



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 505 OF 2014

SAMUEL MUNYAO NZIOKI

T/A NZIOKI TAX CONSULTANTS & ASSOCIATES...PLAINTIFF

VERSUS

KILIMANI JUNIOR ACADEMY LTD.....1ST DEFENDANT

HEIDI JANE JUDY BIRD.....2ND DEFENDANT

RULING

Mandatory and Temporary Injunction

[1] The Plaintiff applied for various temporary and mandatory injunctions in a Motion dated 6th day of November 2014. The significant prayers for determination are No 4, 5, 6 and 7. The Application is expressed to be brought under Orders 51 Rules 1 and 4, Order 40 Rules 1 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act. The Plaintiff filed a supporting and Supplementary Affidavit in support thereof. The Respondent opposed the application and filed Grounds of opposition on the 21st of November 2014 and a replying affidavit sworn by the 2nd Defendant on the 11th of February 2015.

Applicants' gravamen

[2] The Plaintiff is seeking a Temporary injunction against the Defendants to be restrained from continued use of his Email address [particulars withheld] on the Kenya Revenue Authority I-tax portal which has effectively blocked him from using the said Email address as his. The Plaintiff is also seeking a mandatory injunction pending the hearing and determination of this suit requiring the Respondents to remove the said Plaintiffs Email address [particulars withheld] as their contact address on the Kenya Revenue Authority I-Tax portal.

[3] The Plaintiff averred that he is a tax consultant and his provision of Tax related agency services depends of the portal in issue. He stated that, as the Respondents' agents, he was the one who initially registered the 1st defendant with the Kenya revenue Authority as a tax Payer and used his email address at the time as stated in his Supporting affidavit for the sole purpose of ease of communication with the Kenya Revenue Authority on matters related to taxation on behalf of the Respondents. The online registration system at the Kenya Revenue Authority requires each tax payer to have his own email address and any subsequent attempt of registration of the same Email

address by a different taxpayer will be rejected by the online system. As a matter of fact, the Respondents have been using the Plaintiffs email address as their contact address at the Kenya Revenue Authority I-Tax portal as demonstrated by the annexure marked as **SMN 6** in the plaintiffs supporting affidavit. A look at the said annexure at the Top right hand corner under the Caption certificate Date reveals that the said **certificate was issued on the 18th of December 2013**. This is proof of when the Respondents registered on the online platform for tax collection. The date appearing at the said certificate is very significant as the said date was a period of two (2) years after the Respondent had terminated the services of the Plaintiff as their tax Consultant and Agent. The termination of the Plaintiffs services as the Respondents tax agent was through a letter dated **20th of January 2012** by the Defendants advocates which letter has been annexed as **SMN 3** to the Supporting affidavit of the Plaintiff. It is also the Respondents admission that it is not the Plaintiff herein who registered them on the I-Tax Portal thus the question becomes; why they did not present their email address to the Kenya Revenue Authority knowing very well they had already terminated the Plaintiffs services.

[4] The Plaintiff stated in his affidavit that it is public knowledge now that, the Kenya Revenue Authority is in the process of moving all tax related transactions to the I-Tax Platform which platform requires all Tax payers to register and use their Email Addresses. He further averred that as his sole business is on provision of tax consultancy services most of the times it entails being in contact with the Kenya Revenue Authority. Therefore, a change in the details of the tax payer at KRA website requires the Respondents to visit the KRA offices with their original Pin certificate and their new email address. The Plaintiff took action by informing the Defendants of the necessity to effect the said Changes with the Kenya Revenue Authority as evidenced in annexures marked as **SMN7** and **SMN8** of the Plaintiff supporting affidavit which are letters from him and from his advocates informing the Respondents to change the said detail. The Plaintiff also alluded to loss of business as a result of his inability to conduct his business with the Kenya Revenue Authority as demonstrated by the annexures marked **SMN 10 (a)** and **(b)** and **SMN 11** of the Plaintiff supporting affidavit.

