



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 7 OF 2016

RASHID ABDIKADIR KHALICHA :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

ALI SULEMAN & ANOTHER :::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

1. The **Notice of Motion** application before the court is dated and filed on 15th January 2016 by the Plaintiff. The application seeks to secure many injunctive orders. The surviving ones of which are;
 5. That there be a temporary injunction restraining the 1st Respondent whether by himself, his agents, employees and/or servants from pocketing, misusing and/or depositing daily proceeds of the business to accounts other than 2nd Respondent's accounts namely: National Bank of Kenya Limited, Account Number [particulars withheld], Eastleigh Branch & the First Community Bank Limited, Account Number [particulars withheld], Eastleigh Branch, pending the inter parties hearing and determination of the suit.
 6. That the 1st Respondent do render true account of the 2nd Respondent pending the hearing and determination of the suit.
 7. That the 1st Respondent be allowed to jointly run the business with the Applicant.
 8. That all the proceeds of the daily sales of the business be banked in 2nd Defendant's account namely: National Bank of Kenya Limited, Account Number [particulars withheld], Eastleigh Branch & the First Community Bank Limited, Account Number [particulars withheld], Eastleigh Branch, pending the hearing and determination of this suit.
2. The application is supported by the affidavit of RASHID ABDIKADIR KHALICHA sworn on 15th January 2016. The deponent states that he

used to run a business in the name and style of Gulf Steel Limited prior to 1st July 2014. He annexed a document and marked "**RAK – 1**" being copies of samples of receipts for the year 2010, 2012, 2013 and 11th May, 2014 confirming rent payments. The deponent stated that through an Agreement dated 1st July, 2014, he entered into an agreement with the 1st Defendant to jointly run a business in the same premises Eastleigh, 1st Avenue, Opposite Joster Supermarket, Nairobi, earlier occupied by himself. The deponent and the 1st Defendant registered the 2nd Defendant and to date they hold equal number of shares of 500 per person. He annexed "**RAK – 2**" as proof of the same.

3. The mutual agreement was that the 1st Defendant would finance the business by providing capital. The 1st Defendant then made a capital contribution of Kenya Shillings Two Million Five Hundred and Forty Thousand (2,540,000/=) which was utilized to buy opening stock and settle some outstanding rent as evidenced in various receipts, in annexure **“RAK-3”**. Later, two accounts in the name of the 2nd Defendant were opened at National Bank of Kenya Limited, Account Number [particulars withheld], Eastleigh Branch & the First Community Bank Limited, Account Number [particulars withheld], Eastleigh Branch where all the proceeds from the business were to be banked and indeed were banked upto 23rd December, 2015, as shown by annexure

“RAK – 4”, and the business was shared equally as 50% each. Since then, the son of the 1st Defendant has been running the shop on their behalf. The cash sales proceeds has been ranging from 30,000 to Kshs.999,999, and was banked almost daily in the two accounts until 23rd December, 2015 when the 1st Defendant’s through his agent stopped banking the proceeds yet they continue operating the business. It is alleged that the 1st Defendant has now locked out the Plaintiff from running the affairs of the company. The deponent states that he has even come across cheques written by one of the 2nd Defendant’s customers, Aseflaw Tecele Ambaye, directly to the shop attendant Abdikadir Ali Suleiman, son of the 1st Defendant, which is a serious pointer of misappropriation of the company funds. Annexed to the affidavit and marked as Exhibit

“RAK – 5” is a copy of cheque dated 2nd December, 2015.

4. The applicant’s case is that the 1st Defendant has neither audited accounts, nor kept proper books of accounts nor has had the requisite books of account, balance sheet and Profit and Loss Accounts conducted so as to determine the share of profits and losses as per the contract. In addition the 1st Defendant has also through his son tampered with invoices and deliveries and in some instances there are various deliveries without invoices. Further, it is alleged that the 1st Defendant has erased even the deponent’s name on a poster at the entrance of the shop in breach of the said agreement and the law including;

- The duty to act in the best interest of the Plaintiff.
- The duty to take all reasonable steps and to exercise all due diligence to protect and improve the 2nd Defendant’s business and render true and full account of all sums received or spent for and on behalf of the 2nd Defendant.
- The duty not to make any secret profit.
- The duty of disclosure to other shareholders.
- The true and correct financial position of the 2nd Defendant Company.

5. The applicants case is that unless restrained by this court the 1st

Defendant will mismanage the business, dispose all the stock and leave the premises, denying the Plaintiff an opportunity to benefit as per the terms of the Agreement.

6. The application is not opposed. It was served upon the respondents and notice of the hearing was given but the respondents did not come to court. An affidavit of service was filed sworn by JOHN BOSCO MUSAU. The court being satisfied that the application was served, allowed the applicant to proceed with the application.

7. I have carefully considered the application. It is not opposed. Besides, I am persuaded that the 2nd defendants business is being enjoyed by the 1st defendant at the expenses of the plaintiff. I am also persuaded, that the business money should be banked in the account where both parties have the control as opposed to accounts where only the 1st defendant has control. Further, the plaintiff is entitled to the remedy of account, and to jointly run the 2nd defendants business pending the hearing and finalization of the suit. Pursuant to the foregoing, the application is allowed in terms of prayers 5, 6, 7 and 8 of the application with costs in the cause.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI

THIS 28th DAY OF JANUARY 2016.

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Kigen for the Plaintiff

Non appearance for the 1st Defendant

Non appearance for the 2nd Defendant

Teresia – Court Clerk