REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

HIGH COURT CIVIL CASE NO. 184 OF 2016

CHARITY NJERI KANYUA...PLAINTIFF/APPLICANT

VERSUS

TREVOR KENT..DEFENDANT/RESPONDENT

RULING

[1] By her Notice of Motion dated **16 May 2016**, the Plaintiff/Applicant, **Charity Njeri Kanyua**, moved the court for the following orders:

[a] Spent

[b] That the Court be pleased to issue a temporary injunction restraining the Defendant, his agents, servants and/or employees from withdrawing funds paid at Barclays Bank of Kenya through **Business Number (particulars withhheld)**, pending the hearing and determination of this suit.

[c] That an order do issue requiring the customers of **Kent Water Supplies** as stated in the list annexed to the application, and any other persons concerned, to make payment for services rendered to the **Business Account No. (particulars withhheld)** held at Equity Bank Limited, Kikuyu Branch, pending the hearing and determination of the suit.

[d] That the Court be pleased to issue a temporary injunction restraining the Defendant, his agents, servants and/or employees or otherwise howsoever, from diverting monies payable to Kent Water Supplies from the Business Account **No. (particulars withhheld)** held at Equity Bank, Kikuyu Branch pending the hearing and determination of the suit.

[e] That the Court be pleased to issue a temporary injunction restraining the Defendant and his agents, servants and/or employees or otherwise howsoever from withdrawing monies deposited into **Account No. (particulars withhheld)** held at Equity Bank Limited, Kikuyu Branch, without the consent of the Plaintiff pending the hearing and determination of the suit.

[f] That the Court be pleased to grant an order for the rendering of Accounts by the Defendant for the businesses known as **Kikuyu Lodge Hotel** and **Kent Water supplies**.

[g] That the Court be pleased to issue a temporary injunction restraining the Defendant, his agents, servants and/or employees or otherwise howsoever from withdrawing any monies deposited into

Account Numbers (particulars withhheld) and **(particulars withhheld)** held at Barclays Bank of Kenya, ABC Plaza, Prestige Westlands Branch, pending the rendering of Accounts by the Defendant as per prayer [6] above.

[h] That the court be pleased to issue prayers 2, 3, 4, 6 and 7 in the interim pending *inter partes* hearing of the application.

[i] That the costs of the application be borne by the Defendant/Respondent.

[2] The application is supported by the Affidavit of the Plaintiff sworn on the **16 May 2016**, in which she deponed that she bought the property known as **Dagoretti/Kinoo/2800** between the years 1999 and 2000 and thereafter developed the same with a view of establishing her home thereon. To that end, she applied for approval from the Ministry of Environment and Natural Resources to drill a borehole on the property, which approval was granted. That it was during the same period that the Defendant offered to partner with her to conduct business on the property. It was thus that the **Kikuyu Lodge Hotel** (the Lodge) and **Kent Water Supplies** came to be. The Hotel business targeted tourists, while the water supplies business was intended to provide water services to the residents of the area neighbouring the property.

[3] The Plaintiff further averred that towards execution of the terms of their partnership, they opened separate bank accounts for the Lodge, being **Account No. (particulars withhheld)** at **Kenya Commercial Bank Ltd, Kikuyu Branch,** and **Account No. (particulars withhheld) at Equity Bank Ltd**, **Kikuyu Branch** for the Water business. According to the Plaintiff's version, they jointly operated the businesses without any hitch from inception until 2010, when she left Kenya to work in the United States of America, and that, even then, it was their understanding that the Defendant would continue to manage the day to day operations of the businesses for their mutual benefit and keep her informed accordingly.