[5] The Plaintiff claims that the Respondents have admitted that the said Plaintiffs email address appears as their Contact email address on the Kenya Revenue website except they argue that they do not use, cannot access or change the said email address as they do not have the password. These are wrong representations as they are not able to explain the difficulty in replacing the Plaintiffs Email address with one which is theirs. Therefore, there is continued use of the said email address by the Respondents. The Plaintiff has clearly explained that he is already registered with the KRA as using the Email address in controversy and he is not able to use a separate Email address to register in the I-Tax Portal hence the need for the Respondents to stop using the Plaintiff said email on the I-Tax portal. They believed that they have satisfied the threshold for granting of Temporary and Mandatory injunction. See the case of **Giella Vs Cassman Brown and Co .Ltd (1973) EA. 358**. The Plaintiff has established that he has a prima facie case with high chances of success; will suffer irreparable loss that cannot be compensated by an award of damages; and balance of convenience lie in his favour. See also **High Court ELC case Number 514 of 2013 Moses C Muhia Njoroge & 2 others Vs Jane W Lesaloi and 5 others; Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125**. He owns and is the sole registered owner of the Email address used by the Respondents in the Kenya Revenue Authority I-Tax portal. This fact has been admitted by the Respondents. He has not granted any permission or licence to the Respondents to use the said Email address. Further the Respondents are individual tax payers and are not in the taxation business and therefore on comparison, he stands to suffer most as a result of the continued use of the Plaintiff email address by the Respondents. He will lose more business. For now, his business is at a standstill. Therefore, they urged the Court to grant a Temporary injunction.

[6] On mandatory injunction see **Civil Case No. 83 of 2003 in at the High Court in Mombasa, Qualitron Ltd Vs Shaban Swedi**, that:-

It is therefore clear that interlocutory mandatory injunctions are granted but in very

exceptional cases...that “special circumstances, however, depend on the facts and circumstances of each case and the good sense of the trial Judge”

As the Plaintiff is the registered owner of the Email address in question and that the said Email address was solely registered and customized for the use in his profession, and this fact has been admitted by the Respondents, this is a clear case with exceptional circumstances and warrants issuance of mandatory injunction. The Respondents should register their own email address for tax purposes.

1st & 2nd Defendant’s Submissions

[7] The Respondents opposed the application and filed Grounds of Opposition dated 19th November 2014 as well as a Replying Affidavit dated 11th November 2015. They admitted that in the year 1992, they engaged the Plaintiff as their tax consultant and he registered the 1st Defendant with the Kenya Revenue Authority on or about February 2011 and used his e-mail as the 1st Defendant’s contact e-mail. Consequently the Plaintiff duly authorized the 1st Defendant to use his e-mail as its contact e-mail with the Kenya Revenue Authority. The Plaintiff retained and had the sole access to the said e-mail after all he had his own password and the Defendants could not access the same save through the Plaintiff. The Plaintiff’s services were however terminated in the year 2012 and two notices were sent to the Kenya Revenue Authority on the 24th February 2012 and another on the 29th February 2012. The Defendants engaged the services of M/s Aggrey & Associates as their new tax consultants. In the year 2013 the Kenya Revenue Authority initiated the I-TAX platform and merely transferred the entire data to the new platform as it was at the time.

[8] Given the above facts, the Respondents think that the Applicant has not met the legal threshold. He has not demonstrated a *prima facie* case with a probability of success as he voluntarily granted the Defendants his own e-mail for their use. Secondly, the Plaintiff to date, retained the sole password to the said e-mail and therefore there was nothing preventing the Plaintiff from simply changing the same to restrict the Defendants from using the same. Whether the Plaintiff is the owner of the said e-mail address is undisputed but mere ownership does not in any way demonstrate a *prima facie* case. Secondly, the issue of a licence is a mere red herring and afterthought as the Plaintiff himself voluntarily granted the Defendants the right to use the e-mail address.

[9] He had the password to the said e-mail and nothing stopped him from changing the same to prevent the alleged use by the Defendants in order to save the alleged loss. He can as well have registered another email to avoid loss. This is a court of equity and equity assists the vigilante and not the indolent. In the instant case, the Plaintiff elected to sit on his laurels and incur to damages, if any. In any case, the Defendants engaged the services of M/s Aggrey & Associates for purposes of their tax obligations and, therefore, have had no use for the Plaintiff’s e-mail address since the year 2012 as intimated. Indeed, the Respondents do not use the email in question. This court should not, therefore, issue orders in vain. On this see A.A. Lakha, JA, (as he then was) in **M/s Gusii Mwalimu Investment Co. Ltd & 2 others-vs-M/s Mwalimu Hotel Kisii Ltd [1996] eKLR**. The balance of convenience would only tilt in favour of the Defendants.

[10] On mandatory injunctions, the Respondents cited the case of **Kenya Breweries Ltd-vs-Okeyo, [2002] EA 1 109** and stated that the Plaintiff has failed to demonstrate the existence of any special circumstances entitling him to the grant of a mandatory injunction at this interlocutory stage. This is also not a clear case where the issues can be determined at once, reason being that the Plaintiff to date retains the password to his own e-mail, the Defendants terminated the Plaintiff’s services in the year 2012, duly notified the Kenya Revenue Authority and do not use his e-mail anymore. Further, if the mandatory orders are granted at this interlocutory stage the same would be in vain as the Defendant engaged the services of M/s Aggrey & Associates way back in 2012 and do not use the Plaintiff’s address anymore as intimated. Moreover, the grant of

a mandatory injunction at this interlocutory stage would in effect render the hearing of the substantive suit nugatory and determine the entire suit at an interlocutory stage as the prayers being sought in the application are similar to the prayers being sought in the Plaintiff.

