



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 485 OF 2011

CHRISTRIAN LIFE COMMUNITY – KENYA PLAINTIFF

VERSUS

HUMPHREY VIGISA DEFENDANT

R U L I N G

1. Before this Court is the Plaintiff’s Notice of Motion dated 28th October 2011 brought under the provisions of **Orders 36, 39 and 51** of the *Civil Procedure Rules, 2010*. It also encompasses **sections 1A, 1B, 3 and 3A** of the *Civil Procedure Act* as revised. The Application seeks an Order that the Defendant be restrained and barred by an Order of injunction from disposing of, charging, leasing, alienating, selling or in any way interfering or dealing with parcels of land being L. R. No. Kwanza/Namanjala Block 2/Amuka Plot 13, Kipkoriny Plots Nos. 86 and 264 (hereinafter called “the suit properties”). The Application is brought on the following 4 grounds:

“1. THAT the Plaintiff has filed a suit against the Defendant claiming the immediate payment or refund of Kshs. 6,361,852/= being the amount that the Defendant misappropriated while employed by the Plaintiff.

2. THAT about the time the Defendant misappropriated the Plaintiff’s funds, he purchased either in his name or in his father’s name the following parcels of land in Kwanza or Trans Nzoia District: L.R. No. Kwanza/Namanjalala Block 2/Amuka Plot 13: Kipkoriny Plot No. 86 and 264

3. THAT following the equitable Doctrine of Tracing the Plaintiff believes it is entitled to and, has traced the monies embezzled from its accounts to the parcels of land bought by the Defendant: L.R. No. Kwanza/Namanjalala Block 2/Amuka Plot 13: Kipkoriny Plot No. 86 and Kipkoriny Plot No. 264 under the Doctrine of Tracing.

4. THAT the Plaintiff wishes to have the Defendant restrained and barred by an Order of this Honourable Court from disposing of, charging, leasing, alienating, selling or in any way interfering or dealing with the parcels of land.

5. THAT the Plaintiff fears that unless the tracing orders prayed for are granted

and the Defendant prohibited from dealing with the land as prayed, the Defendant may dispose of the land to the Plaintiff's detriment thus rendering the main suit nugatory".

