



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 56 OF 2017

RUIDU (K) COMPANY LIMITED.....PLAINTIFF

-VERSUS -

ROBERT WANGAI GITHINJI.....DEFENDANT

RULING

1. This Ruling is in relation to 3 applications, which are dated 6th February 2017; 16th March 2017 and 3rd April 2017, respectively.
2. The application dated 6th February 2017 was brought by the Applicant, **RUIDU (KENYA) COMPANY LIMITED**. It is an application for interlocutory injunction to restrain the defendant from accessing the Applicant's warehouses in Nakuru and Ruiru.
3. The Applicant (*hereinafter "the Company"*) also asked for an injunction to restrain the respondent, **ROBERT WANGAI GITHINJI**, from operating or otherwise interfering with the company's Bank Accounts.
4. Thirdly, the company sought orders to compel Robert Wangai Githinji, (*hereinafter "the Minority Shareholder"*), to surrender to the company all the company property which were in his possession. In particular, the company asked for the keys to its Post Office Box and a motor vehicle Registration **No. KCJ 205X**.
5. The application first came up for hearing on 9th February 2017.
6. On that date, Mr. Gikunda, the learned advocate for the minority shareholder, asked for 7 days to enable his client respond to the application.
7. Meanwhile, he confirmed that there was a problem in running the company.
8. On the other hand, the Company complained bitterly about the interference with its operations. The interference was said to have been coming from Robert Githinji.
9. Whilst giving consideration to the appropriate Directions to give in the matter, the court asked the Applicant to confirm the value of the security which it was ready to provide in the event that the court granted the reliefs sought.

10. The plaintiff said that it could provide security of Kshs. 3,000,000/-. It explained that that sum was based on the fact that whilst the minority shareholder had invested Kshs. 4.0 Million in the Company, he currently owed the company a sum of Kshs. 4.0 Million.
11. Meanwhile Robert expressed a desire to continue operating the company. He said that although he was the Managing Director of the company, he had been locked out from the company.
12. Robert also said that he had been blocked from operating the company's bank account, even though he had been a signatory.
13. As regards the investment which he made, Robert said that the sum of Kshs. 4.0 Million was invested 5 years ago.
14. Currently, in the estimation of Robert, the goods in the company's warehouse were worth Kshs. 100 Million. Therefore, Robert said that a Guarantee for Kshs. 4.0 Million would be too small a sum. As far as he was concerned, a Bank Guarantee for Kshs. 10 Million was more appropriate.
15. At that stage, the court allowed Robert a period of 10 days to enable him file and serve his Replying Affidavit.
16. The court then ordered each of the parties to come up with a Bank Guarantee for the sum of Kshs. 10 Million.
17. The plaintiff's security would cushion Robert in the event that the reliefs sought by the company were granted in the interim, but were later adjudged to have adversely prejudiced the defendant.
18. On the other hand, the security provided by the defendant would cushion the company if the interim orders were ultimately adjudged to have been adversely prejudicial to the company.
19. In the meantime, the court allowed the company to continue operating its businesses, without any hindrance from Robert, provided that the company would have provided the security.
20. On his part, Robert would be entitled to receive daily information regarding the company's financial dealings. However, such entitlement would only come into effect upon Robert providing the requisite security.
21. In the interim period, the court ordered that Robert would not be a signatory to the company's bank account. However, the company was directed to allow Robert to access the company's premises during working hours, provided that Robert did not disrupt the business.
22. On 17th March 2017 the company filed the application dated 16th March 2017.
23. The company asked the court to review the order which had required it to provide a Bank Guarantee of Kshs. 10 Million as security.
24. The company also asked the court to immediately remove Robert from his position of a shareholder, and to have Robert transfer his shares to **Mr. CUI WEN BO**.
25. By the time the company lodged the second application, it had received a Valuation Report which showed that the company's liabilities exceeded Kshs. 91 Million.
26. The company also said that its financial strain was so severe that it did not have ability to provide the Bank Guarantee which the court had ordered.
27. The reason why the company wanted Robert removed from being its shareholder was that the company had lost trust in him. Secondly, there was now a stalemate between the directors of the

company, thus making it difficult for the company to operate effectively.

28. In his Replying Affidavit, Robert accused his co-director, Mr. **CUI WEN BO** of wanting to pay him only the value of his 10% shares in the company.

29. Robert also expressed the view that it was unfair to require him to raise the Kshs. 10 Million as security, whilst it was the company which had sought reliefs from the court.

30. Secondly, and in any event, because he holds only 10% of the shares in the company, Robert said that it was unreasonable to require him to come up with a security which was equivalent to that being required from the person who held 90% of the shares.

31. In the circumstances, Robert asked the court to discharge him from the requirement that he deposits security worth Kshs. 10 Million.

32. Robert also cast serious doubts on the Valuation Report produced by the company.

33. And because his co-director was not citizen of Kenya, Robert reasoned that that was reason enough to warrant a demand that the said co-director should deposit his passports in court, as security to ensure that he did not leave the jurisdiction of the court when the suit was still pending.

34. By the application dated 3rd April 2017, Robert asked the court to order that **CUI WEN BO**, who is his co-director, be required to deposit his passport in court. He also wanted **YING WANG**, who is the company's Finance Manager, ordered to deposit her passport in court.

