



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
WINDING UP CASE NO. 3 OF 2015
LUCY WANJIKU MKUU.....PETITIONER
VERSUS
1. KARL SALZMANN LIMITED
2. KARL SALZMANN.....RESPONDENTS

RULING

1. The Petition has by a Notice of Motion dated 14/102/2015 and expressed to be premised on Article 159 of the Constitution as well as section 222(1) Companies Act and Rule 711 of the Companies (Winding up) Rules together with all enabling provisions of the law, sought orders from court that:-

- i. That this matter be certified as **URGENT** and be heard **ex-parte** in the first instance.
- ii. That pending the hearing and determination of this application, an order be issued restraining the Respondents, their agents and/or servants from making any withdrawals, without the consent in writing to the Applicant, of the funds belonging to 1st Respondent held in Barclays Bank of Kenya Limited, Diani Branch, Account No. 2026118231 or in any other bank account held or that may be held by the 1st Respondent.
- iii. That pending the hearing and determination of this Petition, an order be issued restraining the Respondents, their agents and/or servants from making any withdrawals, without the consent in writing of the Applicant, of the funds belonging to 1st Respondent held in Barclays Bank of Kenya Limited, Diani Branch, Account No. 2026118231 or in any other bank account held or that may be held by the 1st Respondent.
- iv. That pending further orders from this Court the 2nd Respondent be restrained from interfering with the Applicant's right of access to and occupation of the residential house standing on a plot of land known as Plot No. Kwale/Diani Settlement Scheme/2792 and/or the right to run the affairs of Karl Salzman Limited and/or the right to enjoy the use of motor vehicle Registration No. KBW 262E.
- v. That the 2nd Respondent be restrained from harassing or beating the Applicant.
- vi. That any orders issued herein be served upon the Diani Police Station to ensure Compliance.

vii. **That the costs of this application be provided for.**

2. Prayers 1 & 2 of the application are practically spent from the day this matter came up for hearing and was heard and a ruling reserved. What now pends court's determination are prayers 3, 4 & 5 and the consequent prayers 6 and 7. I say consequent because they would abide the outcome of the substantive prayers.

3. The basis upon which the prayers for prohibitory and mandatory injunctions are sought are that the 2nd defendant has unlawfully conducted the affairs of the 1st Respondent as through they were a personal affairs in complete disregard of the separate and distinct character and personality of the company for which reason the Petitioner contends that it is only fair and just that the orders sought be granted. The application is supported by the affidavit of the petitioner/applicant sworn on the 14/10/2015 and a further affidavit sworn on the 5/11/2015. Both affidavits give a narrative whose gist is that since the year 2011 the petitioner and the 2nd Respondent have known each other initially intimately and graduated into a business venture whose vehicle was designed and driven in the name and creature of the 1st Respondent.

4. As conceived all attempts were made to comply with the then requirement that a company, a private company, has at least two directors. Below that legal veil was however a document intitled "NOMINEE DIRECTOR AGREEMENT" whose sole purpose was to constitute the petitioner for all intents and purposes, the nominee and agent of the 2nd Respondent at beckon and pleasure and to hold the shares so allotted to the petitioner at the unfettered behest of the 2nd Respondent. That document, depending on what weight one places on it, defines in details the architecture of the control and operation of the company. I will however come back for it later in my determination.

5. The application alluded to above was filed within a petition to wind up the company, 1st Respondent, on among other reasons, oppression of the petitioner by the 2nd Respondent. The particulars of such oppression however are centred on the access and use of the company assets by the petitioner for personal interests including as an accommodation, as a source of income from the sales of the landed assets of the company and the control and operation of the company's accounts capped with the accusation of the 2nd Respondent for cruelty and violence shown by physical and verbal attacks. The summary is that it is the petitioner's position that as a result, it is impossible to continue running the company in the current set up.

