



No.3001
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HIGH COURT CIVIL CASE NO.233 OF 2009

JUMBO SECURITY SERVICES LTD.....1ST PLAINTIFF

ALICE MBAIKA MUTUA 2ND PLAINTIFF

VERSUS

FRANCIS MWANZA MULWA & ANOTHER 1ST DEFENDANT

JOSEPHAT KIMONDIU NZILLI 2ND DEFENDANT

RULING

The Plaintiff filed the application dated 28th July, 2009 expressed to be brought under sections 3, 3A and 63(e) of the Civil Procedure Act and Order XXXIX rule 1(a) and 2 of the Civil Procedure Rules. In the main, the plaintiff sought for an order of injunction to restrain the defendants from interfering with the affairs of the 1st plaintiff pending the hearing and determination of the suit.

The application was supported by the affidavit of the 2nd plaintiff sworn on 28th July, 2009 in addition to the grounds set out in the body of the Chamber summons. In opposition, the 2nd defendant swore and filed a replying affidavit.

Apparently, the 1st plaintiff was incorporated on 16th May, 1984. On 21st September, 1993 the 2nd plaintiff together with her husband one, **Wellington Nguta Mutua** acquired, at a consideration the entire shareholding in the 1st plaintiff. In 2007 the defendant expressed interest to buy shares in the company but never actualized the interest. However, on 31st March, the 2nd plaintiff received a copy of a letter authored by the 2nd defendant addressed to the 1st plaintiff's bankers in which the 2nd defendant claimed that the two defendants were lawful directors of the 1st plaintiff. They had a copy of a certificate of official search to back up their claim. They warned the bank against allowing the 2nd plaintiff to operate the account lest the said bank be held accountable for undisclosed damages or other consequences. Acting on the letter, the bank froze the account and since then neither the 2nd plaintiff nor her co-shareholder, have had any access to the funds in the said account, hence the suit and the application for injunctive orders.

The story of the defendants is radically different. According to them, in April 2007, the 2nd defendant was offered a security contract by Kenya Airways limited on condition that he had a registered security company. Through the 1st defendant they established that 1st Plaintiff was in existence but had

not been operational for years. They approached the 2nd plaintiff and her co-director and an agreement was struck that they would be incorporated as directors and shareholders of the 1st plaintiff so that it could be awarded the contract. Thereafter bank accounts were opened first with co-operative bank, Machakos branch and subsequently Masaku Traders Sacco Society Limited wherein the 2nd plaintiff, 1st and 2nd defendants were signatories. Although registration of the new shareholding was never effected, the 2nd plaintiff **Wellington Mutua Nguta**, the 1st and 2nd defendants started drawing dividends on equal basis. However, sometimes in March, 2009 it came to their knowledge and attention that the 2nd plaintiff had secretly opened an account with Kenya Commercial bank, Machakos branch. Apparently the account was opened for the purpose of re-routing funds irregularly and thereby defraud other directors and or shareholders. It was then that they authored the letter dated 31st March, 2009 which the bank acted upon and froze the account.

When the application came up for interpartes hearing on 18th September, 2009 before **Lenaola J.** he directed that the same be canvassed by way of written submissions. The submissions were subsequently filed and exchanged. However, by the time that was done, **Lenaola J.** had left the station on transfer. The task of crafting and delivering the ruling therefore, fell on his successor, **Waweru J.** On 15th April, 2010, **Waweru J.** indicated that he would deliver the ruling on 23rd July, 2010. However, this never came to pass as the judge too soon thereafter left the station. On 17th November, 2011, he returned the file to the station minus the ruling indicating that he was not in a position to craft the ruling due to his busy schedule in his new division in the High Court of Kenya at Nairobi. He therefore requested the court to decide on the way forward.

On 30th November, 2011 I invited the parties to address me on the way forward regarding the application. They were all in agreement that since they had all filed and exchanged their respective written submissions, I should act on the same, craft and deliver the ruling. It was so ordered.

Principles upon which a court grants a temporary injunction are well known. First and foremost, it is a discretionary and equitable remedy. Secondly, the applicant must establish a prima facie case with probability of success, thirdly the applicant must demonstrate that in the event that injunction is not granted, he will suffer irreparable loss that is incapable of being compensated by an award of damages. Finally, if the court is in doubt, it will decide the application on balance of convenience.

Applying the above principles to the circumstances of this case, I am satisfied that the plaintiffs have made out a case to warrant the grant of the prayers sought. This can be gleaned from the legal documents from the registrar companies. The defendants may or may not be directors of the 1st plaintiff. They may have acquired their status as directors of the 1st plaintiff through fraud as claimed by the 2nd plaintiff. They may as well have acquired their directorships genuinely as claimed by them. However, these are issues which will be canvassed and put to rest at the plenary hearing of the suit. For now I think that it is proper that the 1st plaintiff continues to operate.

I have no doubt at all that if the injunction is not granted, irreparable loss will come the way of the plaintiffs. That loss cannot adequately be compensated by an award of damages. The plaintiffs have amply demonstrated such loss by bringing to the fore the fact that a contract hitherto awarded to the 1st plaintiff by Kenya Airways Limited has since been terminated. Similar contracts entered into by 1st plaintiff with other parties may face the same fate. That would amount to irreparable loss.

Finally, the balance of convenience tilts in favour of the plaintiffs. The 1st plaintiff has employees to whom it must pay salaries. Those employees too have families who depend on such salaries. The act of the defendants in compelling the bank to freeze the account no doubt has far reaching implications with regard to future operation of the company and its employees. I do not think that the defendants will suffer any loss or be prejudice in their case if the injunction sought is granted. If there will be misappropriation of the funds by the plaintiffs, no doubt such misappropriation will be discovered and whoever is responsible brought to book or account.

In the premises I grant prayer 2 of the application on condition that the plaintiffs will execute an undertaking as to damages in the tune of KShs.200,000/- within the next seven (7) days from the date hereof. The costs of the application shall be in the cause.

Dated and delivered at Machakos, this 16th day of January, 2012.

ASIKE-MAKHANDIA
JUDGE