



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE 54 OF 2011

FRIGIERI GRAZIANOPLAINTIFF

-VS-

RICARDO FANELLI

NERI CARLO

LINESTAFF LIMITEDDEFENDANT

RULING

1. Before me is an amended Notice of Motion filed on 15th July, 2011. The same carries ten prayers. But for purposes of this ruling, only prayers 2.2, 3, 4.2 and 10 are relevant. It is unusual to find an application with so many prayers and in my view such omnibus applications ought not to be encouraged due to their tendency to obscure the true intent of the application.

2. Equally, the drafting of the application in my view leaves a lot to be desired as the prayers are lumpy and in some instances confusing. As an example, it is not clear whether prayer 7 is seeking a temporary, permanent, mandatory or prohibitory kind of injunction or even the nature of the “interest” that is the object of the prayer. For this reason, I have disregarded it for the purposes of my ruling. The grounds upon which the application is based are equally detailed and further expanded in the Supporting Affidavit of the Plaintiff.

3. The uncontested facts of this case are that the plaintiff and the 1st and 2nd defendant were all shareholders, with one Zeinab Mahmoud Yunus in the 3rd defendant company which had ventured into the real estate business. In the material period, the company conceived a project to develop a set of ten villas known as Manzini villas on land parcel LR 10794/06 (original number 017942/81, 8490). On completion of the project, each of the shareholders was to retain one villa for their benefit while the profit from the sale of the balance of the villas was to be shared. It would appear that some villas were completed. The plaintiff was the managing director (MD) of the 3rd defendant. He held 800 shares in 2010.

4. This suit was prompted by the defendant’s purported removal of the plaintiff as MD of the third defendant by the co-directors on 7-5-2011. The plaintiff disputes the validity of the said action. He further contends that the defendants fraudulently transferred his shares to themselves and asserts that he

continues to hold 40% shareholding of the company. That he is the rightful MD thereof.

5. The defendants on their part insist that the plaintiff freely transferred his shares reducing his shareholding to 10% (100) shares by September, 2010 after he was unable to raise or inject more capital into the project as agreed between the investors. The defendants claim that they have invested a total sum of Kshs. 50,000,000/= into the venture while the plaintiff has defaulted. The defendants maintain that the plaintiff was properly removed as the MD at the Annual General Meeting (AGM) of 7-5-2011 and moreover that the relationship of an MD and the company he manages is a servant/master relationship.

6. This therefore is the summary picture gleaned from a perusal of the supporting affidavit of the plaintiff, the 1st defendants' reply and submissions on record. Having considered all the material before me, I take the following view. The plaintiff by his Notice of Motion seeks both prohibitory and mandatory injunctions. The principles for the grant of these type of injunctions have been well settled in a string of authorities starting with **GIELLA VS CASSMAN BROWN & CO. LTD [1973]EA 358 and LOCABAIL INTERNATIONAL VS AGRO EXPORT (1986)I ALLER 901**, the latter which has been adopted in many local decisions, including **MUCUHA V THE RIPPLES LTD CIVIL APPEAL NO. NAI 186 OF 186(UR)** and **KENYA BREWERIES LTD AND ANOTHER VS WASHINGTON O. OKEYO CIVIL APPEAL NO. 332 OF 2000(UR)**.

7. Has the plaintiff herein established a prima facie case with a probability of success on the substantive dispute pleaded?

The plaintiff claims that his shares were fraudulently transferred without his consent to the 1st and 2nd defendant, and his removal as MD was irregular. However, the replying affidavit of the 1st defendant contains depositions, backed by annexures that raise serious contest to the plaintiff's assertions. At this stage of the matter, it would not be prudent to make any finding of fact on these matters. Suffice to say that the facts forming the foundation of the plaintiff's case are fairly contentious. For example annexures to the Replying Affidavit at pages 12-17 appear to suggest that the plaintiff willingly gave up his shares on 30-9-11 and participated in the meeting of 7-5-2011 in which a new MD was elected to replace him. Without the advantage of evidence, it is impossible for this court to reach any finding on such contentious matters.

8. With regard to the plaintiffs alleged claim to an unspecified villa on land parcel LR 10794/106, the said occupation is also surrounded by controversy. Indeed, there is no evidence tendered regarding the ownership of the said land parcel, by any of the disputants. Neither was any evidence produced before this court to show how the plaintiff acquired his right into the said villa. Moreover, in light of the dispute it is not possible to ascertain his entitlement to the developments at the time of the removal. Did the alleged initial 800 shares or MD position entitle him to the villa in question. What if he relinquished his shares in 2010?

9. On the question of damages, it would appear that the plaintiff's claim if he were to succeed can be quantified, and compensated, both in respect of his alleged removal from his position as MD and as shareholder. Clearly the plaintiff's case does not muster the test set in the **Giella Case** with regard to proof of a prima facie case or irreparable damage. Neither is there any material upon which this court can find that the balance of convenience tilts in the plaintiff's favour.

10. It should be evident from the foregoing that the mandatory injunction reliefs sought by the plaintiff cannot be sustained. This is because the threshold for the grant of such injunctions is even higher. There is a long line of local authorities adopting the criteria outlined in the **Locabail Case** for determining whether or not to grant a mandatory injunction. The relevant passage is as follows:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high sense of assurance that at

the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction. (emphasis mine)

For the foregoing reasons, I find no merit in the plaintiff's application and will dismiss it with costs.

Delivered and signed at Malindi this 29th day of June, 2012 in the presence of: Ms. Otieno holding brief for Mr. Wakahiu for Applicant, Mr. Mwandilo holding brief for Mr. Wandabwa for Respondent.

c/c-Evans/Leah.

**C. W. MEOLI
JUDGE**