2. The Supporting Affidavit to the Application was sworn by one **Cornel Okalo** on 28th October 2011. The deponent said that he was the President of the Plaintiff herein and was competent to swear the Affidavit on behalf of the Plaintiff. He noted that the Defendant had joined the Plaintiff's organisation in 2001 as the Principal of St. Aloysius Gonzaga School, Nairobi and was thereafter promoted to the position of Associate Director – Development Desk at the Plaintiff's Nairobi offices in 2004. In that position, the Defendant had full financial oversight over the Plaintiff organisation's projects and had the power to withdraw and control funds that were disbursed by the Plaintiff for the benefits of its various projects most prominent of which was the St. Aloysius Gonzaga Secondary School. The deponent went on to say that in January 2010, the Executive Council of the Plaintiff commissioned an accredited auditor to inspect and issue a report on the Plaintiff's organisation with specific emphasis on its project financing. The report showed that the Plaintiff had lost a significant amount of its resources through the fraudulent activities of the Defendant. The deponent exhibited a copy of the evaluation of the Plaintiff's internal control system which supported the allegation as against the Defendant. Mr. Okalo went on to say that on 24th May 2010, the Defendant had unequivocally and in writing admitted to culpability for the loss of Shs. 6,361,852/-. As a result, the Plaintiff had terminated the Defendant's services on that day. The Plaintiff had also filed suit against the Defendant claiming the said sum of Shs. 6,361,852/- as money had and received by the Defendant on behalf on the Plaintiff. The deponent went on to note that at about the time that the Defendant had misappropriated the said funds, he had purchased either in his own name, or that of his father, the suit properties.
3. Under Certificate of Urgency, the Application came for ex parte hearing before Mr. Justice Odunga on 3rd November 2011 at which the learned Judge granted interim Orders in terms of prayer 2 of the Application pending the inter-partes hearing of the same. Thereafter on the 1st December 2011, the Defendant herein swore and filed a Replying Affidavit in response to the Plaintiff's said Application. The Defendant categorically stated that he was a member of the Christian Life Community – Kenya since 2001 and that in 2004 he had offered his services to be employed as the principal of the said St. Aloysius Gonzaga School. He admitted his promotion to the Director - Development Desk of the Plaintiff's organisation in 2008 and that he remained in that position until May 2010. He went on to say that the deponent to the Supporting Affidavit said Cornel Okalo was not a duly recognised officer of the same. The Plaintiff's organisation was a company limited by guarantee and that accordingly, it acted through its directors. He was aware that Mr. Okalo was neither a director nor appointed managing director of the Plaintiff organisation. He attached a copy of the Plaintiff's Memorandum and Articles of Association and noted that nowhere therein did it provide for the position of "President". Further, he commented that the so-called Executive Council was unlawfully running the affairs of the Plaintiff Company. As a result, the acts and resolutions passed by the said Executive Committee were illegal *ab initio*. Further, the Defendant categorically denied that he had misapplied the said sum of Shs. 6,361,852/-. He had always maintained a good working relationship with all members and directors of the Plaintiff company and at no point were accusations of impropriety, insubordination or incompetence levelled against him. The Defendant went on to refer to a further audit report carried out by Warao Kamau & Associates dated 11th November 2011 which indicated that the Plaintiff had a liability of Shs. 105,071,262/-. Such amounts were owed to contractors who had constructed the said St. Aloysius Gonzaga School in Langata. The audit report in no way implicated the Defendant or any other employee of the Plaintiff in the mismanagement and/or misappropriation of funds.
4. The Defendant went on to say that an investigative audit that had been commissioned in April 2010 by the Plaintiff and was conducted by James Peter Kamau (who was not a licensed auditor), who had purported to indicate that he had misappropriated the amount in issue here in but he had not been charged with any criminal offence relating to the alleged loss to the Plaintiff organisation. The Defendant then went into details of his side of the story as to what had transpired once the Kamau report had been released on 24th May 2010, involving not only himself but also three other work colleagues. Faced with the accusation of misappropriation of the

Plaintiff's funds, the Defendant maintained that he was treated in a very unfair manner, exposed to rumours, scurrilous allegations, innuendos, scandalous statements and slander touching on his character. He was further threatened with arrest and incarceration at Kamiti Maximum Security Prison by one of the members of what he termed the "illegally constituted" Executive Council. His wish was then to leave the Plaintiff's organisation with some sense of dignity and it was in that regard that he had signed in acknowledgement that he should refund the monies that had been allegedly lost. He maintained that such acknowledgement was extracted from him through coercion and intimidation. The Defendant was further aware that other work colleagues had been found liable for the loss of monies as per the Kamau report but they had not been either sued or prosecuted. He maintained that during his tenure, the Plaintiff did not have and had no proper accounting procedures. There was no accountant employed to oversee the disbursement of funds. Loans from the Plaintiff's bank were "dished out to employees and members of the public" without any collateral, the Defendant giving examples of such. Finally, the Defendant submitted that the Application before this Court did not establish any *prima facie* case as against him with a probability of success. He detailed that he was not the registered owner of the suit properties and that L. R. No. Kwanza/Namanjala Block/2 and Amuka Plot 13 did not exist.

