



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**HIGH COURT CIVIL SUIT NO. 180 OF 2015**

**ACCESS BUSINESS MANAGEMENT CONFERENCING  
INTERNATIONAL LTD.....PLAINTIFF/APPLICANT**  
**VERSUS**  
**DIANA MBINYA MUASYA.....1ST DEFENDANT/RESPONDENT**  
**HUNTLEY CROSS LIMITED.....2ND DEFENDANT/RESPONDENT**

**RULING**

[1] The Notice of Motion dated **13 April 2015** was filed herein by the Plaintiff/Applicant, Access Management Conferencing International Limited, pursuant to **Sections 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 40 Rules 1, 2, 3, and 4 of the Civil Procedure Rules** for orders that:

[a] Spent

[b] Spent

[c] Spent

[d] That the court do issue a **Temporary Injunction** restraining the **1st Defendant/Respondent** from acting, operating and/or conducting the affairs of a **Director** in the **2nd Defendant/Respondent** company while still engaged as a **Director** of the **Plaintiff/Applicant** company pending the hearing and determination of this suit.

[e] That this court do issue a **Temporary Injunction** restraining the **Defendant/Respondents**, their agents and/or servants from conducting trainings, business management conferences, engaging in competing business, diverting business or in any other way interfering with the **Plaintiff/Applicants'** clientele pending the hearing and determination of this suit.

[f] That the costs of the Application be provided for .

[2] In support of the Application is the affidavit annexed thereto sworn by **Victoria Cecilia Karanja** on **13 April 2015**, in which it was deposed that in the month of April 2013, the deponent and her co-director

appointed the 1st Defendant/Respondent as a the 3rd Director in the Plaintiff company, pursuant to a Special Resolution in that regard dated **13 March 2013**, whereupon the 1st Defendant began to execute her duties with due diligence and dispatch, to the satisfaction of her co-directors, but that on or around the month of **June 2014**, the 1st Defendant/Respondent began to make unrealistic demands from the Plaintiff/Applicant, including a demand for fuel allowance. That in spite of being advised by her co-directors that the company was unable to sustain the additional demands, the 1st Defendant continued adamant, to the extent that she started misappropriating company funds.

[3] The last straw for the deponent appears to have been the discovery that the 1st Defendant had secretly registered a company, the 2nd Defendant herein, whose business is identical to the Plaintiff/Applicant's. It was further averred on behalf of the Plaintiff that the 1st Defendant has since been diverting clients from the Plaintiff/Applicant to the 2nd Defendant, while still serving as a Director of the Plaintiff/Applicant, and that efforts to engage her in constructive dialogue with a view of bringing the unsavory situation to an end have yielded no results, such that by the time the application was filed, the Defendants/Respondents were poised to host a Business Management Conference at Laico Regency Hotel from **27 to 29 May 2015** in direct conflict with the 1st Defendant's fiduciary duty as a Director of the Plaintiff. It was against the foregoing backdrop that the Plaintiff/Applicant filed the instant Application.

[4] In opposition to the Application, the Defendants/Respondents relied on the affidavit of **Diana Mbinya Muasya**, the 1st Defendant/Respondent, sworn on **14 May 2015**. It was the contention of the Defendants that the suit and the application are fatally and incurably defective and should be dismissed *in limine* or the following reasons:

[a] **That the suit was filed in disregard of Clause 34 of the Plaintiff's Articles of Association, the dispute being one between the company and one of its Directors;**

[b] **The supporting affidavit offends Section 21 of the Competition Act, No. 12 of 2010 as well as Order 19 Rule 3 of the Civil Procedure Rules, 2010, and is therefore incurably defective;**

[c] **That the deponent of the Affidavit in support of the Application and the Verifying Affidavit had not annexed any Resolution of the Plaintiff Company authorizing her to swear the affidavits on behalf of the company and appointing the Advocates to institute the proceedings.**

[5] It was further deponed on behalf of the Defendant/Respondents that there was **no restraint of trade contract** between the 1st Defendant and the Plaintiff, and that even if any existed, it would have been contrary to the **Competition Act No. 12 of 2010**. The Defendants responded to the specific allegations of misconduct on the part of the 1st Defendant raised in the Supporting Affidavit, contending that her co-directors, who are husband and wife, are merely out to unlawfully push her out of the company to avoid paying her dues.

[6] The Application was disposed of by way of written submissions, which I have carefully perused alongside the pleadings and proceedings to date as well as the affidavits filed. There appears to be no dispute that the Plaintiff/Applicant company was incorporated on **14 June 2012** under **the Companies Act**, and that at the time of its incorporation, the Directors were **Joseph Mathenge Mugo** and **Victoria Cecilia Karanja**, the Deponent of the Verifying and Supporting Affidavits herein. Thereafter, on **13 March 2013**, the 1st Defendant, **Diana Mbinya Muasya**, was appointed as a co-director of the Plaintiff and a total of 150 shares transferred to her, thereby making her both a Director and Shareholder of the Plaintiff.

