



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 542 OF 2011

CATHERINE W KANARI

**(t/a EMBAKASI MEDICAL
CENTRE).....PLAINTIFF**

VERSUS

**JOHN NDIRITU
MUTURI.....DEFENDANT**

R U L I N G

1. The **notice of motion dated 8th December 2011** was canvassed before Khaminwa, J by way of written submissions. The Plaintiff's submissions were filed on 11th June 2012 while those of the Defendant were filed on 13th June 2012. Due to unavoidable circumstances Khaminwa, J could not prepare and deliver the ruling. That is how the matter ended up before me.

2. The application, which is by the Plaintiff, seeks the following main orders –

(i) That the Defendant be ordered to pay the Plaintiff her salary for the months of October and November 2011.

(ii) That the Defendant do furnish the Plaintiff with bank statements and render accounts “in respect of all the monies paid into his account from the date of opening of the medical clinic to-date”.

(iii) That the Defendant “be restrained by way of injunction from engaging in the day-to-day running of the hospital” until the hearing and determination of the suit.

(iv) That the Defendant “be ordered to avail full and proper accounts of all the monies paid by the Plaintiff into his personal account and calculate his initial capital invested into the business”.

3. The application is stated to be brought under **Order 40, rules 1, 2 & 3** and also **Order 20, rules 1, 3 and 4 of the Civil Procedure Rules, 2010 (the Rules)**. **Sections 3A and 63 (c) & (e) of the Civil Procedure Act, Cap 21** are also cited.

4. The grounds for the application stated on the face thereof are –

(i) That the Plaintiff is a doctor, duly registered, running a business known as Embakasi Medical Centre.

(ii) That the Defendant has locked the Plaintiff out from operations of the said clinic.

(iii) That the clinic is now running without a licensed medical practitioner.

(iv) That the Defendant “only provided initial capital for the set-up which has been settled to date by the Plaintiff”.

5. There is a supporting affidavit sworn by the Plaintiff. She has deponed, *inter alia*, -

(i) That on 8th November 2011 she demanded a meeting with the Defendant “to resolve issues relating to capital initially injected by the Defendant”.

(ii) That the Defendant declined to resolve the issues and instead denied the Plaintiff access into the clinic and verbally threatened her and demanded that she should not visit the clinic.

(iii) That she fears the Defendant may occasion her bodily harm.

(iv) That the Defendant has declined to pay the Plaintiff her salary for October and November 2011.

(v) That despite “having paid the Defendant herein fully and offering to buy (him) off and set off (any monies that may be due to him after computation) he has now declined the balance outstanding, if any, so that we can determine his value and that of the clinic”.

There are various documents annexed to the supporting affidavit.

6. The Plaintiff’s case as pleaded in her **plaint dated 8th December 2011** is that she is a duly registered doctor under the **Medical Practitioners and Dentists Act, Cap 253** and has been authorized to practice as such; that she has also been authorized to run a private practice under the name and style of **Embakasi Medical Centre**, which is a private medical institution; that the Defendant at the request of the Plaintiff provided the initial capital “wherein it was mutually agreed that...the capital was to be reimbursed by deposit of all the clinic revenue/funds in the Defendant’s personal accounts”; that the Defendant was to undertake all the managerial and supervisory duties of the medical centre; and that the Defendant’s only role was to provide the initial capital, “i.e., payment of rent deposit and other incidental set-up costs”.

7. The Plaintiff has further pleaded that it was agreed that she was to deposit all monies accruing from the clinic into the Defendant’s accounts “for purposes of verification and audit, and utilize the same for deductions for purposes of settling/recovering his initial deposit/capital”; and that to-date the Plaintiff has settled “all debts and the initial capital” provided by the Defendant.

8. The Plaintiff has finally pleaded that on or about 8th November 2011 the Defendant, maliciously and without any lawful excuse, locked out the Plaintiff from the clinic; that he (Defendant) is now running the clinic without a valid license, thus exposing the Plaintiff to the risk of malpractice suits and disciplinary action from the Medical Practitioners and Dentists Board. The Plaintiff therefore seeks appropriate injunctions, orders for accounts and appointment of an auditor “to determine the net worth of the (clinic)” and damages.

9. The Defendant opposed the application by his **replying affidavit filed on 19th December**

2011. He deponed as follows, *inter alia* -

- (i) That he is the proprietor of the business known as Embakasi Medical Centre which he fully financed and pays rent for the premises occupied by the business.
- (ii) That he is a pharmacist and though not qualified to run the clinic himself, he was not barred from “financing” the clinic and engage the services of the Plaintiff to run the same on his behalf for a “monthly consideration”.
- (iii) That it is not true that the Plaintiff was to refund to him the initial capital.
- (iv) That the Plaintiff “started absconding from discharging her duties and left the clinic unattended for a considerable period of (time)...on diverse dates in the months of July and August 2011”.
- (v) That the Defendant therefore terminated the Plaintiff’s services for gross misconduct and engaged another medical practitioner to run the clinic.
- (vi) That the Plaintiff did not work in October and November 2011 and is not owed any salary.

There are some documents annexed to the replying affidavit.

10. In response to the replying affidavit the Plaintiff filed a **supplementary affidavit** on 23rd April 2012. By it she joined issue with the Defendant upon his replying affidavit. There is one document annexed to the supporting affidavit.

11. I have considered the submissions filed on behalf of the parties.

12. I find the Plaintiff’s pleadings inconsistent. While she seems to plead that she is the sole proprietor of the medical services business known as Embakasi Medical Centre, she does not state what the consideration was for the Defendant to provide the full start-up capital. Was it a loan, and if so, how much was it? Why was it necessary for all the proceeds of the clinic to be banked into the Defendant’s personal accounts? If the Defendant was merely a financier to be refunded his capital outlay, why did he have full and exclusive control of the finances of the clinic?

13. And why has the Plaintiff claimed salary payments from the Defendant? Does this not lend credence to the Defendant’s plea that the Plaintiff was his employee hired for a “monthly consideration” to run the clinic as a medical practitioner on his behalf as proprietor of the business?

14. It appears to me that the exact relationship, business or otherwise, between the Plaintiff and the Defendant has not been fully and candidly disclosed by either party. That relationship will disclose the circumstances of the establishment and financing of the medical business the subject of this suit. That in turn will inform the rights and obligations of the parties relative to each other and to the business. All these are matters that cannot be properly litigated in this application by untested and inconsistent affidavit evidence. They must be fully interrogated upon tested evidence at the trial of the action.

15. In the circumstances I am unable to find any merit in the notice of motion dated 8th December 2011. The same is dismissed with costs to the Defendant. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 27th DAY OF NOVEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2013