



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 80 of 2012

KILIMANI JUNIOR ACADEMY LIMITED PLAINTIFF

VERSUS

S.M. NZIOKI T/A NZIOKI TAX CONSULTANTSDEFENDANT

R U L I N G

1. On 14th January, 1994, the Kilimani Junior Academy Ltd (hereinafter “the Plaintiff”) appointed the Defendant to provide tax consultancy services and be its tax agent under the provisions of the Income Tax Act, Chapter 470 of the Laws of Kenya. The Defendant continued to offer the said tax services not only to the Plaintiff but its directors also. In September, 1997, he was appointed a signatory to the Plaintiffs bank account with Daima Bank Ltd. However, that rosy relationship was brought to a grounding halt on 20th January, 2012 when the Plaintiff terminated the Defendant’s services and demanded that he, inter alia, makes a full inventory of the documents belonging to the Plaintiff in his

2. possession within seven (7) days. The Defendant responded to that demand with a long letter detailing various claims he has with the Plaintiff but did not comply with the demand to deliver the demanded documents to the Plaintiff.

3. By a Plaint filed in court on 10th February, 2012, the Plaintiff claimed that the Defendant had been supplied various documents belonging to the Plaintiff, that there was a fiduciary relationship between the Plaintiff and the Defendant whereby the Defendant had agreed to maintain utter confidentiality, that in breach of his contractual fiduciary relationship, the Defendant had failed to account to the Plaintiff and had acted unprofessionally as a result of which the Plaintiff had terminated the Defendants services with itself. The Plaintiff claimed for a prohibitory and mandatory injunction.

4. Together with the Plaint, the Plaintiff filed a Motion on Notice expressed to be under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and Section 63(1) and (e) seeking similar injunctive orders as those sought in the Plaint. These were sought as follows:-

***“3. The Honourable Court do issue an injunction restraining the Defendant whether by himself, his agent, servants, employees and/or associates from disclosing any confidential information in his possession, or to disclose, destroy, share, sell, or in any way deal or part with all the documents and information currently in his possession to a third party pending hearing and final determination of the suit herein.*”**

4. the Honourable court do issue an injunction compelling the Defendant whether by himself, his agents, servants, employees and associates to deliver all documents, information, data, books and statements belonging to the Plaintiff company and in the possession of the Defendant as the auditor and tax consultant for the Plaintiff pending the hearing and final determination of the suit herein.”

5. The Application was supported by the Affidavits of Ms. Heidi Jane Judy Bird sworn on 9th February, 2012 and 13th March, 2012, respectively. The Plaintiff contended that over the years it supplied the Defendant its internal documents including cheque books, bank statements, cheques, receipts, ledger books, Pin Numbers and all documents relating to financial administration, auditing and management of the Plaintiff, that the Plaintiff was grossly dissatisfied with the Defendant’s work or consultancy as a result of which his services were terminated on 20th January, 2012, that the Defendant had refused to release the documents in question which had paralyzed the financial activities of the school run by the Plaintiff which will cause irreparable loss and damage.

6. The Plaintiff further contended that it was not able to comply with the requirements of the law on auditing of accounts for the reason of the Defendant’s retention of the documents demanded, that the issues between the Kenya Revenue Authority and the Plaintiff has nothing to do with the Defendant, that the Plaintiff did not know the documents in the possession of the Defendant, that the Defendant is entitled to take out any proceedings he wishes to recover any amounts he claims, that the Defendant has no lien over the Plaintiff’s documents. The deponent denied the Defendant’s allegations that the Plaintiff was seeking the documents for illegal purposes.

7. Opposing the application, the Defendant filed the Affidavits of Samuel Munyao Nzioki sworn on 6th March, 2012 and 16th April, 2012, respectively. Most of the averments related to the Defendant’s dealings with the Plaintiff in previous years and are completely unrelated to the application before court. He contended that he has been the Plaintiff’s tax consultant and tax agent since 1992, that he had released all the information required by KRA and some documents which he was legally required to, that David J. Morton, the Interested Party is not a 3rd party as he is the administrator of the estate of the late Josephine M. Morton a shareholder of the Plaintiff, that he had never disclosed his client’s information to 3rd parties in his 40 year career, that he did not intend to disclose the Plaintiff’s information to any 3rd party, that the order being sought was for purposes of perpetuating an illegality, that the orders sought did not particularize the documents sought, that in any event, the Defendant had a lien over the said documents until his fees was settled.

8. The Interested Party filed a Replying Affidavit sworn on 4th April, 2012. He contended that he was the sole administrator of the estate of the late Josephine Magdalena Morton contrary to the averments by the deponent of the Supporting Affidavit, that he had been shut out of the running of the Plaintiff although he was entitled to crucial information relating thereto as the sole administrator of the deceased shareholder, that no resolution had been passed to remove the Defendant from the office as the Plaintiff’s auditor, that it was imperative that the liability of the Defendant be settled before release of the documents, that any documents to be released copies thereof should also be released to him as the administrator of the estate of the deceased shareholder.