[4] The Plaintiff deponed that whereas the Defendant regularly remitted her portion of the profits from the water business between 2010 and 2014, she received no profits, or any form of accounts, in respect of the Lodge in spite of repeated verbal requests; and that, out of concern, she decided to conduct her own investigations into the partnership business. She averred that it was thereupon that she discovered that no monies were being banked into the KCB Account, and that instead, payments were being made into the Defendant's personal account **No. (particulars withhheld)** at ABC Plaza, Prestige Westlands Branch. She contended further that when she confronted the Defendant about the situation, no justifiable explanation was forthcoming; instead it marked the beginning of the deterioration of their business relationship, with the result that the Defendant stopped making any remittances to her altogether for the water business. Thereafter, vide a letter dated **26 March 2016**, annexed to the Supporting Affidavit as **CNK10** the Defendant purported that the businesses were operating at a loss and that it was illegal for her, under **the Partnership Act, 2012**, to withdraw funds from the businesses under the circumstances. The Defendant thus instructed her to refrain from using the funds in the business accounts. Upon receipt of the aforesaid letter, she wrote back to the Defendant seeking accounts and access to the business records; and that instead of a response, the Defendant applied to **Safaricom Limited** and obtained an **Mpesa Business No. (particulars withhheld)**, which he circulated to all their clients of the water business for use henceforth in settling their water bills. When she thwarted those efforts by her complaint to **Safaricom Limited** and consequently had the account de-activated around **30 April 2016**, the Defendant opted for **Airtel Business Account No. (particulars withhheld).** It was, thus, on account of the foregoing that the Plaintiff sought the intervention of the Court.

[5] The Defendant's response to the application was by way of his Replying Affidavit sworn on **15 June 2016** in which he denied the Plaintiff's allegations. In particular, he denied that the suit property was purchased by the Plaintiff. According to him, the property was bought with his own funds, but registered in the Plaintiff's name upon advice that, as a foreigner, he could not hold land in Kenya. He exhibited a copy of the Title deed and expressed surprise that the property had been secretly transferred and registered in the joint names of the Plaintiff, her daughter, **Ivy Wanjiru** and her nephew, **Jeff Gitonga.**

[6] The Defendant further deponed that the property was developed from the onset as a commercial

tourist hotel and not as a home, as alleged by the Plaintiff; and that the construction of the building as well as that of the water project, including design and engineering works were all financed and managed by him, in addition to the sourcing and financing of the machinery, which he averred were imported by him from the United Kingdom.

[7] It was further the Defence case that although there was no **Partnership Deed** signed between the parties, there was a partnership in existence, and an implied term thereof was that they would share the profits and losses of the business. He denied that they were to open business accounts in the name of the Lodge or Kent Water Services to which they would be joint signatories. According to him, the understanding was that the proceeds of the water business were to be channelled through the Plaintiff's KCB Account, while the income from the Lodge would be banked in his US Dollar account with Barclays Bank of Kenya, Westlands Branch.

[8] Regarding the remittances that he made to the Plaintiff after she moved to the USA, the Defendant's contention was that the same were from his own personal resources, and were made basically to bail out the Plaintiff because of the difficulties she was experiencing while settling down in the USA. He contended that the businesses were already operating at a loss even as the Plaintiff continued to withdraw funds from the business account that was in her name. He refuted allegations by the Plaintiff that he declined to furnish her with the accounts for the businesses or access thereto, contending that the accounts had always been prepared by **Jeff Gitonga**, the Plaintiff's nephew, and that the accounts for the years **2012** and **2013** along with the Tax Compliance Certificate were always displayed in the office, and were available for the Plaintiff's inspection when she visited Kenya in **December 2014.**

[9] In his Further Affidavit sworn on **30 June 2016**, the Defendant averred that they lived together with the Plaintiff as a couple both in the suit premises and in Kigali, Rwanda with effect from **1996;** and that he continued to occupy the suit property up to **March 2016**. He annexed to that affidavit a copy of an affidavit sworn by the Plaintiff in respect of **Nairobi High Court Civil Appeal No. 70 of 2005: Stephen Karanja Gichuhi vs Charity Njeri Kanyua,** in which the Plaintiff had deponed thus:

> **"THAT I and my husband Trevor Kent do run the "Kikuyu Lodge Hotel" Kenya which deals with accommodation, wildlife safaris, cultural visits, scenic tours, Airport transfers and car hire..."**

He relied on the foregoing averment to demonstrate that the Plaintiff did not fully disclose all the pertinent facts to the Court, including the fact that they cohabited as husband and wife during the time period in issue.