5. When the matter came back before Court on 7th December 2011, the Judge permitted the filing of a Supplementary Affidavit by the Plaintiff and the said **Cornel Okalo** deponed to the same on 12th January 2012. This Affidavit went into much greater detail as to the organisation of the Plaintiff including the powers of its Executive Council. The deponent maintained and distinguished as between the Plaintiff company and the Christian Life Community which is an international Christian organisation with different branches in many countries in the world including Kenya. He persisted that he was the President of the Executive Council which was responsible for establishing and maintaining internal controls to adequately safeguard cash and other assets of the Plaintiff company. Mr. Okalo went into considerable detail to deny the various allegations made as to financial impropriety as raised by the Defendant in his said Replying Affidavit. He also confirmed that the Defendant was a beneficial owner of the suit properties having purchased the same with money that he had illegally acquired from the Plaintiff. He noted that during the Defendant's tenure as an employee with the Plaintiff, his net salary had been Shs. 27,775/- per month which would not have allowed him to be in a position to purchase the said suit properties. The handwritten sale agreement annexed to his Affidavit in support of the Plaintiff's Application and marked "CO 3" (1) quite clearly detailed that the Defendant was the purchaser and/or beneficial owner of the suit properties.
6. The Defendant swore a Further Replying Affidavit on 3rd May 2012. He reiterated the contents of the Memorandum and Articles of Association of the Plaintiff Company remarking that nowhere did the same provide for an Executive Council nor recognise the office of "President". The Plaintiff herein had not proffered any documentary evidence to prove that a resolution had been passed to establish the post of "President" or that the Directors had donated their powers of control to the "President". Indeed, there was no indication that the deponent of the Affidavits in support of the Application, Mr. Cornel Okalo was the said "President". He maintained that he had been advised by his advocates on record that contrary to the position adopted by Mr. Okalo in his Supplementary Affidavit, the provisions of *Article 159 (1) (d)* of the *Constitution* as to technicalities, did not relieve a party to breach its own internal rules and regulations. As a result, the Plaintiff could not use the Court process to sanction or approve procedural activities conducted through its irregularly appointed "President" and Executive Council. He had not been issued with a dismissal letter from his employment with the Plaintiff's organisation, despite the Plaintiff being aware of his physical and postbox address. Thereafter, the Defendant denied each and every allegation made against him as per the Supplementary Affidavit of Mr. Okalo more particularly with regard to his being able to exploit the Plaintiff's weak accounting procedures for his benefit. He maintained that there had been no evidence put before this Court with regard to the allegations made by Mr. Okalo.
7. The Plaintiff's submissions as regards its Application before Court were filed on 12th January 2012. It should be noted that that such were filed before the Defendant had filed his Further Replying Affidavit on 3rd May 2012. Indeed, I have checked the Record of this Court and the Defendant was not given any leave to file his said Further Replying Affidavit. As such, I strike out the same from the record. In any event, what was detailed therein, to a large extent, formed the

submissions of the Defendant in relation to the Application before this Court. Returning to the Plaintiff's submissions, it reiterated its prayers as regards the seeking of a restraining Order as against the Defendant in relation to the suit properties. The Plaintiff went on to detail the chain of events leading to the termination of the Defendant's employment with the Plaintiff on 3rd June 2010. It emphasised the admission by the Defendant, unequivocally and in writing, as to his culpability for the loss of the said amount of Shs. 6,361,852/-. As regards the ability of this Court to make tracing Orders in relation to the suit properties, the Plaintiff referred the Court to the case of **HCCC No. 1263 of 1992 Madhupaper International Ltd & Anor. v Kenya Commercial Bank Ltd & Anor** as to the doctrine of unjust enrichment. The Plaintiff emphasised that the Defendant was in a fiduciary relationship with it. It maintained that it had shown through the Affidavits in support of the Application that the said amount of money was lost to the Plaintiff through the acts and designs of the Defendant. The Plaintiff further relied upon the case of **Zipporah M. Ngugi v Joseph N. Ngae & 4 Ors (2009) eKLR (Warsame J.)** as to the consequences of a breach of trust/fiduciary relationship.