[11] For those reasons, they urged the Court to deny the application with costs.

DETERMINATION

[12] This is an application for injunction; temporary and mandatory. I will not re-invent the wheel. On temporary injunctive relief; just like other limbs in law, has also grown to provide for situations which were not exactly foreseen before. And courts are expected to examine the entire circumstances of the case in deciding whether or not to grant an injunction while they also seek for answers based on the traditional principles set in the case of **GIELLA vs. CASSMAN BROWN** to wit:-

- a) Has the Applicant established a prima facie case with high chance of success?**
- b) Will the Applicant suffer irreparable damages unless an injunction is issued? and**
- c) Where does the balance of convenience lie?**

See the decision of Mabeya J in *JAN BOLDEN NIELSEN VS. HERMAN PHILLIPUS STEYA Also Known As HERMANNUS PHILLIPUS STEYN & 2 OTHERS (2012) eKLR* where he cited Ojwang Ag. J (as he then was) in the case of *SULEIMAN VS AMBOSELI RESORT LTD (2004) eKLR 589* as follows:-

‘I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the *Giella Vs Cassman Brown* case. The court may look at the circumstances of the case generally and the overriding objective of the law. In *Suleiman vs Amboseli Resort Ltd (2004) e KLR 589* Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-

‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in *Giella Vs Cassman Brown, in 1973* cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover International* made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ 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”....”

Traditionally, on the basis of the well accepted principles set out by the court of Appeal in *Giella Vs Cassman Brown* the court has had to consider the following questions before granting injunctive relief.

- i. Is there a prima facie case....**
- ii. Does the applicant stand to suffer irreparable harm...**
- iii. On which side does the balance of convenience lie? Even as those must remain the basis 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.....**

[13] The test for granting mandatory injunctions at interlocutory stage is as stated in *Halsbury’s Laws of England* (4th Edition) at para 948 that:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the Plaintiff ... a mandatory injunction will be granted on an interlocutory application”.

[14] The above passage has been quoted with approval by the Court of Appeal in many cases which I do not want to multiply either. But in a nutshell, a mandatory injunction will be granted on an interlocutory application if the applicant demonstrates special circumstances. Or if the case is clear either where the court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff.

[15] I will apply the above tests herein. I have considered all the pleadings, affidavit evidence, submissions by parties as well as the applicable law. I take the following view of the matter. There is no doubt that the Applicant is the owner of the email address in question. The email was used for purposes of tax filings and other related matters on behalf of the Respondents. These facts are uncontroverted. The only argument the Respondents are putting forward is that they no longer use the said email address for they do not have the password or access. The other arguments which seem to suggest that the plaintiff was not prevented from registering another email in the interim or should have sought change from KRA are most unfortunate and arrogant of the Respondents. Change of details in I-tax platform will only be done by the tax payer or his authorized agent. The Plaintiff advised the Respondents on the procedure to change the email address but they took no action. There is therefore a deliberate act on the part of the Respondent to prevent the Applicant from using his email. Whether they continued to use it or not is not relevant here as the same email appears in Respondents’ tax documents. There is clear infringement of right here which would impel the court to issue an injunction.

[16] Similarly, this is clear case of infringement of right and ownership of the email in issue and that is not in dispute. It is a straight forward case with a clear mischief by the Respondent. The mischief is readily discernible without much probing or copious explanations; the Respondents wants to steal a match from the Applicant. This is a case that should be decided at once. I do not think the case is unclear as claimed by the Respondents. Herein, an interlocutory mandatory injunction is deserved. Once special circumstances are established and the court finds that the case is a clear one or that there is mischief of stealing a match from another, it matters not whether the mandatory injunction will compromise the entire case. Accordingly I issue a temporary injunction and mandatory injunction as prayed. The Respondents shall follow through on all the procedures of changing the email address from their tax documents or transaction not later than 14 days from today. These orders are not in vain as the change of the email address is to be done by the Respondents alone. Similarly, as long as the email remains the official contact address in the records of KRA the Applicant cannot be able to use it. Contrary to the arguments by the Respondents, the email is to their use and there is every possibility that the email address is being used by the Respondents. They will also pay costs of the suit. It is so ordered.

Dated, signed and delivered in court at NAIROBI this 26th day of June 2015.

F. GIKONYO

JUDGE