[10] Thus, in sum, it was the Defendant's contention that their business relationship with the Plaintiff got strained for two reasons:

> **1) The Plaintiff secretly and fraudulently processed a parallel title for the property in 2011 in the joint names of herself, her daughter and nephew while fully aware that he held the original title deed;**
>
> **2) The Plaintiff made no effort to raise her 50% share of the capital for the business venture or honour the agreement to register the property in their joint names.**

For the foregoing reasons, the Defendant posited that the Plaintiff had come to court with unclean hands and is therefore not entitled to the relief sought. He accordingly urged for the dismissal of the Plaintiff's application with costs.

[11] The application is expressed to have been filed pursuant to **Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** as read with **Order 40 Rules 1,2 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010**. It is within the foregoing context that I have carefully considered the grounds upon which the Notice of Motion is based, the averments by the Plaintiff in her Supporting and Supplementary Affidavits, the response thereto by way of the Defendant's two affidavits

sworn on **15 June 2016** and **30 June 2016**, including all the documents annexed thereto, as well as the written submissions filed herein by Learned Counsel.

[12] The touchstone for the determination of this application is a consideration of whether the principles laid down in the case of **Giella vs. Cassman Brown & Company Ltd [1973] EA 358** have been satisfied by the Plaintiff, namely:

1. **A *prima facie* case with probability of success**

2. **Irreparable damage which cannot be compensated by an award of damages; and**

3. **The balance of convenience.**

[13] I must say that for the purposes of the instant application, I found the affidavits filed herein quite detailed and yet, as stated in the case of **Nguruman Limited Vs Jan Bonde Nielson & 2 Others [2014] eKLR,** at this stage, the court is not required to examine the merits of the case too closely. Here is what the Court of Appeal had to say in this regard:

> **"We reiterate that in considering whether or not a *prima facie* case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right, which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities."**

[14] So what is a *prima facie* case? This question was posed by the Court of Appeal in **Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] eKLR** and the Court proceeded to answer it thus:

> **"...in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

[15] As is evident from the foregoing summary of the evidence presented herein, the Plaintiff's cause of action is that she entered into a partnership with the Defendant in respect of the two businesses aforementioned, and that when she left for the USA, they agreed that the Defendant would manage the day to day operations of the business for their mutual benefit; but that the Defendant failed to account and ultimately purported to extinguish her rights to the businesses by his letter dated **26 March 2016**. The Defendant on his part concedes that they were partners, but contends that the hotel business was making losses and that often times he had to use his own resources to sustain it; and that the Plaintiff failed to contribute her 50% share of the partnership capital and yet was withdrawing funds remitted to her KCB account in respect of the water business for her own personal use without any reference to the Defendant. There is thus sufficient material to show that the Defendant, at some point in time, ceased to remit payments to the Plaintiff or have the same deposited in the KCB account. It has also been shown that the Plaintiff has not received any earnings from the Hotel business for a while. It may well be that the business has been making losses as alleged by the Defendant, but such are matters that can only be effectually resolved at the hearing. Clearly therefore, the Plaintiff has shown that she has a genuine grievance that would require rebuttal by the Defendant at the trial.

[16] Having demonstrated that she has a *prima facie* case with a probability of success, the Plaintiff must further prove that she stands to suffer irreparable damage in the interim if the injunctive relief sought is not granted. This is the second principle set out in **the Giella case,** and as restated in **the Nguruman Case** by the Court of Appeal, these requirements are consequential. The Court observed thus:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

(a) establish his case only at a *prima facie* level,

(b) demonstrate injury if a temporary injunction is not granted; and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially...If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied the injury the respondent will suffer in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim my appear at that stage...The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

