



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 12 OF 2014

UGAS SHEIKH MOHAMMED.....PLAINTIFF

VERSUS

ABDULLAHI SAID SALAT.....1ST DEFENDANT

PLUTO PETROLEUM CO. LTD.....2ND DEFENDANT

SAMUEL KAUMBUTHU M'AJOGI.....3RD DEFENDANT

R U L I N G

1. The plaintiff through a plaint dated 6th June, 2004 sued the defendants seeking a declaration that the plaintiff and all the defendants were all partners in Pluto Service Station with equal rights and liabilities over the said business; a permanent injunction restraining the defendants jointly and severally from expelling the plaintiff or in any way removing the plaintiff from operations of Pluto Service Station; on order that the accounts of Pluto Petrol Station be taken from 19.1.2009 to 31.5.2014 and an order for payment of all monies due to the plaintiff from the defendants and costs of the suit.

2. The plaintiff simultaneously at the time of filing the plaint filed a Notice of motion pursuant to Order 40 Rule 1 of the Civil Procedure Rules praying for temporary injunction to issue restraining the 1st defendant and 3rd defendant from preventing, expelling, suspending or in any other way interfering with the plaintiff's right of access and operations of Pluto Petrol Station pending the hearing and determination of this suit with costs. The application is based on the grounds on the face of the application inter alia; that the applicant as a partner has heavily invested in the business known as Pluto Petrol Station; that the creditors have commenced criminal and civil actions against the applicant and that the defendants have prevented the applicant from accessing/and/or participating in the operations of the business.

3. The plaintiff further relied on supporting affidavit dated 5th June, 2014. The plaintiff contends that by an agreement dated 19/1/2009 the 3rd defendant leased to the 1st defendant the premises comprising of "Pluto Petrol Station Ltd together with its adjacent business apartment namely Pluto De Café as per copy of the agreement marked "USMI". The plaintiff further contend that at the same time they entered into gentlemen agreement with the 1st defendant to partner in running Pluto Petrol Station in Maua Town whereby the plaintiff would be drawing a monthly allowance of Kshs.200,000/- as the partner managing the day to day running of the business. That the plaintiff eventually took over the running of the petrol station to the exclusion of the 1st defendant and that Pluto Petrol Station in Maua Town became synonymous with him" ***UGAS SHEIKH MOHAMMED ALIAS AWAS.***"

4. The plaintiff/applicant contends that he has heavily invested in the business by way of expanding the petrol station as well as injecting his finances obtained through bank overdraft and loans from both Equity Bank and Barclays Bank as per annexed letters “USM2” and “USM3” and that currently various suppliers are owed more than Kshs.24,000,000/- as per annexure “USM4” and some of the creditors have started demanding payment from the plaintiff/applicant as evidenced by demand notices from GemSoil and Mafuko Industries Ltd marked “USM5” and “USM6” respectively; whereas other creditors have taken cases to court as evidenced by Nairobi Criminal Case NO. 1627 of 2014 as per annexure “USM7”.

5. The plaintiff/applicant has further contended that the accounts of Pluto Petrol Station and those of Pluto Petrol Station Co.Ltd are so intertwined that some of the payments due from Pluto Petrol Station were being paid by Pluto Petroleum Co. Ltd as per annexure copies of dishonoured cheques issued by Pluto Petroleum Co. Ltd to Trojan International Ltd marked “USM8” and statements arising from a claim made by the said Trojan International Ltd against the plaintiff marked “USM9” and other creditor-claims as per annexure “USM10”. The plaintiff/applicant annexed annexures “USMII” in respect of all government tenders tendered by him purportedly on behalf of Pluto Petrol Station.

6. The plaintiff/applicant deponed that the 1st and 3rd defendants have now expelled him from the operations of Pluto Petrol Station and threatened to sack all staff who were employed by the plaintiff/applicant. He contends that the take over by the 1st and 3rd defendants is prejudicial to him since the debts owed to the creditors and for which the creditors have threatened and/or have taken both civil and criminal action against him have benefitted the defendants to his exclusion. He pleaded the orders sought be granted as unless the orders sought are granted, the defendants shall use him as a sacrificial lamb while their benefit from their own mischief.

