



**REPUBLIC OF KENYA**

**THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 13 OF 2017**

**ANDREW CHEGE WAINAINA.....PLAINTIFF**

**-VERSUS-**

**DAVID KARANJA MWANGI.....DEFENDANT**

**AND**

**POINT 'A' COMMERCIAL**

**AGENCIES LTD.....INTERESTED PARTY**

**RULING**

1. The plaintiff has filed suit against the defendant seeking judgment against the defendant for:

- a) Special damages as shall be adduced at the hearing.*
- b) General damages for pain, irreparable harm, loss and suffering.*
- c) Costs of this suit*
- d) Interest of (a), (b) and (c) above at court rates from date of institution of the suit until payment in full.*

Along with the suit, he has filed the present Notice of Motion dated 8<sup>th</sup> March 2017 expressed to be brought under **Order 40 Rule 2** of the **Civil Procedure Rules, Section 63 (e), 1A, 1B and 3A** of the **Civil Procedure Act** and unspecified provisions of the **Company's Act**. He seeks orders that:-

- i. The application herein be certified urgent and be heard exparte.*
- ii. The applicant be granted leave to institute this suit against the respondent as minority shareholder.*
- iii. That a temporary injunction does issue restraining the respondent from in any way entering, conducting, handling, transacting and or arbitrarily interfering with the normal operations of the interested party pending the hearing of the application.*
- iv. That a temporary injunction do issue restraining the respondent from in any way arbitrarily altering directorship, operating illegal bank accounts, siphoning and wastage of company assets either by himself, agents or servants pending the hearing and determination of the suit.*
- v. That all the respondent's accounts under the name of the interested party be frozen forthwith, pending the hearing and determination of the application and suit.*
- vi. Any other orders that may be deemed fit to issue during the hearing of the application and the suit.*
- vii. That the respondents bears the costs of the application.*

### The applicant's case

2. The applicant is a minority shareholder in **Point 'A' Commercial Agencies Ltd**, the Interested Party. His case is that the respondent being the majority shareholder has embarked on actions that have undermined the operations and profitability of the company. He has brought the action on grounds that the respondent has barred him from entering the company premises, illegally sold company assets and was in the process of unlawfully replacing the applicant on the board of directors with his (defendant's) wife. The applicant also accuses the respondent of diverting company assets and loans to personal ventures and operating dubious accounts. His case is that the respondent is bent on ejecting the applicant's immediate family from the company and consequently disinheriting them of the fair share of the company that belonged to their deceased father who was a co-founding member of the company. He prays for an injunction to stop the respondent from continuing with the illegal actions enumerated above.

3. Following directions of the court, parties filed written submissions. **Mr. Biko** learned counsel for the applicant highlighted the said submissions court on 18<sup>th</sup> October 2017. The gist of his submissions was that the applicant was deserving of a freezing order to prevent the dissipation of the company. Counsel cited various authorities to make a distinction between a freezing order and an ordinary injunction. He also submitted that the applicant met the standards set in **Giella Vs. Cassman Brown (1973) EA 358** to the effect that the applicant has a prima facie case; will suffer irreparable loss if the dissipation of the company is not enjoined and that the balance of convenience tilts in favour of the applicant.

### The respondent's Case

4. The application is opposed by the respondent **David Karanja Mwangi** who has sworn a lengthy replying affidavit in which he denies the allegations levelled against him by the applicant. In summary the respondent confirmed that the applicant's deceased father **Samuel Wainaina Chege** and himself co-founded the company. He deposed that after Chege's demise, the applicant became a director which directorship had since terminated. He denied allegations of running down the company. He acknowledged that his wife was a shareholder. The respondent further averred that the applicant was bent on running down the company.

5. The respondent filed submissions pursuant to the directions of the court. In highlighting the submissions, **Mr. Chege** learned counsel for the respondent submitted that the application was incompetent as it sought various unrelated reliefs and also sought orders that were not sought in the main suit. His contention was that the contradictory prayers contravened the provisions of **Order 6 Rule 35** (must have meant Order 2 Rule 6) of the **Civil Procedure Rules**. He further submitted that the application was full of unsubstantiated allegations and does not meet the threshold for the grant of injunction. His argument was that the freezing order sought, if granted, would prejudice the respondent's legal rights and paralyze the company's operations.

