



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 431 of 2012

COK FA-ST COMPANY
LIMITED.....PLAINTIFF

VERSUS

JIANG NAN
XIANG.....DEFENDANT

R U L I N G

1. Before the Court are three applications as follows:

a) Notice of Motion dated **5th June 2012** filed under **Section 1A, 1B, 3A and 63 (c)** of the **Civil Procedure Act, Order 40 Rules 2, 3, Order 51 Rule 1** of the **Civil Procedure Rules**. The application seeks three main substantive prayers namely:-

i) That an order of injunction do issue restraining the defendant, his agents or servants from damaging, removing, disabling, dismantling and transferring the property fittings, installations, machinery and goods in the plaintiff's factory or L.R No. 12596/88, Road A Enterprise Road, industrial area pending the hearing of this suit.

ii) That an order of mandatory injunction do issue directed at the defendant his agents or servants to open up the plaintiff's factory for purposes of inspection and preservation of the property in the factory under the supervision of the officer Commanding in Station (OCS) of industrial area police station pending the hearing of this suit.

iii) That an order do issue compelling the Defendant to submit to valuation of the factory, equipment, installation and stocks for purposes of sale and disposal and recovery by the shareholders of their respective shares in the factory pending further orders of this Court.

The application is based on grounds that:

- The defendant is a minority shareholder of the plaintiff company

- The defendant has attempted to waste the property of the plaintiff company forcefully
- The defendant is a Chinese citizen and may leave the jurisdiction of this Court leaving the plaintiff without a remedy.

The application is supported by the affidavit of **LUCY WAMBUI GITHINJI** dated **5th July 2012** with its annexures. The affidavit mainly amplifies the above grounds. Interim injunctive orders issued in favour of the plaintiff in terms of prayer 1 above on **6th July 2012**.

b) The second application by the defendant is also a Notice of Motion dated 12th July 2012 filed under the inherent powers of the Court. The application seeks one main substantive prayer that is:-

- That the Court be pleased to set aside the ex-parte temporary injunction order issued on 6th July 2012, in respect of the first application herein.

The application is based on several grounds stated therein but mainly that the interim injunction orders issued in the first application herein on **6th July 2012** were secured through false representation and non-disclosure of material facts, among them that the Defendant, and not the plaintiff, is the owner of the factory or L.R No. 12596/88, Road A, Enterprise Road, Industrial Area Nairobi together with installation, machinery and goods in the said factory and, secondly, that the plaintiff did not disclose that it owes the defendant a large sum of money estimated at over **Kshs.50,000,000/=** and that the defendant stands to suffer irreparable loss and damage as a consequence of those interim orders.

The application is supported by the affidavit of **JIANG NAN XIANG** dated **12th July 2012** with its annexure. The said affidavit mainly amplifies the above grounds. The application is opposed by the affidavit of **LUCY WAMBUI GITHINJI** dated **13th July 2012** with annexures. This application also came to Court under Certificate of Urgency. However, the Court did not grant any *ex-parte* orders.

c) The third application by the plaintiff is also a Notice of Motion dated 20th July 2012. It seeks two substantive orders namely:-

- That I disqualify myself from hearing and/or issuing any further orders in this matter.
- That an order of injunction do issue restraining the defendant, his agents or servants from operating, proceeding with production, managing the property, fittings, installations, machinery and goods in the suit premises until further orders.

The application is premised on the grounds stated therein among them that:

The plaintiff is apprehensive that there is an appearance of the Judge being biased in his decisions;

The Judge has allowed the defendant to proceed with production and manufacture of goods in the factory unilaterally and locking out the plaintiff who is the owner of the factory, raw materials and goods in the factory;

The Judge is a former partner in the law firm of Ogola & Ochwa Advocates. Mr. Patrick Ochwa is married to the niece of the defendant's counsel and therefore there is likelihood of bias;

- The plaintiff's Constitutional right to a fair administrative action may be breached with the continued proceedings before the presiding Judge;
- It is manifestly unjust to allow one party to have full control of property which is subject of dispute without considering the status quo;

· The judge has relied on unsubstantiated claims of police harassment made from the bar to deprive the plaintiff of the management of its property clearly demonstrating the likelihood of bias.

The application is supported by the affidavit of **LUCY WAMBUI GITHINJI** dated **20th July 2012** with annexures. The application is opposed by affidavits sworn by **JAMES OCHIENG ODUOL** dated **25th July 2012** and that of **JIANG NAN XIANG** dated **24th July 2012** with its annexures.