9. I have carefully considered the Affidavits on record, submissions of Counsel and the authorities relied on. This is an injunction application. The principles applicable are well known. In terms of the **Giella -vs- Cassman Brown case**, the Applicant must establish a prima facie case with a probability of success. He must demonstrate that damages are an inadequate remedy and if in doubt, the court will decide the matter on a balance of convenience. Prima facie case had been defined by the Court of Appeal in the case of **Mrao -vs- First American Bank (K) Ltd (2003) KLR 125** as a case where on the available material presented to court a tribunal directing its mind properly can conclude that a legal right of the applicant has been infringed by a Defendant calling for a rebuttal by the latter. Has there been any right of the Plaintiff which the Defendant has infringed which requires a rebuttal by the latter ?

10. The Plaintiff’s case is that there existed a fiduciary relationship between it and the Defendant as its tax adviser, that it is incumbent upon the latter not to disclose any information obtained by him to a 3rd party

and that he should return the demanded documents. In **Reading –vs- AG (1949) 2 All ER 68**, the English Court of Appeal when dealing with an issue of obligation to account by virtue of one's position as a trustee held at page 70:-

“ a fiduciary relationship exists

a) Whenever the Plaintiff entrusts to the defendant property tangible or intangible (as, for instance, confidential information) and relies on the Defendant to deal with such property for the benefit of the Plaintiff for the purposes authorized by him and not otherwise.

b) Whenever, the Plaintiff entrusts to the Defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the Defendant to procure for the Plaintiff the best terms available.”

From the conduct of the Plaintiff and the Defendant in this case, I am satisfied that the Plaintiff entrusted the Defendant with a job to be performed i.e. deal with, inter alia, its tax/financial matters and had as well entrusted him with confidential information relating to its financial dealings. I am therefore satisfied that there existed a fiduciary relationship between the Plaintiff and the Defendant.

11. As regards the information imparted to the Defendant by the Plaintiff, and whether it can be protected, I think so. The information passed consisted of the Plaintiff's financial dealings and tax liability to the relevant authorities. That is why the Plaintiff supplied to the Defendant, its cheque books, bank statements amongst other accounting documents. In the case of **Stephens –vs- Avery (1988) 2 All ER 477** the Court held at page 479 that:-

“Three requirements have to be satisfied before a court will protect information as being legally confidential. They were laid down by the Court of Appeal in Salatman Engineering Company Ltd –vs- Campbell Engineering Co. Ltd (1963) 3 All ER 413 and were summarized by Megarry J in Coco –vs- A.N. Clark (engineers) Ltd (1969) RPC 41 at 47 in this way:-

“In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself in the words of Lord Greene, M.R in the Saltman case (at 215) must have the necessary quality of confidence about it! Secondly that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.”

I am satisfied on my part that matters concerning finances of any person or entity imparted to its financial or tax adviser have the necessary quality of confidence about them and that when the details of the finance and tax liability was imparted to the Defendant, the same imported an obligation of confidence upon the Defendant. The issue in this case is whether the third limb of an unauthorized use of the information is present. I will revert to this issue later in this ruling.

12. The issue as to whether an injunction can issue to restrain a party from divulging information held in a fiduciary position is in the affirmative. In the text **EQUITY AND THE LAW OF TRUSTS 11th Edition Phillip H. Pettit at page 614** the learned writer has observed that:-

“Under the head of ‘breach of confidence’ in the first sense, injunctions have been granted to restrain an employee or ex- employee from divulging trade secrets, whether they are in the nature of secret processes or a list of customers. An injunction has been granted to restrain the improper use or disclosure of trade secrets, even though the details of the secrets were not disclosed to the court.”

In the case of **Stephens –v-s Avery (Supra)** the court held:-

“The basis of equitable intervention to protect confidentiality is that it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information. Although the relationship between the parties is often important in cases where it is said

there is an implied as opposed to express obligation of confidence, the relationship between the parties is not the determining factor. It is the acceptance of the information or the basis that it will be kept secret that affects the conscience of the recipient of the information.”

I haste to add here that, equity will not allow a party who has received information in confidence to divulge the same to the detriment or otherwise of the party divulging such information. An injunction will and should issue in such circumstances. A fiduciary relationship should never be allowed to be betrayed under whatever circumstances.

