 3rd Respondent was not dissolved therefore nullifying that resolution and thus the Plaintiff cannot claim based said resolutions on. The Defendant avers that at the time the Plaintiff resigned, the 3rd Defendant's bank accounts had an overdraft and the agreement between the parties was that payment received from the debtors would be used to settle those overdrafts.

(12) The Defendant further avers that upon the Applicant's Resignation they proceeded to withdraw all the monies from the KCB Account but does not deny that the Plaintiff is entitled to share of the following properties:-

a) Kwale/Diani Beach 1722

b) Kwale/Diani Beach 1723

c) Apartment No.2 on Block 0 Land Reference 21070- Loresho Greens Estate.

d) Apartment No.F1 on Block F land Reference 21070-Loresho Greens Estate

(13) Further the 1st Defendant does not deny that he removed the Plaintiff as a signatory to the company bank account, but contends that given that the Plaintiff had already resigned, she had no further role in the management of the Company. The 1st Defendant claims that the monies which he withdrew were utilized for business related expenses. He finally submits that having resigned the Plaintiff had no further claim against the Defendants. He urges court to dismiss the application.

ANALYSIS AND DETERMINATION

(14) I have carefully considered the submissions filed by both parties as well as the relevant law. The Plaintiff/Applicant seeks injunctive orders as against the Defendants. The conditions precedent to the grant of an injunction were set out in the case of **GIELLA –VS- CASMAN BROWN 1973 EALR** where the Court held as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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 the application on a balance of convenience.”

(15) Likewise in **EAST AFRICA INDUSTRIES LTD –VS- TRU FOODS LTD [1972] E.A 420**, it was held:-

“A Plaintiff has to show a prima facie case with a probability of success and if the court is in doubt it will decide the application on the balance of convenience. An inter-locutory 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.”

Therefore in order to merit the injunction sought the Plaintiff/Applicant would have to demonstrate to this Court that it has met the above conditions.

PRIMA FACIE CASE

(16) An Applicant who seeks an interlocutory injunction must adduce evidence sufficient to show that it has a prima facie case. **“Prima facie”** is a legal term which means **“at first impression.”** The term denotes the fact that if the evidence were to remain the same at the hearing of the main suit, it is probable that the court will decide in favour of the Plaintiff. The Plaintiff must show a prima facie case for the existence of a right and must also establish that such right has been violated by the opposite party.

(17) In **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD [2003]EKLR** the Court of Appeal of Kenya defined the term **“prima facie case”** as follows:-

“...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case succeeding upon trial...it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter...”

(18) The Plaintiff/Applicant has demonstrated the arrangements which were to subsist upon her resignation from the company. She has annexed the letter dated **1st February 2019** written to the **Branch Manager, Standard Chartered Bank Koinange Branch**, indicating that the mandate for the company account was that both directors were to sign. This letter was signed by **both** the Plaintiff and the 1st Defendant.

(19) Contrary to that Agreement the 1st Defendant later wrote to the same bank but at different branch (being the Kenyatta Avenue Branch) revoking the original instructions and effecting a change in the mandate to include himself as the sole signatory to the account. In this way the 1st Defendant was able to make several withdrawals from the Company accounts without the knowledge and/or authorization of the Plaintiff. I am satisfied from this that the Plaintiff/Applicant has established a prima facie case.

IRREPARABLE HARM

(20) The Plaintiff/Applicant has annexed documents showing that she and the 1st Respondent were to share equally any monies paid into the Company accounts from their debtors. By removing the Plaintiff as a signatory to the bank accounts, the 1st Respondent would be able to, and in fact did proceed to withdraw substantial amounts of money from the company accounts. This was contrary to their letter to the Bank dated **1st February 2019**. In the event no injunction is granted there is a real risk that the 1st Defendant will continue on this withdrawing spree to the detriment of the Plaintiff as he may, go so far as to withdraw all the funds paid in by debtors.

BALANCE OF CONVENIENCE

(21) Finally I opine that the court ought to safeguard the subject matter of the suit being the Company bank accounts pending hearing and determination of the suit. Therefore balance of convenience tilts in favour of the Plaintiff.

(22) Accordingly I do allow the present application and grant an injunction in terms of prayer (6) of the Notice of Motion dated **29th April 2019**. Further I do make orders in terms of prayer (7). Costs of this application are awarded to the Plaintiff/Applicant.

Dated in **Nairobi** this **26th** day of **November, 2019**.

Justice Maureen A. Odera