2. The brief history of the matter before the Court is that simultaneously with the suit the plaintiff filed the first application and secured *ex-parte* orders on **6th July 2012** in terms of prayer 2 of that application on the premise that they are *prima facie* the rightful owner of the suit property. The defendant on **12th July of 2012** filed the second application asking the Court to discharge the *ex-parte* orders aforesaid on the grounds, inter-alia, that the plaintiff had failed in its duty of candour to the Court to disclose all material facts. The defendant submitted that the plaintiff was merely a distributor of the finished products of the machinery and motor vehicle spare parts from the defendant's factory and therefore has no rights and/or interest over the same, and hence the plaintiff could not continue to enjoy the *ex-parte* orders of injunction.

3. The first and second applications were scheduled for hearing together on **19th July 2012**. Both parties explained to the Court the background of the dispute. Mr. Wandago, counsel for the plaintiff, submitted that the defendant was a minority shareholder in the plaintiff company and yet he was frustrating the plaintiff. The Counsel after an elaborate submission urged the court to direct the parties to settle the matter through other avenues other than litigation. He proposed that the matter be submitted to arbitration in accordance with the Memorandum and Articles of Association of the Company. He submitted that under **Article 159 (2) of the Constitution** and under **Order 46 Rule 20 of the Civil Procedure Rules**, this Court is empowered on its own motion to refer the matter to arbitration or mediation.

4. In response to those submissions, Mr. Ochieng Oduol, Counsel for the defendant, submitted that the plaintiff should not take the Court for a ride. After seeking an *ex-parte* order and using the police to harass the defendant the plaintiff was acting in bad faith to suggest that the matter go for arbitration. This, the Counsel submitted, was an abuse of the Court process. The Counsel submitted that the defendant is owed **Kshs.32,000,000/=** by the plaintiff and that the first thing the Court should do is to establish if the Court was misled into granting the interim orders.

5. Upon those submissions I directed the parties to file authorities, if they had any, and I reserved my ruling for **25th July 2012** and also extended the interim orders to that date.

6. I was therefore shocked when on the following day the plaintiff came to Court under Certificate with the third application seeking orders among them that I disqualify myself, on the alleged ground of bias. After hearing Mr. Wandago *ex-parte* on that application, I made an instant ruling as follows;

“I am amazed at the unfairness of this application. How unfair can a litigant be to a Judge? The only order on record in this suit is an *ex-parte* injunction in terms of prayer 2 of the Notice of Motion application dated 5th July 2012, and it is being enjoyed by the applicant alone.

On 16th July 2012 the defendant/respondent came to Court to set aside the said injunction being enjoyed by the applicant. I declined to grant the orders *ex-parte*. Yesterday, 19th July 2012, the parties appeared before me and made representations on their various applications and I reserved a ruling for 25th July 2012.

I am not aware of any orders that I made yesterday. I did not make any orders in the matter yesterday. If I did, such orders would be on the record. A binding order is extracted and served. My record of yesterday does not show that I made any orders in this matter.

The allegation in both the grounds and in the affidavit of LUCY WAMBUI GITHINJI dated 20th

July 2012 that I have allowed the defendant to proceed with production and manufacture of the goods in the factory unilaterally and locking out the plaintiff is not correct. It is made in bad faith and I do not know why. I am shocked by these submissions.

The above notwithstanding, I have considered the application. I certify it urgent in terms of prayer 1 of the application. Personally, as a judge, I would not be comfortable to preside over a matter in which one of the parties is prepared to intimidate me and is prepared to depone to it in an affidavit that he has made discreet inquiries about the judge. It is very unfortunate that Counsel should allow his client to state that kind of thing in an affidavit. I have always been a human being. This matter came before me first on 6th July 2012. I have always had a life. To tell me that you have conducted discreet investigations to establish that I could be related to one of the Counsels in the matter is the height of intimidation. Obviously I would never be inclined to hear a Counsel or his litigant who can depone to discreetly investigating me. In other words this kind of intimidation can easily succeed.

However the orders being requested today cannot issue ex-parte. I direct the application to be served and to be heard inter-partes on 25th July 2012. In any event prayer 2 does not envisage that I would be granting any other orders.”

7. Due to the third application and the orders sought therein, I was not able to deliver the ruling on **25th July 2012** in respect of the first and second applications. I directed that all the three applications be heard on **25th July 2012**. On that date both parties submitted in respect of the three applications.

