



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 97 OF 2017

ELITE COMPUTERS LTD T/A ELITE DIGITAL SOLUTIONS.....PLAINTIFF

- VERSUS -

B.S. MOHINDRA & COMPANY LIMITED.....1ST DEFENDANT

VIRESH KUMAR MOHINDRA.....2ND DEFENDANT

AMAN MOHINDRA.....3RD DEFENDANT

AMIT VIRESH KUMAR MOHINDRA.....4TH DEFENDANT

RULING

1. The plaintiff's application dated 7th March 2017 seeks four (4) substantive reliefs as follows;

2 (a) The Defendants be restrained whether by themselves, their servants, agents, employees or otherwise from dealing in, disposing of, alienating, transferring, charging, assigning interests in, mortgaging, removing from the immediate jurisdiction of this Honourable Court or otherwise dealing in any manner whatsoever with their properties and assets of any description held by or in trust for them including (but not limited to) land, motor vehicles, shares in listed companies at the Nairobi Stock Exchange and the 1st Defendant's stock in trade.

b) In giving effect to Order 2 (a) hereinabove, the Registrar of Lands Nairobi, the National Transportation Safety Authority and the Central Depository and Settlement Corporation Limited do upon service of this order upon them and/or registration thereof forthwith stop, prohibit and freeze all dealings and transactions in respect of all the Defendants' immovable and movable properties and assets whether held in the Defendants' names or in trust for them.

c) All telecommunication service providers operating in Kenya including (but not limited to) Safaricom Limited, Airtel Networks (K) Limited and Telkom Orange Kenya Limited be directed to trace and disable the iPads and iPhones devices supplied by the Plaintiff to the Defendants and to inform the Plaintiff of the whereabouts of the same.

d) The Defendants be restrained whether by themselves, their members, servants, employees or advocates or otherwise howsoever from removing, paying out, transferring, or otherwise

dealing with any monies deposited in their bank accounts held in all and any banks operating in Kenya?.

2. Pending the hearing and determination of the application, the plaintiff sought interim reliefs in exactly the same wording as set out above.

3. In addition, the plaintiff sought an order that all the devices supplied by the plaintiff to the Defendants be seized and handed over to the plaintiff.

4. In the alternative, the plaintiff prayed for the following reliefs;

4 (a) This Honourable Court be pleased to issue warrants of arrest as against the 2nd, 3rd and 4th Defendants to show cause why they should not furnish security for their appearance in this court.

b) The Defendants do within Fourteen (14) days (or such other period as this Honourable Court may deem appropriate) from the date of making this order deposit the sum of United States Dollars Two Hundred and Fifty Thousand (USD 250,000) into a bank account in the joint names of the respective Advocates for the Plaintiff and for the Defendants, as security for the Plaintiff's claim against the Defendants in this suit, AND in default of such deposit within the prescribed time:-

i) The 2nd, 3rd and 4th Defendants be committed to prison until the hearing and determination of this suit; and/or

ii) The Defendants' property, goods and funds (including without limitation monies held in any of the Defendants' bank accounts) valued at USD 250,000 be attached pending the final determination of this suit".

Eventually, the plaintiff asked for an order to compel the defendants to pay the costs of the application.

5. It is the plaintiff's case that between October 2015 and February 2016, it supplied to the 1st Defendant Apple Macintosh, iPad and iPhone devices valued at USD 335,720.

6. However, the defendants are said to have only paid to the plaintiff, the sum of USD 61,948.17 and Credit Notes amounting to USD 43,610.37. Following the said payments, the balance still due and payable by the defendants was said to be USD 230,161.66, plus accrued interest.

7. The plaintiff told the court that the Defendants had issued to it, cheques amounting to USD 180,222 and Kshs. 4,239,637/-. However, all those cheques were dishonoured on presentation and were returned unpaid because of either lack of sufficient funds or after the 1st Defendant had stopped payment.

8. The plaintiff also drew attention to an alleged Electronic Funds Transfer which was effected by the Defendants in favour of the plaintiff. Although the defendants had, allegedly, transferred **G B P** 82,000, no such funds were received by the plaintiff.

