



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 100 OF 2016

YUSUF ABDI ADAN.....1<sup>ST</sup> PLAINTIFF

BLUE BIRD AVIATION LIMITED.....2<sup>ND</sup> PLAINTIFF

-VERSUS-

HUSSEIN AHMED FARAH.....1<sup>ST</sup> DEFENDANT

HUSSEIN UNSHUR MOHAMMED.....2<sup>ND</sup> DEFENDANT

MOHAMMED ABDIKADIR ADAN.....3<sup>RD</sup> DEFENDANT

### RULING

#### INTRODUCTION

1. The **Notice of Motion** Application dated 30<sup>th</sup> March 2016 by the Plaintiffs under certificate of urgency was in the first instance heard ex-parte on 31<sup>st</sup> March 2016 by Hon. Lady Justice Farah Amin who issued ex-parte permanent orders on the face of the record. Those orders were seriously objected to by all the three Defendants/Respondents herein leading to an application by the Defendants demanding the recusal of the judge from these proceedings, which the judge allowed vide her ruling delivered on 13<sup>th</sup> April 2016, but after making the said orders interim. The matter was subsequently referred to the presiding judge who allocated it to me to deal.

2. The said interim orders were extended upto 13<sup>th</sup> April 2016 and were not extended on that day when Lady Justice F. Amin referred the matter to the presiding judge. On 14<sup>th</sup> April when the matter was mentioned before the Presiding Judge Mr. Ahmednassir Abdulahi for the plaintiff applied to the presiding judge to extend the interim orders, but the judge declined, stating that the issue should be urged before me on the same day. However, when the counsel in the matter appeared before me later in the day, they recorded a consent standing the matter to 6<sup>th</sup> May 2016 at 11 am, with no interim orders. It therefore means that the said interim orders expired on 13<sup>th</sup> April 2016.

3. Mr. Ahmednassir for the Applicants then filed a Notice of Motion dated 5<sup>th</sup> May 2016 and filed herein on the same day with the main prayer that the court be pleased to re-certify urgent the Notice of Motion Application dated 30<sup>th</sup> March 2016 and to reinstate the interim orders and or, alternatively, the court be pleased to issue the interim orders sought therein, and that the costs of the application be paid by the Defendants/Respondents.

4. The Notice of Motion application is supported by Affidavit of Mr. **Yusuf Abdi Adan**, the 1<sup>st</sup> Plaintiff herein, sworn on 5<sup>th</sup> May 2016. In his Supporting Affidavit Mr. Adan re-states inter-a-lia that the Notice of Motion Application was filed under Certificate of Urgency by the Plaintiffs herein dated 30<sup>th</sup> March 2016 seeking inter-a-lia an injunction to restrain the Defendants herein from dealing with the properties, assets and accounts of the 2<sup>nd</sup> Plaintiff Company in any manner whatsoever.

5. On 31<sup>st</sup> March 2016, Honourable Lady Justice Amin issued interim orders. These orders subsisted until the 5<sup>th</sup> of April 2016 when the parties through their advocates on record agreed by consent to discharge the said interim orders with a view to explore an amicable settlement between the parties. In good faith and with a view to enable all the parties to engage in a meaningful negotiation, vide a letter dated 22<sup>nd</sup> April 2016 the Plaintiff's advocate wrote to the firm of Messrs Michael, Daud & Associates Advocates giving a comprehensive breakdown of the minimum terms upon which the Plaintiffs would settle the matter. This was done to settle the matter to its finality and with a view to process forward the issues in dispute;

The deponent states that to date, nothing tangible has been proposed by the Defendants, who have failed to address the fears, concerns and rights of the Plaintiffs.

6. The deponent states that on or about the 30<sup>th</sup> of April 2016, the 3<sup>rd</sup> Defendant travelled to Dubai within the United Arab Emirates taking the monthly income of the 2<sup>nd</sup> Plaintiff Company and deposited the same in a bank account in Ajman UAE. It is the Applicants' case that the abuse, misappropriation and transgression by the Defendants will continue and escalate unless this court hears this application urgently, and that without the protection of this court, the properties and assets of the 2<sup>nd</sup> Plaintiff Company are left exposed and subject to further misuse and misappropriation by the Defendants.

