



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL SUIT NO. 27 of 2016

PETER MWANGI MWAURA.....PLAINTIFF/RESPONDENT

VERSUS

GEOFFREY KAMAU WAWERU....DEFENDANT/APPLICANT

RULING

1. The history of this matter is as follows. The Plaintiff sued the Defendant for dissolution of a partnership agreement which he alleges exists between himself and the Defendant. The Plaintiff also sought accounts of the partnership business known as “Tulia Gardens” from the date of inception till dissolution and that the Plaintiff’s shares be rendered. He also sought general damages for certain alleged breaches of the partnership agreement.

2. Simultaneously with the Plaintiff, the Plaintiff took out a Notice of Motion of even date seeking certain interlocutory orders. On 15/06/2017, I gave a ruling granting the following orders to the Plaintiff:

i. First, pending the hearing and determination of the suit or until further orders, an interlocutory injunction shall issue prohibiting the Defendant from selling, transferring, subletting or in any other manner disposing or offering to dispose of the partnership business, or any part thereof known as Tulia Gardens situate at Muthiga, Kinoo.

ii. That within thirty days of today, the advocates of the two parties do agree on a date when the Plaintiff and/or his agents will access the place of business and inspect any goods, books, records and the running of the business for purposes of collecting information to prosecute their case. The two parties’ advocates are directed to plan the visit so that it is as least intrusive as possible. To ensure the smooth operation of the visit, the parties may incorporate and provide for the Executive Officer, Kiambu Law Courts to be present to record the proceedings and make a report to the Court.

iii. The parties shall move with speed to perfect this case for hearing. To this extent, the matter shall be listed before the Deputy Registrar within the next forty five (45) days for further directions.

3. On several occasions – including on 31/07/2017 and 10/10/2017, the parties appeared before me and Counsel for the Plaintiff complained that the Plaintiff had been unable to access the book of accounts as ordered by this Court. On each occasion, I directed that the books of accounts be deposited with the Plaintiff’s counsel within a given number of days. It is important to point out that the Defendant’s counsel then on record, Mr. Gakaria, was present in Court on each of those dates.

4. Finally, on 27/10/2017, the Plaintiff filed an application seeking the following prayers:

i. That, pending the hearing and determination of this suit or application or until further order, a temporary injunction do issue to restrain the Defendant and/or the 2nd Respondent by themselves, their servants or agents from wasting, damaging, alienating, selling, or offering to sell or otherwise dispose of and/or removing from the suit property any of the chattels located at and being part of the assets of the business know as Tulia Gardens situate at Muthiga, Kinoo.

ii. That the Defendant has failed to comply with orders issued on 31/07/2017 by the Honourable Prof. Joel Ngugi and consequently the Plaintiff shall henceforth run/manage the business know as Tulia Gardens situate at Muthiga, Kinoo, upon such terms as the court may direct, and the Defendant is mandatorily enjoined from interfering in any manner whatsoever with the running of the business.

iii. That the Defendant having failed to file and serve his witness statement as directed by the order issued on 10.10.2017 by Honourable Prof. Joel Ngugi judgment be entered in this suit against the Defendant.

5. The Application was filed under a Certificate of Urgency owing to an allegation that the Defendant was running down the business and

that the Plaintiff was reasonably apprehensive that unless orders were given the business would be damaged irreversibly.

6. The Defendant did not file any response to this Application. On the date assigned for its hearing, the Defendant's advocate sent another lawyer to hold his brief with the directions "to take instructions." I placed the file aside and directed the lawyer to inform Mr. Gakaria that the Application would proceed for hearing and that he should make his way to Kiambu. Mr. Gakaria was not in Court at 1:30pm when I finally called the matter for hearing. Hence, the Application proceeded ex parte.

7. On 21/12/2017, I gave a ruling substantively allowing the Application. It is that ruling which is the subject of the present Application. In short, the Defendant seeks to have that ruling and orders associated with it reviewed, set aside and/or varied.

8. The Application was orally argued before me. Mr. Otieno, the Defendant's new lawyer argued the Application on behalf of the Defendant while Mr. Githuka argued it for the Plaintiff.

9. Mr. Otieno made two major arguments in urging the Application. In the first place he argued that prayer 2 of the order of 21/12/2017 leaves nothing to be determined in the final resolution of the case since it is couched in mandatory terms; it is, therefore, not interlocutory in its nature but amounts to a decree. He referred to the decision in *National Bank of Kenya v Ndungu Njau Civil App. No. 211 of 1986*.

10. In the second place, Mr. Otieno argued that the orders of 21/12/2017 were obtained through subterfuge and misrepresentation. Mr. Otieno argues that, in fact, the Defendant complied with the Court orders of 10/10/2017 within seven days as directed. He says that the complaint that the Plaintiff seemed to have by the time he sought the mandatory orders was that the documents provided were not sufficient. Mr. Otieno says that, in the circumstances, what the Plaintiff should have done would have been to seek for further and better particulars and not to seek for the radical measures that the Plaintiff sought here.

