



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.13 OF 2018

JUANCO GROUP LIMITED.....PLAINTIFF/APPLICANT

VERSUS

MIDLANDS LIMITED.....1ST DEFENDANT/RESPONDENT

AFRICAN AGRICULTURAL

CAPITAL FUND LLC.....2ND DEFENDANT/RESPONDENT

PRIMESTAR HOLDINGS LTD.....3RD DEFENDANT/RESPONDENT

R U L I N G

This is a ruling on the Plaintiff's application dated 12th January, 2018 which is a Notice of Motion application. It seeks orders that the Court issue an injunction order prohibiting the 1st and 2nd Defendants, their agents, employees and or servants from alienating, selling, disposing, dealing or otherwise interfering in any manner whatsoever with any of the Plaintiff's shares in the 1st Defendant pending the hearing and determination of this application .

Grounds On The Face Of the Application

- 1. THAT** the Plaintiff acted as a guarantor jointly with other shareholders over a loan facility granted to the 1st Defendant by the 2nd Defendant. The Plaintiff pledged a portion of its shares in the 1st Defendant as security.
- 2. THAT** the 1st and 2nd Defendant have colluded and are seeking to illegally and fraudulently deprive off the Plaintiff its shares in the 1st Defendant.
- 3. THAT** the collusion, fraud and illegality on the part of the 1st and 2nd Defendant effectively discharges the Plaintiff from its obligations as a guarantor and renders any purported or proposed rate of the Plaintiff's shares in the 1st Defendant illegal null and void.
- 4. THAT** the 2nd Defendant has offered the Plaintiff's shares in the 1st Defendant to the 3rd Defendant having not undertaken a valuation of the shares to determine their market value.
- 5. THAT** the Plaintiff stands to suffer irreparably if the 2nd Defendant proceeds with its unlawful action seeking to illegally and fraudulently deprive the Plaintiff of its shares in the 1st Defendant.

The application is supported by Affidavit sworn by Ndung'u Mwithiga who is the Investment Manager of the Applicant Company herein dated 12th January, 2018. He averred that the Plaintiff invested in the 1st Defendant where it owns Kshs. 19, 936,281 shares which shareholding translates to about 35.9% of the total allotted and paid up shares of the 1st Defendant.

He averred that together with the two shareholders the Plaintiff guaranteed a loan advanced to the 1st Defendant by the 2nd Defendant worth Kshs. 100,000,000. The 1st Defendant mismanaged its affairs and thus failed, neglected and/or refused to service the loan facility as and when it fell due in spite of reminders from other shareholders to the 1st Defendant.

He averred that the 2nd Defendant ensured that the 1st Defendant did not service the loan by ensuring the 1st Defendant's costs and overheads were increased and therefore transfer the Plaintiff's shares to Prime star Holdings Co. Ltd which he believes is associated with either or both the 1st and 2nd Defendants. He averred that the 1st Defendant has not held an annual general meeting for the last four years. He averred that the 1st Defendant ignored the requisitions of concerned shareholders who petitioned to have an annual general meeting convened in order to resolve amongst other issues, the outstanding loan.

In response the 1st Defendant/Respondent filed grounds of opposition dated 22nd January, 2018 in which it stated that the Plaintiff in the application has not disclosed how it will suffer substantial loss if the pledged shares are sold and that damages would be an appropriate remedy.

Further the 1st Respondent filed Replying Affidavit dated the 22nd January, 2018 sworn by Wanjohi Ndagu, the official representative of the 2nd Defendant. He averred that the Plaintiff failed to disclose that there is already in existence a suit pending in Court filed by Jungghae Wainaina against the 1st and 2nd Defendants seeking the same injunctive orders being **HIGH COURT CIVIL CASE 93 OF 2016**. A ruling was delivered on 11th July, 2017 on the same.

He averred that the 2nd Defendant's right to sell the shares has already crystalized under the terms of the share agreement dated 4th December, 2012 and the right to sell were further reinforced by the ruling and orders of the Court referred to herein.

A further Replying Affidavit by the 1st Defendant dated 14th February, 2018 was sworn by Mary Wangui Kiarie, the Director of the 1st Defendant Company. She averred that the Plaintiff is a family company controlled and directed by the family patriarch who is also its Principal Director one Jungghae Wainaina. The said Jungghae Wainaina is a founder shareholder and was the Chairman of the board and Managing Director of the 1st Defendant Company from as far back as 2005 until his resignation from the board on 19th April, 2014.

She averred that the company got into financial difficulties and as a result requested a loan from the 2nd Defendant. She averred that the Plaintiff is fully privy to the problems encountered by the company by virtue of the Plaintiff's Principal Director Jungghae Wainaina having been the 1st Defendant's Executive Chairman.

A Supplementary Affidavit dated 2nd March, 2018 by Ndung'u Mwithiga was filed to respond to matters raised in the 1st Defendant's Replying Affidavit. He averred that it is trite law that a company is distinct from its shareholders, thus it is irrelevant that one Jungghae Wainaina holds shares in the Plaintiff and there is no position of Principal Director in the Plaintiff's company as alluded to by the deponent.

He averred that it is absurd for a Principal Debtor (1st Defendant) to support the enforcement of a guarantee when the principal debtor is ultimately responsible for payment of the loan. He believes this is the clearest evidence yet of collusion between the 1st and 2nd Defendants to defraud the Plaintiff. A further affidavit sworn by Wanjohi Ndagu for the 2nd Defendant was filed dated 12th March, 2018.

PLAINTIFF/ APPLICANT'S SUBMISSIONS

Counsel for the Defendant highlighted the background of the matter and submitted that the issues for determination are:-

1. Whether the Applicant is deserving of the injunctive orders sought.
2. Whether such orders can issue against the proposed 3rd Defendant.
3. Whether the Plaintiff is a separate legal entity from its shareholders.

The Applicant relied on the case of *Giella Vs. Cassman Brown & Co.(1973) EA 378* where it was held that;

“An Applicant must show a prima facie case with the 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 and thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

1ST DEFENDANT/ RESPONDENT'S SUBMISSIONS

Counsel for the Respondent highlighted the background of the matter and submitted that the issues for determination are:-

1. Whether the Plaintiff/Applicant has capacity to sue in this instance.
2. Whether the Applicant has submitted any evidence in support of its claims and whether it stands to suffer irreparable loss if the pledged shares are sold.
3. Whether the application is in effect Res Judicata.
4. Whether the Applicant is guilty of undue delay.

5. Whether the foreign award was accompanied with the required documents.

The Respondent relied on the case of ***Mrao Ltd Vs. First American Bank Of Kenya & 2 Others Civil Appeal No. 39 of 2002*** which Bosire J stated as follows as regards a prima facie case;

“But as I earlier endeavored to show, and I cited ample authority for it, 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 success of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

ANALYSIS AND DETERMINATION

I have considered grounds raised in support of the application together with averments in the affidavits filed plus submissions by counsels herein.

I have also considered the Respondents grounds of oppositions averments in affidavits and submissions filed

There is no dispute that loan was advanced by the 2nd Defendant to the 1st Defendant.it is not also disputed that the Plaintiff who is a shareholder of the 1st Defendant guaranteed the said loan; that it guaranteed the loan by pledging its shares in 1st Defendant.

It is not disputed that the 1st Defendant defaulted in repaying the loan and that the loan is in arrears.

I find the following to be issues for determination:-

1. Whether Plaintiff has established prerequisites for grant of injunction as laid down in the case of **Giella Vs Cassman Brown;**
2. Whether Plaintiff is guilty of material non-disclosure.

Plaintiff has confirmed that it pledged its shares for the loan. It has alleged the Plaintiff alleges collusion between 1st and 2nd Defendant to deprive the Plaintiff of its shares and contend that the alleged fraud discharges Plaintiff from the obligation arising from guarantee. No particulars of collusion have been demonstrated. Default in payment of the loan is not disputed.no efforts to repay the loan have been shown. The Plaintiff has failed to discharge his duty of establishing presence of primafacie case to warrant grant of injunction. Further to the above the shares has value that is determinable. There is no indication that the 2nd Defendant will not be able to compensate in the event that the Plaintiffs suit is successful.

From the foregoing I find that the Applicant has failed meet the requirement for grant of injunction.

Despite the fact that I have arrived at the above finding on the first issue I will go ahead to consider the second issue.

Did the Plaintiff fail to disclose material facts in this suit?

I have perused the ruling delivered by Justice Nzioka in respect of **HCCC No. 93 of 2016** delivered on 11th July 2018. Even though the Applicant alleged the party suing herein is the company and the Plaintiff in **HCCC No. 93 of 2016**, it’s Junghae Wainaina, I note that the issues dealt with are the same issues dealt with in that case. It is not disputed that the Plaintiff in **HCCC No. 93 of 2016** is a shareholder in the Plaintiff herein. Share of the Plaintiff herein were pledged as guarantee for the same loan advance to the 1st Defendant by the 2nd Defendant. It’s the same shares that the Plaintiffs in both suits are seeking to stay sale. **HCCC No. 93 of 2016** is filed by the shareholder of Plaintiff in this suit. Plaintiff failed to disclose the relationship between the two suits and that conditional orders have been granted in **HCCC No. 93 of 2016** which I believe Plaintiff is trying to avoid compliance.

From the foregoing I find that the Plaintiff is guilty of material non-disclosure and is not deserving orders sought even if prerequisites for grant of injunction were met.

FINAL ORDERS

The application dated 12th January, 2018 is dismissed with costs to the Respondent.

Dated and Delivered at Nairobi this 27th day of July, 2018

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

CATHERINE: **COURT ASSISTANT**

MUREITHI H/B FOR GATHU: **COUNSEL FOR PLAINTIFF/APPLICANT**

WAMAE H/B FOR GITHARA: **COUNSEL FOR 1ST DEF./RESPONDENT**

KAHARA H/B FOR GICHUHI: **COUNSEL FOR 2ND DEFENDANT**