9. Another issue which the plaintiff drew attention to was the Debt Payment Agreement dated 23rd February 2016. The said Agreement showed that the defendants owed the plaintiff USD 250,000, as at 18th February 2016.

10. The Agreement also showed that the outstanding sums would be paid between 24th February 2016 and 4th March 2016. However, the defendants did not remit any payments.

11. Whilst the defendants had failed to remit payment to the plaintiff, they had sold the devices to third parties.

12. The plaintiff went on to say that if the court did not restrain the defendants by an injunction, the said defendants would alienate their assets, and keep them out of the plaintiff's reach.

13. According to the plaintiff, the 4th defendant had already fled and absconded from the jurisdiction of the court. The plaintiff views the flight of the 4th defendant as being his means of avoiding the payment of the debt.

14. In answer to the application, all the defendants denied the allegations that;

i) they had entered into any contract with the plaintiff;

ii) they had received any items or devices from the plaintiff;

iii) they had issued cheques which were dishonoured after the plaintiff presented them for payment;

iv) they had signed a Debt Payment Agreement dated 23rd February 2016.

15. Meanwhile, it is clear from the Debt Payment Agreement that it was signed by the 4th Defendant, who is one of the directors of the 1st defendant.

16. It is common ground that the 2nd and 3rd defendants are also directors of the 1st defendant (*"the Company"*). They are also shareholders in the company.

17. Although the plaintiff has exhibited Invoices and Delivery Notes addressed to the company, there are no documents that readily show that the 2nd and 3rd defendants had either ordered for or received the various items from the plaintiff.

18. Even the Credit Notes issued by the plaintiff, were addressed to the Company. None of them was addressed to the other defendants, whether in their capacities as directors or in the capacities as shareholders.

19. In respect to the Debt Payment Agreement dated 23rd February 2016, the same was, as is apparent on its face, between the Company and the Plaintiff. Of course, two of the directors have disowned the said Agreement.

20. However, the director who had executed the Agreement appears to suggest that he did so on behalf of the company.

21. It may therefore appear the directors are trying to throw the plaintiff off-balance.

22. Nonetheless, it is noteworthy that the plaintiff made the following submission;

"11. Your Lordship it is trite law that a party dealing with a limited liability company on good faith basis need not concern itself with the internal workings of the company and the purported family differences cannot excuse the 1st Defendant from liability to its creditors. The 1st Defendant is bound by the acts of its directors".

Assuming for a moment that the plaintiff's said submission was accurate in law, that would imply that the plaintiff deemed the 1st defendant to be liable, regardless of the internal workings of the company. In other words, the plaintiff was saying that whether or not the 4th defendant signed the contract and the Debt Payment Agreement without requisite authority from the other directors, the said documents were binding upon the company.

23. If that be the position, it would imply that the plaintiff ought, ordinarily, to have limited its claim to be against the company alone.

24. On a *prima facie* basis, I find that the plaintiff has not demonstrated why or how the directors of the company should be held liable to the plaintiff. I so hold because it is well settled that a limited liability company is a legal person, who is separate from its members. The company can sue and be sued in its own name.

25. It is one thing for the company to be liable for the actions or omissions of its directors, however, it is quite another thing to seek to hold individual directors liable for the actions or omissions of the company.

26. In this case, the plaintiff has alleged that the directors had perpetrated a fraud against the plaintiff. However, I find that the plaintiff has not met the threshold upon which the court could find, even on a *prima facie* basis, that the 2nd and 3rd defendants had committed any fraud against the plaintiff.

27. It is not enough that the plaintiff makes allegations of fraud. Bearing in mind the fact that fraud has an element of a criminal nature, the plaintiff should have given particulars of the alleged fraudulent actions, and should then have led evidence to prove the same.

28. Meanwhile, as against the 4th Defendant I find that he was the person who executed the documents between the plaintiff and the company. Of course, I do appreciate that by simply appending his signature to the documents, in his capacity as a director, the 4th defendant could not assume personal liability for something which the company ought to have done.