7. This application was certified urgent by the duty judge on 6<sup>th</sup> May 2015 and was directed to this court for consideration on 11<sup>th</sup> May 2016. So when the matter was mentioned on the said day, Mr. Ahmednassir Addulahi for the Applicants submitted urging the court to grant the said interim orders. Although the Respondents had not replied to this application, they had replied to the earlier application. However, the consideration of urgency made it possible for all the parties to argue their positions, albeit in consideration for interim orders as prayed in the application.

8. Mr. Ahmednassir Abdulahi for the Applicant submitted that on 14<sup>th</sup> April 2016 parties herein agreed to explore a consent in this matter. They also agreed not to extend the interim orders herein in consideration of those negotiations. However, those negotiations have broken down hence the necessity to start the matter afresh. Counsel submitted that the application dated 5<sup>th</sup> May 2016 seeks to reinstate the original orders which were vacated since the negotiations have collapsed. Alternatively, counsel submitted that prayer no. 3 (a) to (j) of the Notice of Motion dated 30<sup>th</sup> March 2016 be granted on an interim basis. Counsel urged that the 1<sup>st</sup> Plaintiff who is a co-shareholder in the 2<sup>nd</sup> Plaintiff Company should be a co-signatory to the bank accounts of the company. Counsel submitted that there is no statement in the grounds of objection to counter the request in prayer 3, and that the grant of prayer 3 causes the Defendants no prejudice but allows the company to be run in a more transparent manner. Counsel submitted that the Applicants are willing to give undertaking as to damages in case any of the orders given by this court turn out not to have been deserved. Mr. Abdulahi, in urging for the said interim orders demanding that the 1<sup>st</sup> Plaintiff be made a signatory to the 2<sup>nd</sup> Plaintiff's accounts submitted that 95% of monies belonging to the 2<sup>nd</sup> Plaintiff is not being banked in the 2<sup>nd</sup> Plaintiffs known accounts.

9. Mr. Kemboy, making a disputed appearance for the 2<sup>nd</sup> Plaintiff, in opposition to the application submitted that they have sought to strike out the Plaintiffs' suit vide an application dated 6<sup>th</sup> April 2016 which shall determine the issue of representation of the 2<sup>nd</sup> Plaintiff. Until that application is settled, Counsel further submitted that there can be no further proceedings in this matter. On the submissions that the interim orders should be reinstated, Counsel submitted that those orders had lapsed, and that there was no consent suspending those orders. Counsel further submitted that prayer 3 of the application dated 30<sup>th</sup> March 2016 had never actually been granted, since, in his view, the judge formulated her own orders and granted the same, which in any event, have lapsed. Mr. Kenboy submitted that the allegation that 95% of the money belonging to the 2<sup>nd</sup> Plaintiff is not being banked is not supported by any evidence. Counsel submitted that the facts that are put forward are contested and cannot allow any interim orders. Counsel submitted that the application should be heard on its merit before any orders can be issued, and that the 1<sup>st</sup> Plaintiff will not suffer any prejudice if the interim orders are not given.

10. M/s Jan Mohamed for the 1<sup>st</sup> Defendant also opposed the application and objected to the grant of any of the orders granted by Justice Amin or under prayer 3 of the application dated 30<sup>th</sup> March 2016. Counsel submitted that they have applied to cross-examine the deponent to the Supporting Affidavit because most of the allegations in that affidavit are untrue. As for any alleged negotiations, there was none from the very beginning, and there was never any consent to discharge the interim orders because of any negotiations. The orders lapsed on 13<sup>th</sup> of April 2016 and were never extended. Counsel submitted that this application should not be allowed and that granting of any interim orders will cripple the 2<sup>nd</sup> Plaintiff Company. Counsel also submitted that the leave that were granted to commence the suit as a derivative action has been challenged, and if found faulty, this entire suit will fall.

11. Mr. Sagana for the 2<sup>nd</sup> Defendant also opposed the application. Counsel submitted that the interim orders were upto 13<sup>th</sup> April 2016, and they lapsed. Secondly counsel submitted that the suit is filed under section 239 of the Companies Act and seeks leave to continue the action as a derivative suit. Leave has not been granted and as long as that has not been done none of the prayers herein can be granted. Instead the court should just give a date for inter-parties hearing of the application.