8. Since the third application required me to disqualify myself from this matter, I will start with the third application. As I have stated, in the *ex-parte* ruling of **20th July 2012**, the grounds upon which the application is based are not correct, to the extent that I made any orders or directions referred to in the application. The Court record shows clearly that I did not make any such orders or directions. If they were there, the party in whose favour they were given could have extracted them and sought to execute them. I have no hesitation dismissing grounds **(b) (e) and (f)** of the application. Grounds **(a) (c) and (d)** allude to my possible bias due to the fact that I was a partner to Mr. Partrick Ochwa who is married to Betty who is a step niece of Mr. Ochieng Oduol, Counsel for the Defendant. It is true Mr. Ochwa was my partner in the law firm of Ogola & Ochwa. The law firm was dissolved in 2006 when the partners together with other people established Cootow & Associates Advocates. To expect me to disqualify myself from the matter on that ground is the height of pettiness. The relationship, if its there, is too remote. In fact, I am not related to Mr. Ochieng oduol. The allegation that I could be bias because of this fact is to underrate the office of a Judge. The Judge has taken oath of office and being a Judge also enables the Judge to differentiate between issues.

9. In my view the application is not only uncurtius to the Judge but is meant and calculated to intimidate the Judge in carrying out the Judge’s Constitutional mandate. It is meant to strike fear into the Judge, and cause the Judge to down the judicial tool and to ground the wheel of justice in respect of the matter at hand. In my understanding there would occasionally be situations where, for good grounds, a Judge may be required to recuse himself in a matter. Such a request would not mean that the Judge is culpable for any real or imagined offence. But it would be abdication of Constitutional office for a Judge to down tools in respect of a particular matter simply because a litigant feels he/she could loose a case before a Judge. The applicant has not alleged that the Judge has had any contact, whether bad or good with the defendant. What the applicant appears to be saying is that it fears that it could loose the application before the Court. If that is correct then this application is opportunistic and is simply meant to frustrate the fair and just finalization of this matter.

10. **“Bias”** is defined in Black’s Law dictionary as

“Inclination, prejudice, predilection, actual bias is a genuine prejudice that a Judge Juror etc. has against someother person. Implied bias is a prejudice that is inferred from the experiences or relationship of a Judge Juror or other person- it is also termed presumed bias”

I have analysed the above definition of bias in relation to the matter at hand. The record shows that I have not expressed any bias towards the applicant whatsoever. In fact, the only party enjoying the ex-parte orders of this Court is the applicant. There is no evidence of possible bias.

But if for some reason unknown to myself, I have been biased as alleged by the applicant in the cause of this matter, such bias would amount to what is called in law “**Judicial bias**”. Judicial bias is defined in Black’s Law Dictionary as

“A Judge’s bias towards one or more of the parties to a case over which the Judge presides”

It is also worth to note that

“Judicial bias is usually not enough to disqualify a Judge from presiding over a case unless the Judge’s bias is personal or based on some extrajudicial reason”

11. I have carefully considered the concept of bias. Whether actual, implied or judicial, I believe I have not in any way whatsoever expressed the same or given the applicant any reason to be apprehensive of the same. In any event as I have already stated, evidence of a judicial bias would not entitle me to disqualify myself from the current matter.

In dismissing the application, I am saddened that the plaintiff would make such kind of allegations when the court record clearly show that to date, they are the sole beneficiary of orders of the Court. If Judges were to recuse themselves only because a litigant fears losing a case or an application before a Judge, no judicial work would proceed before the Courts since in every suit or application there is a winner and a loser.

12. I however wish to re-assure the applicant that I am committed to preside over a fair trial and determination of the issues which will become before me in this matter and that in this Court the applicant has independent, fair and impartial tribunal to which it is entitled under the Constitution.

13. Concerning the first and second applications it should be noted that application number two is a reply to application number one and both are in direct opposition to each other.

I have carefully considered the applications. I have specifically noted the business the parties are engaged in. I have also noted that issues between the parties are very emotive and may require a very sober approach in a fair and solemn forum where the parties may face each other and freely ventilate their grievances. The dispute between the parties is not insurmountable. I therefore accept the submissions by Mr. Wandago that the parties be given a chance and an opportunity to talk to each other and explore other modes of dispute resolution.

In the exercise of my discretion under **Order 46 Rule 20 of the Civil Procedure Rules** and under **Article 159 (2) of the Constitution**, I order and direct the parties to resolve this matter by way of arbitration in accordance with the Memorandum and Articles of Association of the plaintiff Company. For that purpose this matter will be mentioned on **19th September 2012** to determine the progress of the same.

14. In order to facilitate the arbitration process above, I herewith discharge and set aside the interim orders granted herein on **6th July 2012**. The costs of this application shall be for the Defendant/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2012

E. K.O OGOLA

JUDGE