29. But in this case, the 4th defendant issued cheques drawn from his personal account. As the cheques were dishonoured because the drawer's account lacked sufficient funds or because the drawer instructed his bankers to stop payment, I find, on a *prima facie* basis, that the 4th defendant's conduct was a reflection of his accountability to the plaintiff.

30. He cannot simply have drawn cheques to the plaintiff, for no reason. And unless he is able to justify the issuance of cheques, which were later dishonoured, I hold the view that the 4th defendant may well be liable to the plaintiff.

31. Furthermore, in the Debt Payment Agreement dated 23rd February 2016, the 4th defendant expressly offered his personal guarantee, to ensure that the company would pay-off the debt.

32. Pursuant to the said guarantee, the 4th defendant appears to have assumed a personal responsibility to pay-off the debt, if the company did not pay it.

33. In the circumstances, I find that the plaintiff has established a *prima facie* case with a probability of success against the 1st and the 4th defendants.

34. However, as the plaintiff conceded that the devices which it had sold to the company, has already been sold-off to third parties, I find that the company cannot be restrained from doing something which had already been done.

35. In respect to orders sought against entities who are not parties to these proceedings, I hold the view that it would be unjust to condemn them without having accorded them an opportunity to be heard.

36. In any event, when orders for an injunction are in respect to **“all the Defendants immovable and movable properties and assets whether held in the Defendants' name or in trust for them”**,

such an order may be incapable of enforcement when it is directed against persons other than the defendants.

37. This court declines to give orders which are so amorphous as to be incapable of being enforced.

38. As relates to the orders sought against **“All telecommunications service providers operating in Kenya”**, I hold the view that the plaintiff has failed to satisfy the court that there is any legal basis for requiring the said service providers to trace and to then disable the ipads and the iPhone devices which the plaintiff had supplied to the defendants.

39. On the issue of the alleged mis-joinder of the 2nd and 3rd defendants to the suit, I hold that the same cannot, at this stage, defeat the plaintiff’s application.

40. In the case of **KANDUYI HOLDINGS LIMITED Vs BALM KENYA FOUNDATION & ANOTHER Hccc No. 5 of 2013**, at Bungoma, the court said;

“The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the Civil Procedure Rules is to prevent the Defendants and would be judgement-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him”.

41. In the event, the devices which the company had already sold to third parties cannot be capable of being retained by the company.

42. In the case of **BETA HEALTHCARE INTERNATIONAL LIMITED Vs GRACE MUMBI GITHAIGA & OTHERS Hccc No. 256 of 2015**, Kariuki J. held as follows;

“...it is clear that Order 39 Rule 5 deals with situations where the Respondent was about to dispose of or remove property from the jurisdiction of the court. I think, in my own view, it fits situations where the property is still available but is about to be removed from the jurisdiction”.

43. The plaintiff herein has not demonstrated that the defendants were about to remove their properties from within the jurisdiction of the court.

44. Kariuki J. did quote with approval, the following words of Lord Denning MR in the case of **THIRD CHANDRIS SHIPPING CORPORATION & OTHERS Vs UNIMARINE S.A. THE PYTHIA, THE ANGELIC WINGS, THE GENIE [1979] 2 ALL E.R. 972**, at page 985;

“The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgement or award is satisfied”.

45. Based on that preposition, the learned Judge went on to say;

“Further there is absolutely no evidence anywhere about whether the 1st Respondent is about to liquidate the assets of the 3rd Defendant and divert them to other entities”.

46. The same can be said about the plaintiff in this case.

47. Therefore, although I have found that the plaintiff has established a *prima facie* case with a probability of success against the 1st defendant and the 4th defendant, I am unable to grant a *mareva* injunction against the said defendants.

48. Accordingly, the application dated 7th March 2017 is dismissed. But I order the 1st defendant and the 4th defendant to meet their respective costs of the application. I so order because the conduct of those 2 defendants is underserving of being compensated with costs, when, on a *prima facie* basis, they owe the plaintiff large sums of money.

49. However, the plaintiff will pay to the 2nd and 3rd defendants, the cost of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of December 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Koech for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 3rd Defendant

Kimoni for Nyaosi for 4th Defendant

Collins Odhiambo – Court clerk.