12. Mr. Aden Daud for the 3<sup>rd</sup> Defendant also opposed the application. Counsel submitted that this suit is a derivative suit on behalf of the company. Before the suit can commence leave must be granted. Before that the court has no jurisdiction to grant any orders under section 239.

13. In reply Mr. Abdulahi submitted that this suit is a derivative suit and does not require authority to commence, especially authority of those whose actions are being challenged. According to Mr. Abdulahi, the issue of a derivative action is no longer alive. That prayer was granted and it was a final order. It can only be appealed against. That prayer was in clear terms. The only interim orders were injunctive orders. In terms of the derivative suit, the issue is water under the bridge.

14. I have carefully considered the application, the alleged urgency for the interim orders, and the opposition to the application. From the outset I must state that there is already bad blood and suspicion pitting the Plaintiffs and the Defendants in this matter. This is made worse by further combination of factors which included the admitted "slip" by the judge who issued final as opposed to interim orders, and the subsequent recusal of the judge from these proceedings. I say this from the outset so that I release myself from the bad history of this case, and so that I am able to look at this case just like any other case brought under certificate of urgency and crying for urgent justice. Further, the current application dated 5<sup>th</sup> May 2016 seeks to have this court look afresh at the application dated 30<sup>th</sup> March 2016 without the historical baggage aforesaid. I am therefore now ready to apply my mind to the application and base my decision purely on the merits of the case for interim orders, and baring in mind that the Respondents are yet to respond or reply to the application dated 5<sup>th</sup> May 2016.

15. For this purpose I will briefly stray into the application and the supporting affidavit of The 1<sup>st</sup> Plaintiff/Applicant. He is a 75 years old man, and one of the original subscribers to the 2<sup>nd</sup> Plaintiff Company together with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The 1<sup>st</sup> Plaintiff/Applicant is allegedly a 25% shareholder, member and director of 2<sup>nd</sup> Plaintiff. It is alleged that the 2<sup>nd</sup> Plaintiff owns 19 aircrafts of various descriptions. For reasons explained in paragraphs 11 and 12 of the Supporting Affidavit, the 1<sup>st</sup> Plaintiff is a minority shareholder, and I am satisfied that he cannot secure the authority of the other shareholders to commence the suit as a derivative suit. It seems that the management of the 2<sup>nd</sup> Plaintiff company both at the Board level and at the management level is totally controlled and dominated by the Defendants.

16. In paragraphs 19 – 34 of the Supporting Affidavit, the 1<sup>st</sup> Plaintiff explains how he has been excluded from running the 2<sup>nd</sup> Plaintiff Company or from participating in its dividend since 1992 when the company was formed. The narration depicts a person totally unaware of the goings on in the 2<sup>nd</sup> Plaintiff company, its business profits or properties. He appeared to have trusted and believed what his partners told him. At paragraph 35, the Applicant shows evidence that the Defendants want the 1<sup>st</sup> Plaintiff out of the company and are willing to purchase his share at USD 45 million, a figure which, he explained, he did not understand how they arrived at. The 1<sup>st</sup> Plaintiff then, being suspicious as to why his co shareholders wanted to get rid of him, sought to investigate the properties and the worth of the 2<sup>nd</sup> Plaintiff Company. From the Supporting Affidavit, it would appear that the 2<sup>nd</sup> Plaintiff Company has acquired so much property without the 1<sup>st</sup> Plaintiff's knowledge and, as alleged, some of those properties are in the names of the Defendants or their close associates. There are also several bank accounts allegedly being operated by the Defendants without the 1<sup>st</sup> Plaintiff's knowledge. It is clear that the Respondents do not deny that the Applicant is a 25% shareholder. That is a huge interest in this matter which the court cannot ignore. It is also clear that since there is a serious dispute between the parties, the shareholders currently managing the company have an upper hand and can do in fact sell, hide, transfer mortgage or deal with any of the properties belonging to the 2<sup>nd</sup> Plaintiff in a manner to defeat this suit. I am therefore satisfied that the Plaintiff as a co-shareholder with equal rights with any one of the individual shareholders, has established a case for urgency in this matter, and that this court should apply its mind to the application.