[7] That the 1st Defendant thereafter incorporated the 2nd Defendant Company some time in 2014 is also not in dispute. The documents marked **VCK-3**, **VCK-4** and **VCK-7** annexed to the Supporting Affidavit confirm that the 1st Defendant is one of the two Directors of the 2nd Defendant, a company that offers more or less the same services as the Plaintiff/Applicant. It is therefore not difficult to see that a conflict was bound to arise, owing to the aforesaid situation, between the 1st Defendant on the one hand

and her co-directors on the other hand, thereby precipitating the filing of the instant suit on **15 April 2015**. Thereafter, the 1st Defendant's co-directors purported to have terminated her services vide the letter dated **30 April 2015** marked **DMM-D** that is annexed to the Replying Affidavit.

[8] Before delving into a consideration of the merits of the Application, and whether or not the Application meets the threshold laid down in the case of **Giella vs Cassman Brown [1973] EA 358**, I propose to deal with two of the issues raised herein by the Defendant/Respondents which appear to be in the nature of a preliminary objection, and therefore falling within the parameters of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**, in which it was held that:

**"...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."**

[9] The first point taken by the Defendants/Respondents was that the suit was filed in disregard of **Clause 34** of the Plaintiff's Articles of Association, the dispute being one between the company and one of its Directors. Clause 34 of the Plaintiff's Articles of Association provides thus:

**"Whenever any differences arise between the Company on the one hand and any of the members ... on the other hand, touching on the true intent or incidents, or consequences of these Articles ... every such difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference..."**

[10] There appears to be no specific response to this point in the Plaintiff/Applicant's written submissions. Be that as it may, **Section 6 of the Arbitration Act** provides that:

**"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds--**

**(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or agreed to be referred to arbitration..."**

[11] The issues in contest herein revolve around alleged breach by a Director of her fiduciary duty. All these are issues within the purview of the **Articles of Association**, and therefore amenable to arbitration. Accordingly, the only issue to determine is whether, in the light of **Section 6(1) of the Arbitration Act**, the Defendants/Respondents can rely on this ground in opposition of the application for injunction.

[12] It is noteworthy that **Section 6(1) of the Arbitration Act**, is couched in peremptory terms, and that it explicitly requires that an application for referral to arbitration be filed contemporaneously with the filing of the Memorandum of Appearance, for it reads **"... not later than the time when that party enters appearance or otherwise acknowledges the claim..."** (Emphasis added). It is noted that whereas the Defendants filed their Replying Affidavit in acknowledgement of the instant application and, by extension, the main suit on 14 May 2015, no such application, as envisaged under Section 6(1) of the Arbitration Act has been filed so far. It is therefore not open to Defendants to rely on their own default to lackadaisically defend the instant application. I therefore find the argument mischievous and untenable.

[13] The second and perhaps more pertinent point raised by the Defendants/Respondents was that the deponent of the Verifying Affidavit Application and the Supporting Affidavit, having not annexed any **Resolution of the Plaintiff Company** authorizing her to swear the affidavits on behalf of the company, the suit and the application dated **13 April 2015** are fatally defective. It is the law that a suit by a corporation be supported by a Verifying Affidavit sworn by an authorized agent of the company, for **Order 4 Rule 1(4) of the Civil Procedure Rules** provides that:

**"Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of**

**the company duly authorized under the seal of the company to do so."**

[14] The deponent of the Verifying Affidavit herein deposed in paragraph 1 thereof that she had been duly authorized, as a Director of the Plaintiff, to swear the affidavit on behalf of the company. Whereas that would, ordinarily suffice for the purposes of **Order 4 Rule 1(4), Civil Procedure Rules**, noting that there is no specific requirement that the resolution of the company be exhibited, where, as in this case the dispute is between the company and its directors, or the directors inter se, it is imperative that the court be satisfied that the filing of the suit was authorized by a resolution of the company and that the deponent was specifically mandated by such resolution to sign the documents and swear any necessary affidavits in connection with the ensuing court action. In this respect, I fully share the viewpoint taken by **Njagi, J** in the case of **Affordable Homes Africa Limited vs Henderson and 2 Others [2004] eKLR** in which it was held thus:

**"As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty...in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all..."**

In that case, a dispute arose between the directors, and one of them contended, that no meeting of the board of directors had been held and consequently no resolution had passed authorizing the institution of the suit.

[15] I note that in the instant case, there was no resolution attached either to the Verifying Affidavit or the Supporting Affidavit authorizing the institution of this suit, and that even after this issue was raised in the Replying Affidavit, there was no rebuttal thereof by way of a Supplementary Affidavit or otherwise. The failure by the Plaintiff to comply with **Rule 1(4) of Order 4 of the Civil Procedure Rules** is a fundamental flaw, for the company would be deemed not to be competently before the court.

[16] It follows therefore that the instant application is incompetently before the court and is hereby struck out accordingly, with costs to the Defendants.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF MAY, 2016**

**OLGA SEWE**

**JUDGE**