



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**WINDING UP CAUSE NO 1 OF 2012**

**IN THE MATTER OF CHARLESTONE TRAVEL LIMITED**

**AND**

**IN THE MATTER OF A PETITION FOR MINORITY SHAREHOLDER**

**ANNE MUKAMI WANYOIKE.....PETITIONER**

**VERSUS**

**MOHAMMED WANYOIKE MBURU.....1<sup>ST</sup> RESPONDENT**

**CHARLES MUTHAMI KARIUKI GIKUNDI.....2<sup>ND</sup> RESPONDENT**

**HAMISI HASSAN GUCHU.....3<sup>RD</sup> RESPONDENT**

**ANGELA TRACY SCOTT.....4<sup>TH</sup> RESPONDENT**

**CHARLESTONE TRAVEL LIMITED.....5<sup>TH</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. Several applications have been filed herein seeking declarations and setting aside consent orders. Indeed, this matter has had a chequered history that saw Mutava J recuse himself and Havelock J (as he then was), mediate the dispute between the parties herein and endorse and adopt a lengthy consent by the parties as an order of the court on 28<sup>th</sup> March 2012. Appreciably, this consent had been intended on compromising the winding up of the 5<sup>th</sup> Respondent.
2. Previously, in his ruling of 16<sup>th</sup> March 2012, Musinga J (as he then was) had underscored the importance of parties respecting court orders with a view to having the 5<sup>th</sup> Respondent remain in business as it was not in any of the parties' interests that the 5<sup>th</sup> Respondent go under. In the said ruling, he had stated the following regarding Mutava J's ruling:-

**“ The learned judge expected that parties will enter into buy-out arrangement of the petitioner and consequently directed that if that arrangement did not materialize within 60 days from the date of the ruling, the parties would fix the wind-up petition for hearing.”**

3. Both parties were agreed that the terms of consent of 28<sup>th</sup> March 2012 had been substantially complied and that the only issue that was remaining was the issue of the transfer of the IATA license by the 5<sup>th</sup> Respondent to the Petitioner.
4. As parties were completely unable to make any progress, they filed a Notice of Motion application dated and filed on 16<sup>th</sup> December 2013 which was brought pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-
  1. **Spent.**
  2. **Spent.**
  3. **THAT an injunction do issue restraining the 5<sup>th</sup> Respondent whether by itself, its agent, subsidiaries or servants, from selling, issuing tickets or advertising any STA products or students ticket business in the country for a period of two (2) years as stipulated in the Consent Order recorded in Court on 28<sup>th</sup> March 2012.**
  4. **THAT the 5<sup>th</sup> Respondent be compelled to procure a bank guarantee from a reputable bank of Kshs 10,000,000/= in favour of IATA to enable the Petitioner apply for an IATA license through her company Corporate Travel and Leisure Management Limited.**
  5. **THAT in the alternative the 5<sup>th</sup> Respondent be compelled to pay the Petitioner the sum of Kshs 10,000,000/= to procure the bank guarantee.**
  6. **THAT in default of complying with the orders of the court herein, the 5<sup>th</sup> Defendant be wound up.**
  7. **THAT the Petitioner be awarded the costs of the application in any event.**

#### **THE PETITIONER’S CASE**

5. The Petitioner was a minority shareholder of the 5<sup>th</sup> Respondent. It was a term of the consent that was recorded on 28<sup>th</sup> March 2012, that the Respondents were to release to her, IATA License Number 4120119. However, the Respondents had refused to comply with the said order and failed to furnish her with audited accounts for the Mombasa office making it difficult for her to undertake work as a Travel Agent.
6. She contended that the 1<sup>st</sup> and 4<sup>th</sup> Respondent had also made an application to STA head office to be granted exclusive agency with respect to STA business in the country contrary to the said consent. She wanted the 4<sup>th</sup> Defendant compelled to pay her a sum of Kshs 10,000,000/= as a bank guarantee to enable an application in her name, be issued to her.
7. In support of her application, the Petitioner swore a Supporting Affidavit and Supplementary Affidavit on 16<sup>th</sup> December 2013 and 15<sup>th</sup> January 2014. Her written submissions were dated 15<sup>th</sup> May 2014 and filed on 20<sup>th</sup> May 2014. To support her case, she also filed Lists of Authorities that were dated 26<sup>th</sup> March 2014 and filed on 27<sup>th</sup> March 2014 and those that were dated 12<sup>th</sup> May 2014 and filed on 20<sup>th</sup> May 2014. Notably, although she had commenced an application for contempt of court proceedings, the same was pending hearing and determination.