13. Having so stated, how does the same apply in this case? I have already found that there was a fiduciary relationship between the Plaintiff and the Defendant. I have also held that prima facie, the information and documents imparted or supplied to the Defendant was so imparted in the position of confidence. Has there been disclosure or threat of divulging the same to 3rd parties ? According to the Plaintiff, the wrongs which the Defendant has committed are set out in paragraphs 7, 8, 9 and 10 of the Affidavit in support by Heidi Jane Judy Bird. These were that the Defendant had in breach of his contractual and fiduciary obligations failed to account for money paid to him and/or show tax returns he had made over the years, that the Defendant had conducted himself in an unprofessional, negligent and abuse of his professional obligation and that he had failed to account for the job he had been employed for and had failed to give back all the financial and legal documents that had come to his possession of virtue of his employment. Having carefully considered the Supporting and Supplementary Affidavit of Dennis Muriithi of 15th March, 2012, nowhere has the Plaintiff pleaded or averred that the Defendant is on the verge of or is about or has threatened to disclose to any third party the documents and/or information in his possession relating to the Plaintiff. However, in paragraph 57 of his Replying Affidavit the Defendant has sworn:-

“57. THAT I reiterate that I have no intention whatsoever of disclosing the said information to any person, leave alone some undisclosed third parties who are unknown to me. In any event, it is not possible for me to disclose information to persons I do not know.”

That is how categorical the Defendant was. Whilst, there was no single allegation on oath that the Defendant was about to or there was likelihood or real fear that the Defendant would disclose the information to any third party. To my mind therefore, the Plaintiff has not established the 3rd ground set in the case of **Saltman Engineering Co. Ltd** to call for the protection of information legally confidential.

14. In any event, the Defendant has claimed a lien over the books of account in his possession. To my mind that is a good defence to a claim for delivery of the books. The common law claim and/or right of a lien as I understand it is that a workman is entitled to hold an object that he has expended work on and in the process improved its value. Like lawyers, I believe that other professional like Accountants, Architects, Quantity Surveyors, Engineers et al have a right to retain any object they have either worked on or that has come into their possession in the course of their professional work. That needs no authority. The lien is exercisable in lieu of payment of the fees or charge owed to the workman or professional. To my mind, the Defendant is legally entitled to hold on to all and any document and/or property belonging to the Plaintiff that came to his possession during his employment pending settlement of basic charges. The Plaintiff has already quantified the same as Kshs.978,170/- plus interest. Possessory lien is defined in **BLACKS LAW DICTIONARY, 7th Edn.** as:-

“a lien allowing the creditor to keep possession of the encumbered property until the debt is satisfied. It may also be defined as retaining lien.”

In the Case of **Woodworth vs. Conroy (1976) 1 ALL ER 107 at pg 110**, the Lawton LJ with whom the rest of the members of the English Court of Appeal agreed held:-

“The first matter to be decided is whether in law the Defendants as accountants could have any kind of lien over the plaintiff’s papers and tax files.....I can see no reason whatsoever why accountants should not have a lien of some kind. Books of account and other documents are entrusted to them by their clients for work to be done on and in connection with them, often by entering up

ledgers and almost always by analysis.”

It would seem that the English courts have upheld the proposition that professionals are entitled to claim a lien over documents and/or materials they have expended work on as against their clients (see also **Leicestershire C.C vs. Fraday, Ltd (1941) 2 ALL ER 483 and Chantrey Martin & Co. vs. Martin (1953) 2 ALL ER 691.**

Accordingly, on my part, I am of the view that on the material presented, the Defendant was engaged as a professional and any documents and/or material that came to his possession did so as such and he must have worked on such documents and material engaging his professional input. In my view, therefore, he is entitled to retain the documents that were supplied to him until his debt is satisfied.

15. Accordingly, in view of the foregoing, I am not satisfied that the Plaintiff has established any prima facie case with any probability of success.

16. Having come to the conclusion that no prima facie case has been established, I think I need not consider the other limbs in the **Giella –v-s Cassman Brown case.** However, if my views are needed, I am of the view that damages can adequately compensate the Plaintiff and that the balance of convenience tilts in favour of declining the injunction and maintaining the status quo. The damage to be suffered is the sum of legal fees demanded by the Defendant which the Plaintiff can be refunded if at the trial it is found that the Defendant was not entitled to it.

17. Before concluding this ruling, one other thing, I have noted the fact that the deponent of the Affidavit in support of the Motion was not truthful. She swore in paragraph 22 of the Supplementary Affidavit that she was a co-administrator in the estate of the late Jenniffer Magdalena Morton. However, from exhibit “**DSM1a**” produced in the Replying Affidavit by the Interested Party, the Grant of letters of Administrators of the estate of the late Josephine Magdalena Morton was granted to David Josef MOTION on 14th January, 2009 in Succession Cause No. 1679 of 2008. It is trite law that he who comes to equity must do equity. It is not doing equity when one tells lies on oath! In such a circumstances, can a court of both equity and law grant any equitable remedy to such a party? I doubt. Further, it is clear that granting the orders sought in the motion will completely conclude the entire suit. I believe that will not be just in the circumstances. There would be no suit left to be tried.

18. Accordingly, I decline to grant the motion and I dismiss the same with costs.

DATED and **DELIVERED** at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE