



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY COURTS
CIVIL CASE NO. 626 OF 2007

**ELSEPHAN INGALULA SHISOKA.....PLAINTIFF/
APPLICANT**

- VERSUS -

**KARIUKI B.S. HOLDINGS LIMITED.....DEFENDANT/
RESPONDENT**

R U L I N G

By a Chamber Summons dated 16th August 2010 brought under Rule 6 of the High Court (Practice and Procedure) Rules made under Section 10 of the Judicature Act and read with Order XXXIX Rules 2, 2A, of the Civil Procedure Rules and Section 1A and B, and Section 3A of the Civil Procedure Act. The Applicant sought orders *inter-a-alia* that:-

1. Pending the hearing and determination of the application *interpartes* and pending hearing of the main case herein an Order do issue authorizing the Plaintiff/Applicant to get back into the premises of the business operated and known as TAUSI CAKE & CANDY SHOP or as may have been renamed by the Defendants and to continue with its management and operation as the Managing Partner in accordance with the Order of this Court issued on the 27th of May 2008.
2. That the following Directors of the Defendant Company, Charles M. Kariuki, Bhupendra Shah and Sanju Lalchand Shah be found and be held to be in contempt of the Orders of this Honourable Court issued on the 27th of May, 2008 duly served and notified upon them and be committed to serve a prison jail term for a period not exceeding six months for the contempt and disobedience of the said Orders.

The application is based on grounds that:-

1. The named Directors of the Defendant Company have violated the Orders issued by the court in this case on the 27th May, 2008 by fraudulently evicting the Plaintiff from the premises of the business TAUSI CAKE & CANDY SHOP and from its management.

2. The above act amounts to flagrant disobedience of the court order and contempt and spite of the courts process.

3. It is in the interest of justice and for the protection of the dignity of the court for the orders sought to be granted.

It is supported by the affidavit of the Plaintiff, Elsephan Ingalula Shisoka dated 16th August 2010 and filed in court on 17th August 2010 together with annexures thereto.

The brief history of the application is that the Applicant was a partner in a business named TAUSI CAKE & CANDY SHOP along Tom Mboya Street – Nairobi which he operated and managed on behalf of the Defendant Company. Dispute arose between the Plaintiff and the directors of the Defendant Company and on 26th November 2007 the Applicant filed the suit in court for *inter-a-alia* payment of over 50% of the established earnings.

On 3rd October, 2008, the Applicant applied to this court for an order that pending the hearing and determination of the suit herein the Defendants be restrained from selling or negotiating the sale of the business known as Tausi Cake & Candy Shop, and that the Respondents be restrained from sacking or terminating the Plaintiff from his position as managing partner and or from pushing him out of the business. This order was granted on 27th May 2008. It is alleged by the Applicant that the said order was served upon the Defendants, but the Defendants flagrantly disobeyed it. The Defendants instead terminated the appointment of the Applicant as managing partner, sold the business and/or arranged to operate it in a new name with the sole purpose of defeating the said court order, and that to date the said court order has not been obeyed. The Applicant now wants this court to reinstate him in his employment and to punish the directors of the Defendant Company for contempt.

The application is opposed vide a replying affidavit dated 31st August 2010 sworn by Charles M. Kariuki in which he totally denies the Applicant's allegations and denies disobeying or disregarding the orders of this court. The Respondents instead submit that the lease agreement of the premises housing Tausi Cake & Candy shop was between English Press (Properties) Limited (the Landlord) and Kuster Bakers Limited, (the Tenant). It is submitted that when the landlords signaled their intention to take back the premises, the tenant - distinct from Tausi Cake & Candy Shop and who is not a party to this suit - was left as a bystander. This caused Tausi Cake and Candy shop to close for lack of premises, and that the Defendants no longer operate the business in the said premises under a different name as alleged by the Applicant.

The Applicant has submitted that the Defendants changed the name of the business and have proceeded to operate the same business with part of the previous staff and in the same premises. It is submitted for the Applicant that there is no way the landlord can repossess the premises, and the following day continue with the business of the tenant and employing some of the tenant's staff. The Applicant suspects a conspiracy and now requires this court to order him back in the premises as the managing partner regardless of the name under which the business is now operated.

I have considered the application, the opposing affidavits and counsel submissions. I am satisfied that there is a complicated scheme of deceit by the Respondents to frustrate the Applicant and to ensure that the Applicant does not run the business and is not aware of its income and other activities. This deceit has been cleverly planned and calculated to defeat the legal process. They evaded the previous court order by colluding with the landlord and allowing the landlord to carry out the tenants business in a completely different name. But this court will not be cheated. A court order remains a court order until it is discharged. The order of this court dated 27th May 2008 has not been discharged and must be honoured by the Defendants. In the case of **HADKINSON – VS – HADKINSON** the court observed that:-

“it is the plain and unqualified obligation of every person against , or in respect of whom an order is made . . . by court of competent jurisdiction to obey it unless and until that order is

discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or even void.”

I have no hesitation granting the application if the effect of the same is to uphold the earlier order of this court and its dignity. I therefore direct and order that pending the hearing and determination of the main suit herein an Order do issue, and hereby does, authorizing the Plaintiff/Applicant to get back into the premises of the business operated and known as TAUSI CAKE & CANDY SHOP or as may have been renamed by the Defendants and to continue with its management and operation as the Managing Partner in accordance with the Order of this Court issued on the 27th of May 2008.

On prayer 5 dealing with contempt, this court has powers under order 40 Rule 3 to detain the Defendants' directors for breach of order of this court. I will instead direct that the Defendant's directors Charels M. Kariuki, Bhupendra Shah and Sanju Lalchand Shah to come to this court on 7th February 2012 to show cause why they should not be detained for a term not exceeding 6 months pursuant to Order 40 Rule 3.

The costs of this application shall be for the Applicant.

These are the orders of this court.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

Makhoha for the Plaintiff/Applicant

Gacheu H/B for Ngale for the Defendant/Respondent

Irene – Court clerk