7. The defendants are opposed to the plaintiff/applicant’s application dated 5th June, 2014. The 1st defendant filed a replying affidavit dated 16th June, 2014 whereas the 3rd defendant filed a replying affidavit on his behalf and of the 2nd defendant. The 1st defendant deponed that the application is without merits and an abuse of the court process. He contends the applicant was his employee having employed him after he leased the 2nd and 3rd defendant’s premises to transact in petroleum business. He averred at no time did he make the plaintiff/applicant a partner in his business but only trusted the plaintiff/applicant as a brother to run his business as he deemed fit and proper but within the limits and instructions. That he later discovered that the plaintiff/applicant was abusing the trust as after putting more than Kshs.30,000 litres of diesel, 20,000 litres of super and 5,000 litres of kerosene in the business there was no profit hence he had to enquire from the plaintiff/applicant what was happenings, to which the plaintiff/applicant pretended to be sick and left the premises in a hurry for a month just to appear by way of this suit. The 1st defendant contends that he had not seen the plaintiff/applicant for a forcing him to dismiss him from duty. The 1st defendant contends that since the plaintiff/applicant disappeared he discovered the applicant had the following accounts under his name:-

- i. **Barclays Bank A/C NO. 0004260862003577129**
- ii. **Equity Bank A/C NO. 0400599748413 as per annexures marked ASSI(a) and (b) as per demand letters over the said accounts.**

8. The 1st defendant depones that he had not given the plaintiff/applicant any authority to open personal accounts as the Pluto Petroleum Co. Ltd had its own account and it was operational. The 1st defendant averred that he is surprised that the plaintiff/applicant was taking supplies under his own personal names and as such he had been taken to court for ordering goods by false pretences as per annexure “ASS2” which is a copy of the charge sheet. That he even issued his personal cheques to pay as per annexure “ASS3”. The 1st defendant regrets that after investing millions of shillings in the business he only found Kshs.240,000/- in the genuine account of Pluto Petroleum Co. Ltd. He added that the plaintiff/applicant was not a signatory to the only account of the company and he is of the view that’s why he became clever and deceitful to open his own and transact in his own personal names. He contends that he was not privy to plaintiff/applicant dealings and as such the plaintiff/applicant must face the law. He added that the plaintiff/applicant ran away from work after he was asked for accounts, and that he left on his own

volition, and as such he won't be allowed to come back and cause damages to the 1st defendant's already lame business. He added that this suit is an attempt by the plaintiff/applicant to derail the criminal cases he is facing.

9. The 3rd defendant in his replying affidavit on his behalf and that of the 2nd defendant contends that he is a Director of Pluto Petroleum Co.Ltd which is a company incorporated in Kenya as per annexure "SKM1 & 2". That he leased out premises where petroleum co. is erected to the 1st defendant/respondent alone and that he knew the 1st defendant/respondent had employed the plaintiff/applicant. He added that he is not privy to the dealings between the 1st respondent and the applicant as he only leased the premises and as such he does not know why he has been sued.

10. That when the application dated 5th June, 2014 came up for hearing Mr. Kahiga learned Counsel appeared for the applicant whereas Mr. Mwanzia, learned Counsel appeared for the defendants/respondents. That both the learned Advocates agreed that the application be disposed of by way of written submissions. The court directed the advocates to file written submissions and matter be mentioned on 31st July, 2014 to receive written submissions. On 31st July, 2009 only advocate for the defendants appeared and prayed for ruling date. The court set the ruling for 23/10/2014 and ordered ruling notice to be served upon the plaintiff/applicant advocates by the respondents.

11. The court has very carefully reproduced the pleadings and affidavits by both parties in this matter. It has also considered the written submissions by both parties' advocates and authorities relied upon. The issue for consideration in this matter is whether the plaintiff/applicant has met the principles laid down in granting an application for injunction and whether the applicant's applications should be granted or not.

12. The principles applicable in deciding whether or not to grant a temporary injunctions are well stated in **GIELLA V CASSMAN BROWN & CO. LTD(1973) E. A 358.** The principles are that the applicant must establish a prima facie case with a probability of success, show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages and if the court is in doubt it should decide the application on balance of convenience.