11. Mr. Otieno's third argument was constitutional in nature. It was that the effect of the mandatory orders of 21/12/2017 was to violate the constitutional rights of the Defendant – and in particular Articles 40 – on his right to property; Article 47 – on fair administrative action; and Article 50 on the rights to fair trial. Mr. Otieno's view is that all those rights have been curtailed by the orders of 21/12/2017.

12. Mr. Githuka, in opposing the Application, argued that none of the conditions for reviewing a Court order have been satisfied in the present case. He argued that there has been no discovery of new and important matter here. Neither is there, he argued, any error or mistake apparent on the face of the record. Neither is there, he further argued, any good or sufficient cause to review the orders of the Court. Mr. Githuka argued that in fact what the Defendant is arguing is that he is dissatisfied with the orders of the Court and that, therefore, what he ought to have done would have been to prefer an appeal to the Court of Appeal and not come back to this Court for a review.

13. On the question of documents supplied, Mr. Githuka argues that the Plaintiff deponed that the documents supplied were indecipherable and that the Court had ordered the Defendant to supply books of accounts which is not what was supplied. Lastly, on whether the orders granted were definitionally conclusive of the cause of action and in the nature of a final decree, Mr. Githuka referred to section 16 of the Partnership Act which gives the Court the discretion to give the kind of orders it did.

14. I have anxiously considered the Application and all the materials placed before me by the parties. I have also considered all the arguments made the Learned Counsels and the cases they cited.

15. I should begin by summarily disposing off two arguments made by Mr. Otieno. The Application before me does not have any constitutional incidences or convergences at all. The orders granted to the Plaintiff on 21/12/2017 did not transfer property or any of the incidences of property ownership from one party to another at all. The Court only gave orders which it felt were warranted by the circumstances to preserve the subject matter of the dispute (which is a going business concern) until the resolution of the dispute. The evidence before the Court, which was undisputed at the time the orders were granted, was that the subject matter was in danger of dissipation.

16. Similarly, there was no failure to accord fair administrative action or fair trial rights to the Defendant. The orders granted on 21/12/2017 were granted after the Application dated 27/10/2017 was served on the Defendant and he having failed to file any responses to it. Additionally, neither the Defendant nor his lawyer was in Court for the arguments in favour of the Application despite the Court setting the file aside until the afternoon to accord time for the lawyer to be present. It is no doubt a stretch to now claim failure of due process rights of the Defendant.

17. Having perused the Court record and the documents filed herein, I am also unable to conclude that the orders of 21/12/2017 were obtained stealthily or by misrepresentation by the Plaintiff or his lawyer. The Plaintiff was quite candid with the Court that what had been served on him did not amount to compliance with the Court orders and that the documents so served were not useful for the purposes for which they had been ordered. Consequently, nothing comes out of this complaint by the Defendant. The Court did come to the view, in the absence of contrary views presented to it by the Defendant, that the documents served did not, indeed, amount to compliance with the Court order. The only recourse for the Defendant, then, is to contest that finding by the Court at the Court of Appeal.

18. I will not turn to the question whether the orders made were, in their nature, final. There is no question that a Court should not grant, at the interlocutory stage, orders which, in their nature conclusively determine the dispute between the parties. However, there are certain conditions under which a Court will grant a mandatory interlocutory injunction.

19. In *Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR* the Court of Appeal succinctly stated the principles which a Court considers when granting a mandatory interlocutory injunction:

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 march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’

20. The same Court restated the standard and considerations in ***Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR*** in the following words:

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.

21. In the present case, I am persuaded that there were special circumstances that warranted the issuance of the interlocutory mandatory orders. These were:

- i. Credible evidence available to the Court at the time the orders were granted that the business was being run down with the possibility of destroying the entire subject matter of the dispute;
- ii. What appeared to be willful disobedience of clear Court orders coupled by failure by the Defendant to respond to the application for the orders sought which gave the indication that the Defendant was giving both the Plaintiff and the Court the run-around; and
- iii. The fact that the nature of the orders given were not to result in any transfer of property interests but to keep the subject matter of the dispute as a going concern.

22. I am still persuaded that the circumstances warrant the orders granted on 21/12/2017. However, it is imperative to clarify that those orders will remain in effect only until the determination of the suit herein or until further orders of this Court.

23. **Consequently, I will proceed to dismiss the Amended Notice of Motion dated 29/12/2017 with costs.**

24. **Given the nature of this case, I will, once again, give directions that this case be listed down for pre-trial directions and hearing on an expedited basis.**

25. Orders accordingly.

Dated and delivered at Kiambu this 2nd day of August, 2018.

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JOEL NGUGI

JUDGE