6. The application was opposed on the basis of the affidavits sworn by the 2nd Respondent; the Replying Affidavit and further replying affidavit. The sum total and effect of the two affidavits are that the composition and creature of the 1st Respondent was a business venture of the 2nd Respondent conceived and fully funded by him and that the petitioner was brought into the shareholding fold to comply with the law as advised by the advocate retained at incorporation but that the character of the company in terms of control was reserved for the 2nd Respondent. To prove that point, there are exhibited correspondence with the advocate and documents prior to and leading to incorporation and acquisition of the property owned by the Company.

7. One such correspondence is an email dated 10.6.2012 whose tenure was to allow the 2nd Respondent "drive any business" without any approval by the Petitioner. Additionally, the Respondent filed a list of authorities in support of the propositions that; the company is separate and distinct from its promoters, that for one to be entitled to an injunctive order one has to demonstrate a *prima facie* case which must be a case beyond merely arguable, that for the court to grant a mandatory injunction the case must be a very strong one as such orders are granted sparingly and in very rare occasions as quite often it involves undoing what has taken place, many a times at great expenses. The court before granting a mandatory injunction would consider the disproportions between the detriment the injunction would inflict on the defendant and the benefit it would occasion to the plaintiff. Basically the court interrogates the balance of advantages and disadvantage such a grant would visit to the parties to the litigation.

8. Parties equally filed written submissions and to the submissions by the Petitioner were annexed authorities ranging from the mother of decisions for the legal principle that a company has separate legal entity from its promoters, in *Solomon -vs- Solomon Company Ltd*, to the decision in **MISTRY ANWAR**

SINGH -VS- SERWARJO to the effect that a foreigner was barred by law from acquiring an interest in land without the written consent of the Governor; **LALJI KARSAN RABADIA & OTHERS -VS- KEB** on construction of legal instrument and on the instances when an appellate court would interfere with exercise of discretion by a trial court.

9. In the submissions, industry was employed to demonstrate that on the facts pleaded of common law marriage, and co directorship and oppression, the fact that the parties had resided on the property owned by the 1st defendant *qua* its directors and the fear that the 2nd Respondent was likely to withdraw and misappropriate the funds belonging to the company injunction was deserved. Great emphasis was placed on the contention of fraud and illegality committed by the 2nd Respondent as against the Petitioner.

10. On irreparable loss it was submitted that deprivation of property was *ipso facto* irreparable loss and secondly that a party entitled to an injunction cannot be forced to take damages.

11. On their part the Respondent filed a list and copies of authorities as well as submissions and submitted that the attempt to establish a *prima facie* case was hollow in that there was no right of the petitioner/applicant vested over the company's property; that the right of the applicant if any is limited to the shareholding and does not extend to the property of the company unless at winding up and only on the surplus.

12. On fraud it was submitted that allegations of fraud demand higher proof by evidence and not interlocutory and that it must be strictly proved even if not to the level of proof beyond reasonable doubt but undoubtedly, well above balance of probabilities. On irreparable injury the Respondents contend that the need for accommodation for the petitioner and the 10 years old child is not irreparable. Because the petitioner may easily get a rental accommodation whose rent would be ascertainable and a verifiable and can thus be awarded as damages.

13. On interlocutory mandatory injunction it was contended and submitted that no exceptional circumstances were proved to warrant grant of an interlocutory mandatory injunction.

14. In brief, these are the rivaling positions taken by the opposite sides in this matter and which I must consider to reach my determination on whether or not to grant to the petitioner/applicant the orders sought.

Issues for determination:

15. When to grant prohibitory and mandatory injunctions are now well beaten paths. The parties all agree that for prohibitory injunction the norm is to apply *GIELA -VS- CASSMAN BROWN*, while to consider granting an interlocutory mandatory injunction a very strong and straight forward case must be shown.

Interlocutory Temporary injunction

16. As designed in equity, the remedy of temporary injunction is intended to forestall an injury or breach of contract by a defendant. For one to succeed, he must show that there is vested upon him a right that stands precarious for infringement by the defendant and would so be infringed unless the court steps in to forestall the infringement.