8. The Defendant's submissions, somewhat predictably, were grounded upon the formalities of the Memorandum and Articles of Association of the Plaintiff company. He pointed out that the Plaintiff, being a limited liability company, had no life of its own and its business could only be transacted through its directors who "breathe life into the corporate entity". The Defendant pointed out that Mr. Okalo was not a director of the Plaintiff Company. Its directors were five other individuals as had been pointed out in the Replying Affidavit. As a result, Mr. Okalo was not authorised to conduct business on the Plaintiff's behalf, more particularly with regard to this suit. There was no such thing as an "Executive Committee" as claimed by Mr. Okalo in his said Affidavits in support of the Plaintiff's Application before Court. There was no Resolution of the Company authorising Mr. Okalo or indeed any other person from instituting the suit as against the Defendant. As a result, Mr. Okalo's actions were *ultra vires* the Memorandum and Articles of Association of the Plaintiff company herein. The suit therefore was *ultra vires* and Mr. Okalo lacked the necessary *locus standi* to bring these proceedings. The Defendant referred to the case of **East Africa Safari Air Ltd. v Antony Kegode & Anor. (2006) eKLR** to support his contention in this regard.
9. Further, the Defendant submitted that he did not misappropriate monies from the Plaintiff. He emphasised that he had not been charged with any criminal offence for such alleged misappropriation. He had been called upon to facilitate and offer strategic assistance for the various programs instituted by the Plaintiff as well to advise on policy issues, formation weekends and consultations for which he had received no consideration. He pointed to the Warau Kamau Audit Report dated 11th November 2010 which concluded that the Plaintiff did not lose funds during the period that the Defendant was in charge of the Plaintiff's development desk. He further maintained that his alleged admission to reimburse monies to the Plaintiff had been obtained by duress, coercion and contrary to the rules of natural justice. He maintained that the Plaintiff organisation lacked proper accounting structures and/or an overall financial manager. He maintained that the Plaintiff had not proffered any cogent evidence that the suit properties belonged to him. Nothing could have been easier but for the Plaintiff to conduct a proper search of the same at the local Land Registry. Further, the Plaintiff had not proved that its loss could not be compensated by way of damages. Finally, the Defendant referred to the following authorities: **Acre Homes Ltd v Insurance Company of East Africa Ltd (2011) eKLR** and **Kenya Hotels Ltd v Kenya Commercial Bank Ltd (2004) 1KLR 80**.
10. From the Exhibits attached to Replying Affidavit of the Defendant herein sworn on 1st December 2011, it is quite clear that the Plaintiff organisation is a Company limited by Guarantee. The Memorandum and Articles of Association of the Plaintiff clearly detailed its objects and provide at *Article 34*:

"The business of the Company shall be managed by the Directors who may exercise all such powers of the Company, and do on behalf of the Company all such things as are not, by the Act or by these Articles, required to be exercised by the Company in general meeting and subject to the provisions of the Act and these Articles and to such regulations as may be made by the Company in general meeting; but no regulation made by the Company shall invalidate any prior act of the Directors which would have been varied if such regulation had not been made."

According to the Defendant, the deponent to the Affidavit in support of the Application on the part of the Plaintiff, **Cornel Okalo**, was not a director of the Plaintiff company. In fact Mr. Okalo in his two Affidavits filed herein, describes himself as the President of the Plaintiff and, later on, as the head of the Plaintiff's Executive Council. I would have thought that, having perused the Defendant's Replying Affidavit, Mr. Okalo may have wished to explain, in his Supplementary Affidavit, exactly what his position was vis-a-vis the Articles of Association of the Plaintiff as well as its Board of Directors. I have perused the Plaintiff herein dated 28th October 2011 as well as the Verifying Affidavit sworn by the said Mr. Okalo on the same date. It details that Mr. Okalo is the President of the Plaintiff herein and he has been duly authorised to swear the same. Unfortunately for the Plaintiff, being a limited company albeit by Guarantee, there is no resolution of the Company's members nor indeed of the Board of Directors authorising the institution of this suit. However, the Application before this Court is not to strike out the suit but for an injunction to issue as against the suit properties ostensibly owned by the Defendant.