### Analysis & determination

6. **Order 40 Rule 2** under which the application is brought provides as follows:-

*“Where in any suit it is proved by affidavit or otherwise –*

*a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree; or*

*b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.”*

7. In support of their respective positions, both parties cited to me the principles for grant of injunction as stated in **Giella Vs. Cassman Brown (1973) EA 358**. These are that:

**i. an applicant must show a prima facie case with a probability of success**

**ii. an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.**

**iii. If the court is in doubt, it will decide an application on the balance of convenience.**

8. In addition and as stated above both parties submitted at length on the prayer for a freezing order. They cited the principles enunciated in **Goode on Commercial Law 4<sup>th</sup> Edition at page 1287** that:-

*“.....Before granting a freezing injunction the court will usually require to be satisfied that;*

*(a) .....*

*(b) .....*

*(c) .....*

**(d) There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and**

**(e) There is a balance of convenience in favour of granting the injunction.**

**Whether the applicant has made out a prima facie case**

9. A look at the reliefs sought by the applicant in the application and in the plaint are on the face of it at variance. As submitted by the respondent, the prayers in the application have no corresponding prayers to be granted in the suit. While the prayers in the application relate to injunctive orders in respect of the present running of the company, the prayers in the suit relate only to damages. There is no prayer for a mandatory injunction in the plaint. I will however consider whether or not the application even in its faulty state meets the principles set out above. See **Mary Ngaru Vs. Family Bank Ltd & 2 others (2014) eKLR**.

10. It is common ground that the applicant and the respondent were directors of the interested party. The applicant argues that he has been unlawfully removed by the respondent from the said directorship. He prays for a temporary injunction to restrain the respondent from arbitrarily altering the directorship. The respondent on the other hand argues that the respondent willingly resigned from the Interested Party. He has attached copies of the minutes and resignation letter said to have been written by the applicant. I find from the rival averments and submissions that it is not clear at this stage whether there was a lawful termination of the applicant's directorship or not. No rebuttal of the alleged resignation was made by the applicant. This is a matter therefore that must await strict proof at the hearing.

11. In prayer (iii) the applicant seeks an order restraining the respondent from entering conducting or handling or transacting or interfering with the normal operations of the company pending hearing of the application. I would presume that the correct order would be pending the determination of the application. Be that as it may, from the applicant's affidavit and submissions, I do not find sufficient evidence of how such an injunctive order would benefit either the applicant or the company. It is not evident from the rival affidavits whether the company has a running management structure from which the warring directors are excluded.

12. As earlier stated the parties strongly argued their respective positions on the freezing orders sought by the applicant. I have considered the respective positions as shown in the affidavits and the submissions. I have also carefully considered the authorities cited to me. It is my view that there is not much evidence to support the claim on dissipation of the company assets. It has not been demonstrated that there was risk of the company assets being removed from the reach of the members or that the same would not be subject to the normal audit of the interest party. It is a well respected principle that freezing orders should be issued with abundant caution owing to their likely impact on business. In **Electric Mobility Co. Pty Ltd Vs. Whiz enterprises Pty Ltd (2006) NSWSC 580** cited in **International Air Transport Association & Another -Vs- Akarim Agencies Company Ltd & 2 others 2014 Eklr** the court stated that:-

**“.....must be proved on a balance of probabilities in the way and to the extent that is usual in interlocutory applications for restraint generally. There is no need for the case to be made out in some special way. The reference by Mustill J (Ninemia) to “solid evidence” is meant in my view only to emphasise that there must be actual evidence from which the appropriate inference may be drawn by the court. On the other hand, the appellate courts have reminded primary judges that they must always be vigilant to ensure that parties’ assets are not frozen and their businesslives impeded lightly and that Mareva relief is not to be used to give plaintiffs security for the satisfaction of their judgments...”**

The upshot of the above is that I do not find that the applicant has made out a prima facie case to warrant both the injunctive and freezing orders.

13. The applicant has argued that the respondent has denied him access to the company and was in the process of changing the directorship and also dissipating the assets. The respondent on the other hand has argued that applicant resigned voluntarily from the company and that some compensation was agreed on. Whether or not the compensation has been paid appears to me to be the kind of loss that is quantifiable and compensable by damages. I do not in the circumstances find that the loss suffered by the applicant incapable of being compensated but damages. Indeed the applicant seeks in the plaint special and general damages.

14. Finally after evaluating the opposing positions, I find that the balance of convenience would favour a situation where the company is preserved pending the determination of the suit. This would be the import of not granting both the injunctive and freezing orders as sought by the applicant. To the contrary therefore, it is clear that the balance of convenience is not in favour of the applicant.

15. In the premises, I find the applicant's application dated 18<sup>th</sup> March 2017 devoid of merit. It is dismissed. Costs in the cause.

**Ruling delivered, dated and signed in open court this 19<sup>th</sup> day of December, 2017**

.....

**R. LAGAT KORIR**

**JUDGE**

In the presence of:

C/A Emojong

N/A for applicant

Mr. Chege for respondent