17. It has been said repeatedly that a court should be shown to grant an interlocutory injunction if the effect would be to exhaust the remedy sought in the action. I have pointed out that the application for injunction in this matter is founded on the petition to wind up the company. In the petition, the ultimate remedy sought is winding up on the basis that the petitioner has been excluded in an oppressive manner from the use of the property of the company and access to its accounts. If the court was to grant the orders of injunction as sought that restraining the operation of the company's accounts by the 2nd defendant and ordering the petitioner back on the company's property as its agent, the court shall have tacitly determined the question whether or not the petitioner has been oppressed and in doing so the prayers **c** and **d** shall have been effectively determined prior to hearing the petition.

18. That aside whose property is it that the petitioner wants the court to vest in her right over? “Does the petitioner have any distinct proprietary rights in the property of the company beyond her shares?” The answer to this is to be found in **SOLOMON -VS- SOLOMON & CO. LTD AND MACAURA -VS- NORTHERN ASSURANCE CO. LTD**, cited by both sides, that the company has distinct and separate legal capacity and entity from its promoters. This creates the boundary between the ownership of the company's assets from ownership of the company shares by such promoters or shareholders.

19. In Nacaura, the court said, of a shareholder:-

“He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.”

20. That pronouncement and decision direct me that the plaintiff's interests in the company is limited to her share holding and limited to profits where declared or to a share in the surplus assets on winding up and no more. She cannot therefore assert a right to occupy and use the company property as her residence purely because she and the 2nd Respondent have done so in the past.

21. In effect the injunction would work to deprive the 1st Respondent of the control and enjoyment of its property as deemed fit by it. It would amount to arbitrary deprivation of the right to property.

22. In my view I think an injunction in the circumstances would not serve the interest of justice. Granted that petitioner is the majority shareholder, that does not dismantle the delineation between her and the company in so far as proprietorship of the property is concerned.

23. A lot has been said of the document called Nominee Director agreement, and I suspect a lot will still be said when the petition is to be heard. I will thus hesitate at commenting much on the document and its purport, but it suffices to say *prima facie*, it defines the what the parties set out to do in running the company.

24. It says:-

“(I) The Nominee director will be appointed as a director of the company and will act in such capacity only under the express written instructions of the beneficial shareholder and will at all times act in the best interest of the beneficial shareholder.”

The Petitioner has submitted extensively on the conduct of the 2nd Respondent bordering on fraud and criminality but I think that must be left for trial when evidence will be led and tested, by cross examination. I opt to say no more on the assertions.

Interlocutory mandatory injunction

25. Having said that in my view the petitioner/applicant has no vested interest in the property of the company I must look in the pleadings and affidavits by the applicant to find out what other right need to be protected by grant of a mandatory injunction. It is not in doubt that her shareholding has not come under challenge. However, to grant her prayers for a mandatory would to say that beyond the shares in the 1st Respondent the applicant has other interests on the property of the 1st Respondent as to override the 1st Respondent's own interests. I am unable to discern such interests. It is however not lost to court that the petitioner reserves the right to use the organs of the company to direct its operations.

26. The upshot of my foregoing findings is that there being no vested interest upon the petitioner on the property of the company, no *prima facie* case, irreparable loss or exceptional circumstances have been established to warrant this court granting the applicant a interlocutory prohibitive or mandatory injunction. The application thus stands dismissed.

27. Owing to the past relationship between the petitioner and the 2nd Respondent, the fact that *prima facie* the petitioner is the majority contributor to the 1st Respondent and the prospects that the two

individuals still need to meet and transact the business of the 1st Respondent, I order that the costs of this application be in the cause.

Dated, signed and delivered at Mombasa this 7th day of December 2015.

In the presence of

Ms.Murage for the Petitioner/Applicant.

Mr.Kongere for Respondent.

P.J.O.OTIENO

JUDGE