



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMERCIAL & ADMIRALTY DIVISION**  
**MILIMANI LAW COURTS**  
**HCCC CASE NO 79 OF 2014**  
**HASSAN ZUBEIDI..... PLAINTIFF**  
  
**VERSUS**  
  
**PATRICK MWANGI KIBAIYA..... 1<sup>ST</sup> DEFENDANT**  
  
**ELITE PAKA SERVICES LIMITED .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion application dated and filed on 4<sup>th</sup> March 2014, brought under certificate of urgency on the same date, the Plaintiff sought interim injunctive orders seeking to restrain the Defendants whether by themselves, their agents, advocates, servants, employees, assigns, or otherwise howsoever and any persons whatsoever from selling, disposing off, transferring, leasing, letting, pledging, dealing, further charging and/or vary any existing charges, interfering and/or intermeddling with the property known as LR No 209/1052/1; IR No 134939 and/or demolishing any structures or buildings thereon pending the hearing and determination of the said application and of the suit herein.
2. When the court heard the said application on 4<sup>th</sup> March 2014, it declined to issue *ex parte* injunctive orders on the ground that there was an arbitration clause in the Joint Venture Agreement appearing on pg 20 of his application and directed that he serves the said application for *inter partes* hearing on a date to be taken at the registry.
3. The matter came up for *inter partes* hearing on 18<sup>th</sup> March 2014 when the Defendants' counsel served the Plaintiff's counsel with a Replying Affidavit filed on the same date.
4. Parties were unable to mutually agree if interim injunctive orders could be granted herein pending the *inter partes* hearing of the said application. This court therefore directed that each party orally submit on Prayer No 2 only of the said application. The ruling herein is therefore in respect of Prayer No 2 only of the said application.
5. It did appear to the court that the parties delved too much on the facts of the case which this court finds would have best been canvassed while arguing Prayer No 3 of the application herein. The court will therefore not consider the obligations by the respective parties under the Joint Venture Agreement appearing in pp 5-31 of the Plaintiff's Notice of Motion application and marked as "HZ – 3".
6. If the court were to exercise its discretion of granting interim injunctive orders based on the rights and obligations of the parties as stipulated in the said Agreement, it would run the risk of analysing the merits and demerits of the Plaintiff's application before parties have filed all the

- documents they would wish to rely on.
7. At this juncture, this court is only interested in establishing whether or not if it does not grant the injunctive orders as has been sought in Prayer No 2, the Plaintiff will suffer prejudice or loss or that the decision of the court in respect of Prayer No 3 of the application will be rendered nugatory by the time it grants injunctive orders, if at all. The issue of a deposit of any monies or filing of undertakings by any party would also come at this later stage.
  8. It is evident from the grounds of the application, the Supporting Affidavit of Hassan Zubeidi sworn on 4<sup>th</sup> March 2014, the oral submissions by counsel, that the Plaintiff was apprehensive of :-
    - a. **Losing a sum of Kshs 33,400,000/=.**
    - b. **Losing his anticipated returns from the joint investment he had entered into with the Defendant which he said ran in excess of Kshs 500,000,000/=.**
    - c. **The Defendant selling, disposing, further charging or intermeddling with the subject property in a manner that was prejudicial to him.**
  9. From the documents that have been presented to this court by the Plaintiff, there is nothing to suggest that the Defendants are intermeddling with the subject property in a manner that was prejudicial to the Plaintiff. There is also no evidence furnished by the Plaintiff to show that the Defendants are disposing of or are likely to dispose of the subject property before Prayer No 3 of the application herein is heard.
  10. At this interim stage, the burden is on the Plaintiff to prove to the court that its ruling in respect of Prayer No 3 would be rendered useless or nugatory by the time it was delivered because there would be no subject matter, the same having been disposed of before or during the pendency of an application to be heard on an *inter partes* basis. It is not the Defendants who should discharge this burden.
  11. There is also nothing on record that this court can find to show that adverse action will be taken by the Defendants before Prayer No 3 of the application herein can be argued *inter partes*. Mere apprehension on the part of the Plaintiff is not sufficient for him to be granted injunctive orders before the said Prayer No 3 herein is heard.
  12. In the circumstances foregoing, bearing in mind that the power to grant an order of injunctive relief is a discretionary one, this court hereby declines to grant Prayer No 2 of the said application as there is no evidence provided by the Plaintiff to show that his interests in this matter have been prejudiced or will be prejudiced pending the canvassing of Prayer No 3 of the said application.
  13. Accordingly, the upshot of this court's ruling is that Prayer No 2 of the Plaintiff's Notice of Motion application dated and filed on 4<sup>th</sup> March 2014 is not merited and the same has not been granted as had been sought by the Plaintiff.

14. Orders accordingly.

**DATED SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of March 2014**

**J. KAMAU**

**JUDGE**