35. Secondly, Robert wanted the court to reinstate him to the company's management.

36. Thirdly, the minority shareholder asked the court to compel the Finance Manager to provide the company's statement of financial affairs.

37. Finally, the minority shareholder demanded that the company should pay his salary for the months commencing February 2017, until now.

38. Apparently, the company's bankers, **EQUITY BANK** and **STANDARD CHARTERED BANK**, had informed Robert that Kshs. 8.9 Million had been withdrawn from the company's bank accounts, and remained unaccounted for.

39. Whilst the company had not put down the security, by way of a Bank Guarantee for Kshs. 10 Million, it had locked out Robert from the management of the company.

40. As I indicated earlier, both parties had been required to raise securities in the sum of Kshs. 10 Million. Neither of them raised the said securities.

41. Therefore, the conditions precedent to the orders dated 9th February 2017 becoming effective, were not honoured. That would mean that the company could not stop Robert from participating in the affairs of the company, under the pretext that the court had so ordered.

42. Similarly, Robert could not demand the company's daily financial statements because, he too, had failed to meet the conditions precedent.

43. Both the company and Robert have said that they cannot raise the security which the court had ordered.

44. In the circumstances, I think that justice demands that the court order be reviewed, as I now do, by discharging both parties from the need to deposit Bank Guarantees for Kshs. 10 Million each.

45. However, I must point out that Robert's advocate had expressly said that his client was ready to raise the security of Kshs. 10 Million. Therefore, it sounds like one big escapist excuse for the minority shareholder to now say that he is unable to raise the said security.
46. I also note that whilst Robert had originally told the court that the value of the goods in the company's warehouses was Kshs. 100 Million, the opinion of Joseph Mwangi Kaboyo, (*who is the certified Public Accountant who was hired by Robert to comment on the Valuation Report of MGK Consulting Limited*), states that the closing stocks figures was Kshs. 34.9 Million.
47. It appears that Robert had originally overstated the value of the stocks in the company's warehouses.
48. On the other hand, I hold the view the company may be overstating its liabilities.
49. These views constitute my initial appreciation of the materials placed before the court.
50. One thing is, however, very clear. The directors do not trust each other. In the circumstances, it would be literally impossible for the 2 of them to continue running the company, together. One must give way to the other. However, the one who gives way ought to be compensated appropriately.
51. At present, the figures being put before the court do not appear to be reliable. The figures appear to be serving the interests of whichever party had instructed the person who generated them.
52. In principle, it does appear that Robert had agreed to give up his shares, provided that he was paid. On its part, the company's other director had expressed a readiness to purchase Robert's shares.
53. That course of action remains the most realistic avenue through which the parties will both attain justice.
54. In the meantime, I find no reason in law to order **CUI WEN BO** or **YING WANG** to deposit their respective passports in court. The assets of the company are within the jurisdiction of the court, and the person who invested in the bulk of the said assets is **CUI WEN BO**.
55. There is no reason for the court to think that he was about to leave the jurisdiction of the court.
56. If anything, it is Robert who appears to be suggesting that **CUI WEN BO** and **YING WANG** may not have a lawful presence in Kenya, and that they might choose to leave the country. When I read between the lines, I hold the prima facie view that Robert may be harbouring a desire to have the 2 persons leave the country. If that were to happen, the assets, which are in Kenya, would remain in the hands of Robert.
57. On the other hand, there is a possibility that Robert's co-director could dissipate the company's assets, leaving Robert without recourse. Therefore, the court needs to safeguard the assets until such time as Robert will have been compensated, so that when he leaves the company, he would have no reason to concern himself with how the company was being operated.
58. Upon exercising appropriate evaluation of the parties competing interests, I find that justice demands that the orders for the deposit of Bank Guarantees by both parties be waived. I therefore allow the 2 applications to that extent.
59. In effect, whilst Robert will not be reinstated into the company's management straightaway, he will be entitled to receive timely information on the company's financial dealings.
60. In order to make it more efficient and realistic, the company is now enjoined to provide Robert with detailed reports every week. The reports will include particulars of stock-in-trade; sales and bank statements of account. The first report will be provided seven (7) days from today.

61. Meanwhile, I find that the only way to find a lasting solution to the dispute is by having an independent person, (*who has the requisite expertise*), conduct an evaluation of the company's share value.

62. Earlier, the parties had agreed on **Mr. KENNETH KUGURU** of Kuguru Associates. However, the company later felt that the said Kenneth Kuguru was not independent.

63. In the result, I now direct that the Chairperson of the Institute of Certified Public Accountants of Kenya, Nairobi Branch shall appoint an appropriate person to carry out the process of ascertaining the value of the shares in the company.

64. The appointment is to be made within 7 days from the date when this Order is served upon the Chairperson.

65. Thereafter, the person who will have been appointed will have 30 days to file his or her report in court.

66. The fees payable to the person appointed to conduct the valuation shall be shared between the two parties equally.

67. The case will be mentioned immediately after the lapse of the 30 days, for purposes of further Directions and Orders.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of December, 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Muu for Miss Mucheru for the Plaintiff

Muu for the Defendant

Collins Odhiambo – Court clerk.