17. In order to that I raise the following issues for determinations:

i. ***Whether the said interim orders lapsed on 13<sup>th</sup> April 2016 and whether that also included the order granting the leave to commence and to continue the suit as a derivative action.***

ii. ***If the said orders had lapsed, whether the same can be reinstated by this court.***

iii. ***If not, whether prayer No. 3 of the application can be granted.***

18. On issue number one, it is clear that the interim orders granted by the judge on 31<sup>st</sup> march 2016 were extended to the 13<sup>th</sup> April 2016, but were not extended when the parties appeared before Justice Fred Ochieng on 14<sup>th</sup> April 2016. In fact, when the parties later on that day appeared before me, they with consent, did not extend those orders. This is the reason why Mr. Ahmednassir for the Applicant has applied for reinstatement of the same. Crucial to this narrative is the position of the order which granted the Applicants the leave to commence and to continue these proceedings as a derivative action. The counsel for the respondents submitted that the said order also lapsed, and that without that order this suit stands incompetent for lack of locus. This issue is paramount. Mr. Ahmednassir submitted that the leave to continue the action as a derivative action was not affected, and that in fact, that is a matter which was granted and whether that was rightfully or wrongfully done, the issue is now water under the bridge, and is overtaken by events and cannot be revisited now.

19. I have looked at the application and the prayer asking for the said leave. It is prayer No. 2 (a) of the said application. That prayer was granted on the day the application came before the court as order No. 1. By granting that prayer the court was clothing this suit with the legality and the locus necessary for any proceedings to take place in this matter. Without that leave no further action could be taken in this matter, including the current proceedings. If the order granting the leave also lapsed, then, as submitted by counsel for the Respondents, these proceedings are a nullity ab initio.

20. In my view, a court, such as this, faced with such a scenario must take the approach that is best for the suit. Parties submit themselves to court so that they may get a solution to their problems. So, if a law requires certain leave to be granted before a process may proceed further, and that leave is granted, that leave, if, like in the instant case, is one subject to challenge, must be deemed to exist, and continue and remain valid until it is successfully challenged. It is the finding of this court that while the grant of the said order granting leave to the Plaintiff to continue this action as a derivative action may be challenged, that order cannot be deemed to have lapsed on 13<sup>th</sup> April 2016. It is the order which breathed life to the suit herein and which now makes possible these proceedings. To hold otherwise would not only be a draconian action, but it would also be a meaningless action on the part of the court because it would amount to the court driving out parties who have come to court for a solution of their problem, even before hearing them. The orders which lapsed on 13<sup>th</sup> April 2016 were the injunctive orders and not the order for leave to continue these proceedings as derivative action.

21. The second issue I raised is whether the injunctive orders which lapsed on 13<sup>th</sup> April 2016 can be reinstated pursuant to this application. I will not go into further details on this issues, only to say that those orders cannot be reinstated for the reason that both sides to the dispute appeared to agree that the orders were so draconian, and that it is the court that framed the same. However, I find no problem with the court framing the said orders. I also believe that it is possible that the said orders were far too reaching and that is in part the reason Mr. Ahmednassir decided to have as an alternative prayer, that prayer No. 3 of the application dated 30<sup>th</sup> March 2016 be considered.

22. The last issue I raised is whether this court can grant prayer No. 3 of the application dated 30<sup>th</sup> March 2016. I have carefully considered this issue. Having considered the application and opposition to it, I am satisfied that the 1<sup>st</sup> Plaintiff/Applicant is a serious investor in the 2<sup>nd</sup> Plaintiff company. This has not been denied, and there is also evidence that the Respondents at some time tried to negotiate with the 1<sup>st</sup> Plaintiff/Applicant for the purchase of his interests in the 2<sup>nd</sup> Plaintiff Company. The 1<sup>st</sup> Plaintiff/Applicant presents a case of someone who was either to naive or too trusting in relation to his partners. This naivety and/or trusting relationship went on for over 23 years during which