#### **THE RESPONSENT’S CASE**

8. The 1<sup>st</sup> Respondent swore Replying and Further Affidavits on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents herein. The same were sworn and filed on 13<sup>th</sup> January 2013 and 23<sup>rd</sup> June 2013 respectively. Its written submissions and List of Authorities were dated 23<sup>rd</sup> June 2013 and filed on 24<sup>th</sup> June 2013.
9. The Respondents pointed out that some parts of the aforesaid consent had been overtaken by events and that any part of the consent that had not been complied with had been frustrated by the

- Petitioner. They stated that sums of Kshs 8,000,000/= and Kshs 38,383,333/= under Paragraphs (2) and (3) of the said consent had already been paid to the Petitioner save for a sum of Kshs 3,616,667/= that was payable under the aforesaid Paragraph (3) of the consent.
10. The Respondents averred that the process that had been agreed upon before Havelock J could not be concluded as the Petitioner had failed to execute the Agency Agreement, License Code Agreement, Share Sale Agreement, Share Transfer Form and requisite affidavits/forms to enable them effect transfer to her and she could not therefore be heard to say that they had refused to transfer the IATA License.
  11. They were emphatic that there was no legal basis for the Petitioner's demand of the sum of Kshs 10,000,000/= firstly, because the same was not envisaged in the consent that they had recorded and secondly, once they transferred the License to the Petitioner, the Petitioner was expected to bear the obligation to provide requisite guarantees for the same to IATA.
  12. They also averred that they gave the Petitioner the Agreement of the STA Agency Agreement in the first week of April 2012 with a view to transferring to her the STA Trading Tools. It was their contention that as the Petitioner was going to trade on the Respondents' guarantee given to STA London of the sum of \$ 50,000.00, they asked her for a back-to-back guarantee for the same amount but she declined to give them the same.
  13. They stated that subsequently, the Petitioner obtained her own STA Revenue Stream on 26<sup>th</sup> April 2012. STA London asked the Respondents to continue trading until the Petitioner complied with their bank guarantee requirements. They contended that the 5<sup>th</sup> Respondent obtained an STA License for its Southern Sudan office and could not therefore be construed to have been in breach of the aforesaid consent.
  14. Their case was that the Petitioner could not seek to wind up the 5<sup>th</sup> Respondent for the reason that she had been paid ninety (90%) per cent of the value of her shares, she was not a creditor of the Respondent and that there was no Petition for winding up the same having been compromised by the filing of the aforesaid consent.
  15. Notably, the Respondents had previously stated that in their Replying Affidavit they were ready and willing to deposit the outstanding monies in court pending the execution of all documentation by the Petitioner. However, in their Further Affidavit, they stated that they forwarded a sum of Kshs 3,716,667/= in settlement of the balance of the Petitioner's purchase of shares despite not having received any executed agreements. It was their averment that the Petitioner was not sure of the road map to the transfer of the IATA process hence her application which was merely trying to re-write the consent that had been recorded in her favour.

## **LEGAL ANALYSIS**

16. It is apparent from the Petitioner's submissions that her case was hinged on disobedience of court orders by the Respondents as could be seen from her reliance on the cases of **Judicial Service Commission vs Speaker of the National Assembly & Another [2013] eKLR**, **Civil Appeal No 535 of 2006 Koinange Investments and Development Limited vs Nairobi City Council** (unreported) and **Mohammed Yeslam Awadh vs Dr Peter Wilbur Marumbu [2004] eKLR**. However, in view of the fact that she had an application for contempt of court proceedings against the Respondents that was pending hearing and determination herein, it was the considered opinion of the court that the said issue would be best ventilated in the said application.
17. Turning to Paragraph (7) of the aforesaid consent, it was evident that none of the parties would restrict the other from operating similar business. Instructively, in Paragraph (4) of the said consent it had been indicated that the Respondents or their agents would not interfere with the STA Revenue Stream or solicit for the said STA UK and/or advise STA UK of any changes to the license for a period of two (2) years of this consent.
18. Whilst the court noted the submissions by the parties herein in respect of restraint of trade, the court was of the view that the same had been overtaken by events as the two (2) year period that had been stipulated in Paragraph (4) of the consent had since elapsed, the consent having been recorded on 28<sup>th</sup> March 2012. In fact the said period expired even before they asked this court to write the ruling herein. In this regard, Prayer (3) of the Petitioner's present application had been overtaken by events.
19. Further, the Petitioner did not provide any evidence to the court to demonstrate that the