11. In my view, there may be some reasonable explanation which the Plaintiff has yet to disclose to this Court, as to the creation of its Executive Council with Mr. Okalo as its head. Such may have been created as a committee of the Board as provided for under *Article 36 (a)* and, in that regard the provisions of Article 50 provides that all *bona fide* acts done by any meeting of any committee of the Directors, notwithstanding it is afterwards discovered that there was some defect in the appointment or continuance in office of any such person acting, would be as valid as if every such person had been duly appointed and was qualified to be a director. The Court is also aware that under the provisions of the Non-Governmental Organisations Coordination Regulations 1992 made under the provisions of the Non-Governmental Organisations Coordination Act, that organisations such as the Plaintiff are required to abide by such Regulations and make various returns to the Non-Governmental Organisations Coordination Board. The said Regulations talk about providing particulars of officers of the organisation but do not mention directors or Boards of directors but detail the "three Top Officials in Kenya". The Regulations also detail that non-governmental organisations are subject to the directions of the Non-Governmental Organisations Executive Committee and it may be that the Plaintiff has paid heed to that title in its own organisation model.
12. Further, the Defendant herein has established and relied upon the Reports and Accounts for the Plaintiff for the period ended 31st December 2009 as Exhibit B to his Replying Affidavit. He has maintained that there is no evidence as against him or indeed any shortfall mentioned in the Plaintiff's said Accounts relating to his area of responsibility. It is difficult for this Court to understand how the Defendant can place reliance upon Exhibit B which quite clearly details the Report of the Executive Council in which Mr. Okalo is clearly indicated as "President" as well as the report of the Independent Auditors, Waraho Kamau & Associates confirming the position of the Executive Council as the overall authoritative body for the Plaintiff. On the one hand, the Defendant maintains that the Executive Council has no position or authority under the Plaintiff's Articles of Association yet on the other, he places reliance upon the Executive Council's Report to exonerate himself from any wrongful misdeed. Similarly, I do not find the Defendant's Replying Affidavit or Submissions relevant to the Application before Court, to the extent that he concentrates upon the apparent misdeeds of other employees in the Plaintiff's organisation in order to point the finger away from himself. To my mind, what is quite clear, is that whether he was coerced or otherwise, he had signed a letter addressed to the Executive Committee of the Plaintiff dated 24th May 2010 committing himself to pay back funds owing to the Plaintiff amounting to Shs. 6,361,852/-. In my opinion, all these matters will be relevant to the hearing of this suit in due course and have no place here in relation to the Application before Court. Further and in that regard, I find no relevance to the Application before this Court as regards the authorities quoted by the Defendant being the **East African Safari Air Ltd** and **Acres and Homes Ltd** cases (supra).
13. In this Court's view what is pertinent to the Application before it, is whether the Plaintiff has been able to satisfy the requirements in relation to the granting of an interlocutory injunction pending the hearing of this suit. In this regard, the Court must necessarily turn its attention to the principles as set out in the **Giella v Cassman Brown (1973) EA 358** case. The Plaintiff must, in the first instance, prove that it has a *prima facie* case with a probability of success and that has been

defined in the case of **Mrao Ltd v First American Bank Ltd (2003) KLR 125** by **Bosire JA** as being:

“So what is a *prima facie* case? I would say that 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.”

14. In my opinion, in order for the Plaintiff to establish a *prima facie case*, it has to prove that it or indeed the Defendant has an interest in the suit properties. It was the Defendant’s position that the Plaintiff had not established that he had any interest in the suit properties. The Defendant submitted that an Order for injunction should not be granted as it would affect the rights of the registered owner of the suit properties, who is not a party to the suit. In this regard, I would tend to agree with the Defendant. I have carefully perused the rather badly handwritten Exhibit “CO 3 (1)” annexed to the Affidavit in support of the Application as well as the so-called minutes of a meeting supposedly held on Friday 25th March 2011. The supposed Agreement for sale mentions Plot No. 264 being a 2 acre piece of land at Kipkoringy Farm. The document details the Seller as Peter Hezron Kagunza and the Purchaser as Francis Kimei Kiplimo. There is no mention of the Defendant whatsoever or whether Mr. Kiplimo is in any way related to the Defendant. Is the Court to presume that Mr. Kiplimo is the Defendant’s father as per the Plaintiff’s allegation to this end? The minutes of the meeting supposedly held on Friday 25th March 2011 are a bit more explicit in that they actually do mention the Defendant by name. They do mention the purchase of 2 acres of land by the Defendant but there is no detail of the Plot number or indeed anything else in that regard. To my mind, such is far away from being any evidence that the Defendant has an interest in the suit properties. As a result, I find and hold that the Plaintiff has failed to establish a *prima facie* case sufficient to warrant the granting of an interlocutory injunction.

15. The outcome of the all the above is that I dismiss the Plaintiff’s Notice of Motion dated 28th October 2011 with costs to the Defendant.

DATED and delivered at Nairobi this 25th day of February, 2014.

J. B. HAVELOCK

JUDGE