time the 1<sup>st</sup> Plaintiff/Applicant alleges that his co-shareholders in the 2<sup>nd</sup> Plaintiff Company amassed a lot of wealth from which the Applicant was barred. A lot of this wealth is alleged to have been used to buy various real properties and shares either in the name of the 2<sup>nd</sup> Plaintiff Company or in the individual names of the Respondent Shareholders and/or in the names of their friends or relatives. The suit and the application brings out a story in the mould of the famous James Bond characters. Whether the allegations are true or not, I do not know. However, what I do know, having read the application, is that the 1<sup>st</sup> Plaintiff's cry for justice from this court is audible, and I am satisfied that the 1<sup>st</sup> Plaintiff's interests in the 2<sup>nd</sup> Plaintiff Company, and those interest which would be proven to have been held in trust for him by his co-shareholders, require an interim measure of protection as the application progresses to inter-parties stage. The difficulty this court has, however, is how to frame that protection given that the orders sought are so extensive, and could also involve request of injunctive orders upon properties whose ownership by the 1<sup>st</sup> Plaintiff/Applicant would be at best speculative at this stage.

23. With Caution and trepidation therefore, this court is satisfied that prayer No. 3 of the said application should be allowed as failure to do so will leave the subject matter of the suit to be exposed and without any protection from disposal by the Defendants herein. It has been submitted by the Respondents that some of the orders under prayer No. 3 such as ordering the Respondents to admit the 1<sup>st</sup> Defendant as a mandatory co-signatory in the 2<sup>nd</sup> Plaintiff Company's accounts would, if granted, incapacitate the said company. However, it is the finding of this court that the 1<sup>st</sup> Plaintiff has equal rights with the individual Respondents, and he cannot be kept out of his investments in the 2<sup>nd</sup> Plaintiff Company. He has the right to monitor the progression of those interests as a co-signatory to the 2<sup>nd</sup> Plaintiff's accounts. If the respondents think that such an eventuality would incapacitate the company, they can agree with the 1<sup>st</sup> Plaintiff on how to manage the said accounts. It has not escaped the attention of this court that the wealth of the 2<sup>nd</sup> Plaintiff Company is as much in cash as it is in real property or in shares, and therefore it is important to the 1<sup>st</sup> Plaintiff that he be a co signatory to those accounts. The orders prayed for under prayer No. 3 of the application are far reaching. This court will therefore try to moderate the same. For instance, at prayer 3 (g) of the application the Applicant prays for an order that the Defendants do supply to the Plaintiffs an inventory of properties, shares, companies and all assets they bought in their names or in the names of their relatives or companies and associates, in the last 23 years both in Kenya and outside Kenya. One issue that emerges from this prayer is that the 1<sup>st</sup> Plaintiff/Applicant is not exactly sure about properties and assets which belong to the Respondents in their individual capacity or which they may have acquired fraudulently using the 2<sup>nd</sup> Plaintiff's money. With this kind of doubt, the 1<sup>st</sup> Plaintiff/Applicant cannot at the same time seek to freeze any activities in properties which as at now appear to belong to the Respondents or their relatives, and there is yet no evidence that the same were acquired fraudulently. In my view, once prayer 3 (g) of the application is granted and the Defendants have provided the said inventory enabling the 1<sup>st</sup> Plaintiff/Applicant to know for certain what properties or assets have been acquired fraudulently by the Defendants, the Applicant can then seek restraining orders in respect of any such properties held by the Defendants or their proxies. However, this court hastens to add that all the properties and assets identified and named under the said prayer No. 3, and which for now clearly belong to the Respondents or their associates, are properties and assets the subject matter of this suit and upon which the Plaintiff lays a claim. Even though this court will not issue any restraining orders in respect of those properties or assets, they are properties and assets under the radar of this court, and any attempt to interfere with them in anyway, which such attempt is not already ongoing as at the time of this ruling, would be deemed by this court to be an action in bad faith, and is probably intended to take the said property out of reach of this court or of the 1<sup>st</sup> Plaintiff/Applicant. If there is any need to sell or to charge or to interfere with any of those properties, the leave of court shall be obtained first.