13. The defendant/respondents relied on the case of **GIELLA V CASSMAN BROWN & CO. LTD(SUPRA) AND NGURUMAH LTD V JAN BONDE NIELSEN & 2 OTHERS(2014) eKLR** where Court of Appeal sitting at Nairobi stated:

While it is not denied by the 2nd respondent that these letters emanated from him and while it is clear to us as it was to the learned Judge of the High Court that there was some sort of a relationship between the 1st and 2nd respodnents, we have not however seen any material to conclude prima facie that relationship was one of partners or persons engaged in a joint venture or even of trust."

14. In the instant application the plaintiff/applicant made general averments that he was a partner in the Pluto Petroleum Station and he had invested heavily in the company. The plaintiff/applicant relied on what he referred to as "gentlemen agreement." He did not produce any partnership deed. He did not even produce any agreement in which he was amongst the lessees to the 2nd and 3rd defendants. He was not signatory to the alleged partnership business. The plaintiff/applicant alleges he was a partner yet in his affidavit and annexures he was relying on he was running accounts in his own name as it appears in "USM2". "USM3. He was sourcing supplies in his own name and paying by his personal cheques and not those of the company. The 1st respondent annexure "ADS3" support the defendant contention that were there is existence of partnership, a partner do not issue personal cheques to settle debts for the partnership business. That further the plaintiff/applicant has been charged with criminal case and demand the notices have issued to him in his personal capacity and not as a partner to the defendants noted of the partnership. This normally do not occur where partnerships exists. Further I find it strange to have a partnership where a partner is not signatory to the partnership account. All evidence adduced by plaintiff/applicant through his affidavit do not, with all due respect, point to an existence of partnership.

The defendants pointed out that the plaintiff/applicant was an employee of the 1st defendant. That on being asked by the 1st defendant for accounts he pretended to be sick and left in a hurry on his own volition. The plaintiff/applicant did not controvert the contents of the 1st and 2nd defendant's affidavits.

15. Whereas this court has no doubt that there existed a relationship between the plaintiff/applicant and the defendants the court has not been supplied with any material evidence to enable it conclude that the plaintiff/applicant was a partner to 1st defendant. The applicant has not established a prima facie case that his relationship with the defendant was one of the partnership or he was one of the persons engaged in a joint venture with a view to make profit and share the same with any of the defendants herein.

16. The plaintiff/applicant was obligated to show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages for court to issue temporary orders of injunction . The plaintiff/applicant averred the takeover by 1st and 3rd defendants/respondent is prejudicial to him due to debts owed to creditors. That the creditors have taken both civil and criminal action against him and that unless orders are granted he shall be used as a sacrificial lamb while the defendants benefits. The plaintiffs/applicants contention notwithstanding he has not shown nor alluded to the fact that he will suffer irreparable harm which cannot be adequately compensated by an award of damages. The Court of Appeal sitting in Nairobi in its judgment in **NGURUMAN LIMITED V JAN BONDE NEILSEN AND 2 OTHERS CIVIL APPEAL NO. 77 OF 2012**(*supra*) stated:-

In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case these conditions the relief is not available.

In view of the above-mentioned authority and the plaintiff/applicant's failure to bring facts to bring his case within the conditions set out herein above I find that the relief of injunction cannot issue in such circumstances.

17. The court is therefore not in doubt that the plaintiff/applicant has not established a prima facie case with probability of success nor has he shown that he will suffer irreparable harm which cannot be compensated by an award of damages and had the court been in doubt then the balance of convenience would tilt in favour of the respondents who are in possession whereas the plaintiff/applicant left the premises at his own volition and by granting this application the court would be imposing the applicant upon the defendant's business hence occasioning hardship to the defendants. The harm to the applicant arising out of failure to grant the injunction can be adequately compensated by damages. The court cannot at this stage decide substantive issues at the interlocutory application stage but it leaves the said issue for trial.

18. The upshot is that the plaintiff/applicant's application dated 5th June, 2014 is found to be without merits and is dismissed with costs to the defendants/respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF OCTOBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Kahiga for the plaintiff/applicant

2. Mr. Mwanzia for the defendants/respondents.

J. A. MAKAU

JUDGE