[17] Accordingly, I now turn to the issue as to whether the applicant has demonstrated herein that she stands to suffer irreparable harm. It bears repeating that the Plaintiff, in her Plaint dated 16 May 2016, seeks the following relief:

[a] A permanent injunction restraining the Defendant, his agents, servants and/or employees from diverting funds in respect of Kent Water Supplies from the Equity Bank Limited;

[b] An order that the Defendant provides full and accurate accounts in respect of the two businesses;

[c] An order that the Defendant pays to the Plaintiff from the date of judgment until full payment all monies that shall be found due and owing to the Plaintiff following the provision of accounts;

[d] General damages for loss of income

[e] Interest on [c] and [d];

[f] Costs of the suit; and

[g] Such other relief as the Court may deem fit to grant.

[18] From the foregoing, and from a careful perusal of the Affidavits filed herein and the documents annexed thereto, it is apparent that the disputation herein is in respect of the proceeds of the hotel and water business ventures. Indeed, the gravamen of the application is summed up in **Ground No. 17** of the Notice of Motion dated **16 May 2016** thus**:**

"THAT unless restrained by this Honorable Court, the Defendant shall continue with his acts of fraud to the detriment of the Plaintiff and the Plaintiff is truly apprehensive that he may further remove the monies to an unknown location."

[19] Again, I revert to what the Court of Appeal had to say with regard to what amounts to irreparable damage in the **Nguruman Case,** namely:

“On the second factor, that the applicant must establish that he might otherwise suffer

irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

[20] Accordingly, my considered view is that this is a matter in which accounts can be taken, all the payments, remittances and deposits verified from the bank records and other books of accounts kept by the company; and any shortfalls compensated for. It is not lost to the court that one of the reliefs sought herein is an award of damages. Additionally, it has not been demonstrated that the Defendant will not be in a position to pay whatever sums that may be found due from him to the Plaintiff. Hence, I am not convinced that the Plaintiff has demonstrated that she stands to suffer irreparable harm in the sense that there would be no basis or standard by which the loss could be measured with reasonable accuracy; nor has she demonstrated that the injury or harm envisaged is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy. Indeed, I would agree with the submissions of the Defence Counsel, that granted the facts of this case, it would be in the interest of both parties that the businesses be allowed to continue in operation as the parties pursue the determination of this disputation, and in particular the thorny matter of accounts.

[21] Additionally, with regard to the issue of balance of convenience, it is now trite that the Court in responding to prayers for injunction should always opt for the lower rather than the higher risk of injustice. For instance, in the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589**, **Ojwang Ag. J** (as he then was) expressed the following viewpoint, which I find useful:

"Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella v Cassman Brown, the Court has to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied: (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice."

The Court, in the foregoing precedent, quoted with approval the words of **Justice Hoffman** in the English case of **Films Rover International Vs. Cannon Films Sales Ltd (1986) 3 All ER 772** in which the said judge made this point regarding the grant of injunctive relief:

" A fundamental principle is … that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' …"

[22] It is to be noted that it is the Defendant's contention that he made substantial contribution to the businesses, including importing the equipment for the water project, a fact conceded to by the Plaintiff. He further contended that the Plaintiff is yet to inject her 50% of the partnership capital into their joint venture, and while all these assertions remain to be proved at the hearing, it is my considered view that the path that carries the lower risk of injustice herein is for the Defendant to continue with the operations of the businesses pending the hearing and determination of this suit. Indeed, it is undisputed that the Defendant has been running the two business concerns since 2009 when the Plaintiff left Kenya for the USA.

[23] In view of the foregoing, it is my considered finding that the Plaintiff has not only failed to demonstrate that she will suffer irreparable damage if the injunction sought is not granted, but also that

the balance of convenience lies in favour of the retention of the *status quo ante*. I would accordingly dismiss the Plaintiff’s Notice of Motion dated **16 May 2016,** but order that the costs thereof to be in the cause.

It is so ordered.

SIGNED, DATED AND DELIVERED at NAIROBI this 30th DAY OF AUGUST, 2016

OLGA SEWE

JUDGE