24. I now turn to the orders, and I grant prayer No. 3 of the application dated 30<sup>th</sup> March 2016 in the following terms;

***a. An order of a temporary injunction hereby issues restraining the Defendants jointly and severally whether by themselves, their employees, agents servants, relatives, proxies, nominees and associates from selling, transferring, charging, mortgaging, pledging or dealing with the following properties in anyway in whatsoever manner:***

***i. LR Number 19184 Naivasha;***

***ii. LR Number KJD/MAILUA/1810***

***iii. LR Number KJD/MAILUA/2065***

***iv. LR Number Kajiado/Osililae/14 Sungura Farm at Basil Sungura;***

***v. LR Number 16659 (Formerly LR 14209) Mwambije Ranch (83,000 acres) located in Kilibani, Kinayo Sub-County, Taita Taveta***

***vi. 10,000 acres in Eldas Ranch in Wajir County.***

***b. For avoidance of doubt prayers 3 (a) VI, VII, VIII, IX, X, XI, XIII and XIV are NOT granted.***

***c. An order of a temporary injunction hereby issues restraining the Defendants jointly and severally from being the sole/only signatories to all and any of the Kenya Shilling Bank accounts and America dollar accounts held by the 2<sup>nd</sup> Plaintiff with Commercial Bank of Africa (CBK) in any of its branches, or with any other bank and further that all such bank accounts be operated with the 1<sup>st</sup> Plaintiff as an alternate co-signatory with the other Defendants except that no transaction will take place in any of those accounts without knowledge of the 1<sup>st</sup> Plaintiff/Applicant.***

***d. It is hereby ordered and the Defendants directed to ensure that all monies received from the customers of the 2<sup>nd</sup> Plaintiff especially from Miraa customers and from the Government of the United States of America and/or any other customers be deposited into bank accounts held by the 2<sup>nd</sup> Plaintiff Company with Commercial Bank of Africa (CBA) or any other bank and that such accounts be operated by the 1<sup>st</sup> Plaintiff and the Defendants as co-signatories, and that any transaction in these***

*accounts must be carried out with the full knowledge of the 1<sup>st</sup> Plaintiff/Applicant.*

*e. An order is hereby issued prohibiting the Defendants from hoarding, warehousing, transferring, wiring, transporting, depositing any money belonging to the 2<sup>nd</sup> Plaintiff to any bank accounts to which the 1<sup>st</sup> Plaintiff is not a signatory.*

*g. An order is hereby issued prohibiting the Defendants, their agents, proxies, nominees, employees, servants, relatives, workers from depositing any money, wiring into or out any money, withdrawing any monies or dealing with the said accounts in any manner whatsoever, and the court do further order total and complete freezing of all activities in the following bank accounts; (i) Account Number 0111004662024 Ajman Bank, Swift Ajmnaej, Amazon International FZE and operated on the instructions of the Defendants; (ii) Account Number 021-490800-100, HSBC, Dubai branch operated in the name of Amazon International FZE and operated on the instructions of the Defendants; (iii) Account Number 610 897 031 000 Invest Bank, Ajman Branch, United Arab Emirates.*

*g. It is hereby ordered that the Defendants do disclose to the court and to the Plaintiffs within 21 DAYS from today how much money they personally or through associated companies, proxies or other third parties hold in Kenya and outside Kenya and to adduce and file with the court, bank statements and other documents in proof of the same.*

*h. It is hereby ordered that the Defendants do supply to the Plaintiffs with 21 days from the date of this court's order an inventory of properties, shares, companies, and all assets they bought in their names, or in the names of their children, relatives, companies and associates in the last 23 years both in Kenya and outside Kenya.*

*i. For avoidance of doubt prayers 3 (h), (i) and (j) are NOT granted.*

*j. Costs shall be in the cause.*

Orders accordingly.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 18<sup>th</sup> DAY OF MAY 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Mr. Muite & M/s Hanan for the 1<sup>st</sup> Plaintiff

Mr. Kenboy for the 2<sup>nd</sup> Plaintiff

M/s Jan Mohamed for the 1<sup>st</sup> Defendant

Mr. Sagan for the 2<sup>nd</sup> Defendant

Mr. Daud for the 3<sup>rd</sup> Defendant

Mr. Ojiambo & Jelle for Mohamed Hassan Abdi

Teresia – Court Clerk