- Respondents had acted contrary to Paragraph (4) of the said consent. She did not rebut the Respondents' assertions that she refused, declined and/or ignored to execute the agreements mentioned herein. From the documents that she adduced as evidence, it was clear that parties did not seem to agree on the road map or process of transferring the IATA license. This would not amount to refusal to execute agreements as each party was accusing the other of not doing something.
20. The court thus not satisfied that the Petitioner was entitled to the remedy of an injunction as she had not demonstrated a *prima facie* case with a probability of success or that she would suffer irreparable loss if the injunction was not granted or that the balance of convenience tilted in her favour. Accordingly, bearing in mind the criteria that was set out in the case of **Giella vs Cassman [1973] EA 358** that she had relied upon, the court found that the Petitioner's application fell below the threshold that would have been required before an injunction could be granted.
  21. The consent that was recorded on 28<sup>th</sup> March 2012 was very explicit as to what parties had to do with a view to resolving the dispute between the parties herein. Prayer Nos (4) and (5) were therefore introducing a new dimension in the case herein. As was clearly submitted by the Respondents, this was tantamount to re-writing of the terms of the consent that they had voluntarily and freely entered into. The Petitioner opted to obtain her own IATA license which was quite a departure from what had been consented upon.
  22. The Respondents cannot be compelled to make a payment of Kshs 10,000,000/= with a view to the Petitioner obtaining her own IATA license through her company Corporate Travel and Leisure Management Limited. Ordering the Respondents to pay the extra sum of Kshs 10,000,000/= as had been prayed for by the Petitioner would amount to unjust enrichment as she had been paid as per the terms of the aforesaid consent.
  23. For all purposes and intent, the consent of 28<sup>th</sup> March 2012 remained a valid order of the court until such time that it would be set aside, vacated and/or varied. In the absence of such an order, the Petitioner's demand was unjustified as the parties were bound by the terms of the said consent.
  24. As regards Prayer No (6) of the Petitioner's application, the court was in agreement with the Respondents' submissions that a prayer for winding up of the 5<sup>th</sup> Respondent could not be determined by way of an application. The proper procedure would be to set down the Petition for hearing.
  25. As could be seen hereinabove, Mutava J had indicated that if parties were not able to agree on an arrangement, they were to set down the Petition for hearing. Although the court noted the parties' submissions and the case law in support thereof as regards the winding up of the 5<sup>th</sup> Respondent, it was hesitant to comment on the merits or competence of the Petition herein or otherwise in this forum as that was not the issue that was presently before this court for determination.
  26. This was notwithstanding the fact that all orders that had previously been issued herein had been overridden by the terms of the consent of 28<sup>th</sup> March 2012, a fact the Respondents argued, showed that there was no existing Petition herein, the same having been compromised by the said consent.
  27. Having considered the pleadings, affidavit evidence, written submissions and the case law in support of the parties case, the court found that Prayer No (2) of the Petitioner's application had been overtaken by events for the reasons shown hereinabove and that the Petitioner did not demonstrate that she had any legal basis to make demand for a sum of Kshs 10,000,000/= in her favour or in favour of IATA to enable her apply for an IATA License through her company Corporate Travel and Leisure Management Limited.
  28. It was the finding and holding of the court that the parties herein were bound by the terms of the consent of 28<sup>th</sup> March 2012. There having been no short cut, parties were required to proceed accordingly as required by IATA to see a logical conclusion of their dispute. The court cannot micro-manage the process of doing so. If the Petitioner had any issues regarding the compliance of the orders by the Respondents, she ought to have moved the court appropriately. The Respondents were also at liberty to seek the same remedy if they felt that the Petitioner was acting in contravention of the said consent. This application was not necessary as it did nothing but to delay the implementation of the aforesaid consent order.

## **DISPOSITION**

29. Accordingly, the upshot of this court's ruling was that the Petitioner's Notice of Motion application dated and filed on 16<sup>th</sup> December 2013 was not merited and the same is hereby dismissed with costs to the Respondents.

30. It is so ordered.

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> day of December 2014**

**J. KAMAU**

**JUDGE**